

# California Native Plant Society

1722 J Street, Suite 17 • Sacramento, CA 95814 • (916) 447-2677 • FAX (916) 447-2727

October 15, 1998

Chris Beale  
Department of Fish and Game  
1416 Ninth St.  
Sacramento, CA 95814

Re: Proposed Regulations for Implementation of the California Endangered Species Act

Dear Mr. Beale:

The following are the comments of the California Native Plant Society (CNPS) on the proposed regulations for implementation of the California Endangered Species Act (CESA) (Proposal), Initial Statement of Reasons (ISR), and the Draft Environmental Document (DED).

## **Comments on Proposed Regulations**

We have several serious concerns regarding the proposed regulations and the new process for issuing incidental take permits (ITPs). These comments will address the sections of the Proposal in the order presented.

### **Sec. 801 Prohibitions**

Section 801 (a) contains an erroneous statement. The Natural Community Conservation Planning (NCCP) Act specifically does not allow taking of state-listed species. Rather, Sec. 2825 (c) states "Natural community conservation plans, as appropriate, shall be implemented pursuant to Section 2081." The statement that taking can be authorized through an NCCP and independent of CESA should be removed from the Proposal.

Sec. 801 (c) exceeds the authority of CESA. Neither section 2080 nor section 2081 of the Fish and Game Code (FGC) exempt CDFG personnel and its agents from CESA's take prohibition. Section 2081 of the FGC does authorize CDFG to issue a permit to or enter into a memorandum of understanding with its personnel for the importation, exportation, take, or possession of any threatened or endangered species. However, proposed subdivision (c) of section 800 is a blanket exemption from CESA's take prohibition. Subdivision (c) does not define scientific, education, or management and under what circumstances CDFG would exercise its discretion to issue either a permit to or enter into a memorandum of understanding with its personnel and agents for these purposes. Furthermore, there is no law enforcement exemption nor even any discretionary permit authority for this purpose for CDFG personnel or its agents under CESA. Therefore, this proposed regulation exceeds the discretion the Legislature granted to CDFG under subdivision (a) of section 2081 of the FGC and should be removed.

## Sec. 802 Permit Applications

These regulations in general need to clarify that the requirements for permit issuance listed in FGC § 2081 and in Sec. 802 of this Proposal, including plans for minimization and mitigation of impacts, monitoring, etc., are also terms and conditions of all ITPs. That clarification should be added to this section, to Sec. 806 General Permit Conditions and to Sec. 807 Permit Suspension and Revocation.

We are concerned that Sec. 802 (c) of the Proposal would authorize issuance of ITPs for unlisted species. Much less generally is known about unlisted species than about listed species. Therefore the DFG will often have less information available regarding effectiveness of mitigation proposals or conditions leading to possible jeopardy. Moreover, the Proposal specifies no term or time limit for ITPs, so ITPs issued for unlisted species may well be far out of date and thus no longer meet the requirements of CESA when and if the species concerned become listed. This section should be removed or at least amended to require that ITPs for unlisted species be reviewed and altered or terminated as appropriate at the time of listing.

## Sec. 803 CEQA Compliance

We have several concerns regarding this section.

Sec. 803 (a) presents the information that must be included in ITP applications when DFG is a responsible agency under the California Environmental Quality Act (CEQA). The information requirements appear inadequate to allow the DFG to make an accurate determination of whether a project proposal meets the requirements of Sec. 2081 of the FGC. Sec. 2081 requirements still exist whether or not DFG is the lead agency. We are concerned that documentation prepared for another lead agency may not contain sufficient specific information on impacts to listed species to allow the DFG correctly to determine whether an ITP may be issued. This section should be changed to clarify that all ITP applications shall include sufficient specific and documented information to allow DFG to determine whether the ITP application meets all of the requirements of FGC § 2081, including information on potentially significant adverse impacts to listed species, mitigation measures for such impacts, or alternatives that would eliminate or minimize impacts, monitoring plans, funding sources, etc.

We further suggest that provisions be added to these regulations to require (1) early notification of DFG by lead agencies when a project may affect a listed species, (2) early consultation on the scope and form of the CEQA documentation for such projects, and (3) cooperation between lead agencies and DFG in information gathering and analysis throughout the CEQA process. This cooperation is required by statute (Public Resources Code (PRC) 21080.4 and 21104.2), and those requirements should be restated and emphasized in these regulations. Such cooperation will both increase the efficiency of the CEQA process and further the conservation goals of CEQA and CESA.

Sec. 803 (a)(2) appears to overlook the requirements of the CEQA Guidelines that an Environmental Impact Report (EIR) be prepared if

"[t]he project has the potential to substantially degrade the quality of the environment, substantially reduce the habitat of a fish and wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, reduce the number or restrict the range of an endangered, rare or threatened species, ...."  
(CEQA Guidelines § 15065 (a))

Clearly any project requiring an ITP is covered by this provision because it would "reduce the number or restrict the range of an endangered, rare, or threatened species." It may be possible in some circumstances to use a focused EIR which examines only impacts to listed species. However, there is no case in which a finding of significance can be avoided for an ITP. This section should be modified to reflect CEQA requirements.

Sec. 803 (b) appears also to be illegal in that it purports to allow the DFG to issue ITPs even for projects that would cause "significant adverse environmental effects" that would not be mitigated, even if a project would cause jeopardy to a species. It implies that DFG would be able to use some equivalent of CEQA's statement of overriding considerations to make a finding that project "benefits" will somehow outweigh its unmitigated impacts to listed species. This is clearly illegal under CESA. SB 879 required that all impacts to listed species be "minimized and fully mitigated" (Fish and Game Code, Sec. 2081 (b)(2)). The law further mandates that no ITP can be issued if it would jeopardize the continued existence of a listed species (FGC Sec. 2081(c)). No exceptions to these requirements exist. The regulations should be clarified to state that no ITP can be issued unless a finding is made by DFG that all impacts to listed species and their habitats have been minimized and fully mitigated and that the project will not jeopardize the continued existence of any species.

This subdivision goes on to make the somewhat odd proposal that applicants themselves be allowed make determinations, apparently based solely on their own information and opinion, that they are exempt from requirements for mitigation and for analyses of alternative project designs in environmental documentation for ITPs. We do not understand this section. Clearly applicants' vested interest in projects makes them ineligible to make such determinations. Moreover, it is inconsistent with CESA (§2081 (c)), which gives DFG sole authority over ITP issuance and conditions. We suggest that this section be clarified to state that DFG alone will determine (1) whether it is appropriate and legal to issue an ITP, (2) what mitigation is required by law, and (3) whether alternative project designs must be considered.

#### Sec. 804 Permit Review Standards

Sec. 804 (c) states that the DFG shall consider economic practicability when determining whether mitigation measures are capable of successful implementation. Nothing in SB 879 directs DFG to consider economic issues when selecting mitigation measures or determining their capability of being successfully implemented. Mitigation measures should be selected based on technological feasibility and effectiveness in eliminating impacts to listed species, not based on the ability or desire of the permittee to pay for them. The goal of CESA is to

"conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat" (FGC § 2052)

not to facilitate private economic gain at the expense of public trust resources. The language allowing the use of economic criteria should be stricken.

We are also extremely concerned that this section specifically encourages the use of "new [mitigation] measures or other measures without an as yet established record of success." We fear that this provision would increase the already abysmal failure rate for mitigation projects. Mitigation measures fail often due to a variety of factors including poor implementation, lack of adequate funding, poor scientific analysis, inappropriate translation from another ecosystem, lack of follow through, etc. (see e.g. Falk, D.A. Millar, C.I. and Olwell, M. 1996. Restoring Diversity. Island Press, Covelo, CA). The explicit sanctioning of untested mitigation measures unnecessarily and recklessly increases the risk of failure. Rather, DFG, and these regulations, should require thorough, site specific testing of all potential mitigation measures *before* take is allowed so that the probability of success will improve. CNPS encourages the use of small pilot mitigation projects to demonstrate that mitigation proposals are technically feasible, effective, and meet performance standards before implementation of projects that will cause take. CESA requires that "all [mitigation] measures shall be capable of successful implementation." (FGC §2081 (B)(2)). This section should be strengthened to ensure compliance with this provision.

We are also concerned that the regulations do not take more advantage of the opportunities offered by the amendments to CESA to implement adaptive management. CESA now requires effectiveness monitoring for all mitigation measures (FGC §2081(b)(4)). These regulations should require that relevant effectiveness monitoring results be reviewed before issuance or renewal of an ITP. Effectiveness monitoring results should be used as a basis for decisions on appropriate mitigation measures to be required in ITPs. The advantages of the amendments to CESA regarding effectiveness monitoring are discussed in the DED (e.g. p. 4-24,5), but not implemented through the Proposal.

### Sec. 805 Permit Process

Sec. 805 (a) states that on site inspections may be required as part of ITP review. On site inspections should be *required* before any ITP is approved. There is no way for DFG to verify information on ITP applications or approve mitigation proposals without visiting project sites and examining the habitat and organisms that will be impacted. On site inspections should be a required and routine part of ITP review.

We suggest that language be added to Sec. 805(b) or elsewhere in the Proposal to require that DFG verify claims in ITP applications before permit consideration proceeds or before permit applications are approved.

We also suggest that language be added to require surveys for listed species to gather accurate baseline data before permit issuance.

We are concerned that the time limits for DFG review proposed in this section may not be adequate. Sec. 805 (b) gives DFG 30 days to determine whether an application is complete. There is no requirement in CESA that CDFG must determine that an application is complete within 30 days, or, that inaction by CDFG within this time frame requires an automatic determination that the application is complete. We understand CDFG wanting a reasonable time line for its review of an application. But, an arbitrary determination that an application is complete based on the passage of time will not help the permit applicant. If the Department cannot fulfill its responsibilities under CEQA because the application as submitted is incomplete, despite the automatic determination based upon the passage of time, or the Director cannot make its determination to issue the permit because the application is incomplete, the permit applicant will be prejudiced. We recommend deleting the last sentence of subdivision (b).

We are concerned that these regulations may not mandate an adequate role for DFG in CEQA processes for projects that may impact listed species. We reiterate our suggestion that provisions be added to these regulations to require (1) early notification of DFG by the lead agency when a project may affect a listed species, (2) consultation on the scope and form of the CEQA documentation for that project, and (3) cooperation between lead agencies and DFG in information gathering and analysis throughout the CEQA process.

Sec. 805 (c)(1)(B) places a limit of 90 days from the date of application acceptance by DFG for issuance of an ITP. We fear that this provision may in some cases force ITPs to be issued before CEQA is completed for the overall project. This would reduce the ability of DFG to participate in the design of the project and to reduce impacts to listed species most effectively. Again, we want to encourage maximum cooperation between DFG and other relevant agencies throughout the CEQA process so that CEQA and CESA can be complied with most effectively and efficiently. Sec. 805(c)(1)(B) should be amended to state that ITP determinations will not be made before CEQA is completed for the overall project.

Sections 805 (c) and (d) propose time limits for analysis when the Department is the lead or responsible agency. These time limits are also inflexible and may be inadequate. Some ITPs are complex and may require large amounts of time to review. Moreover, the DFG is already severely understaffed in many areas, particularly botany, and is undergoing a restructuring which may further exacerbate this problem. We suggest that additional provision be made in these regulations for exceptions or extensions to all time limits for complex projects or in cases where staffing in relevant specialties is insufficient to perform an adequate review. We reiterate that an adequate review should include a site visit and any research, testing, or analysis necessary to develop a good estimate of the likelihood of success of proposed mitigation, as well as a scientifically rigorous estimate of the risk of jeopardy.

The public notice and comment procedures in the Proposal are also of concern. If the DFG is not the lead agency under CEQA, there may be no opportunity for the public to comment specifically on an ITP application. This is clearly unacceptable.

If DFG is the lead agency, the public would be given only 30 days to comment on an application, without exception. Notices would be distributed only to a few relatively inaccessible locations. We suggest that notices be publicly distributed for all ITP applications, whether or not DFG is the lead agency. We also suggest that notices be posted on the internet, which is an inexpensive way to make them widely available. We further suggest that notices be distributed to at least one newspaper in the project area and that local DFG offices maintain a list of interested members of the public who should receive periodic updates of ITP applications under consideration. The California Department of Forestry and Fire Protection regularly sends interested members of the public lists of Timber Harvest Plans under review and includes summary information on their location and possible impacts. There is no reason why DFG should not follow a similar practice. Finally, we suggest that, at least for complex ITPs, provision should be made for DFG to extend the public comment period as needed to allow full public analysis and input.

We note that there is no provision in Sec. 805 specifically directing DFG to perform an analysis and make a finding regarding the consistency of the ITP application with the requirements of FGC § 2801. We suggest that subdivisions be added to Sec. 805 directing the DFG, whether it is acting as a responsible or lead agency, to analyze the whole record, including the permit application and public comment, the results of mitigation effectiveness monitoring from other relevant projects, and to determine whether there are feasible alternatives and/or mitigation measures which would minimize and fully mitigate adverse effects to listed species and prevent jeopardy to their continued existence, and adopt those measures as terms and conditions for any ITP that will be issued. These regulations must make clear that DFG will go through an analysis process, consider the public record and the best available science, and develop ITPs that comply with the requirements of FGC §2081.

Sec. 805 (d)(5) again would allow the DFG essentially to issue a statement of overriding considerations allowing significant unmitigated adverse environmental effects to occur. As noted earlier in these comments, this is illegal under CESA and CEQA. This provision should be stricken from the regulations and the regulations should be clarified to state that no ITP can be issued unless a finding is made by DFG that all impacts to listed species and their habitats have been minimized and fully mitigated and that the project will not jeopardize the continued existence of any impacted species.

#### Sec. 806 Permit Conditions

A subdivision should be added to this section clarifying that DFG has the ability to add project-specific terms and conditions to ITPs regarding mitigation, monitoring, etc.

Sec. 806 (a)(2) would allow permittees to transfer ITPs without DFG approval in several circumstances. This is an extremely troubling provision because there is no assurance that the terms and conditions of ITPs can or will be met by a new permit holder. There is no assurance that mitigation or monitoring plans will be implemented correctly, for example. This section should be modified so that all ITP transfers are reviewed by DFG to ensure that the terms and conditions of all permits will be properly executed after transfer.

Sec. 806 (b) does not allow public notice, review or comment on permit renewal applications. Members of the public may frequently have information relevant to permit renewal applications, including information on permit compliance and on the success or failure of mitigation measures. Moreover, ITP renewal is a discretionary action by DFG that may have a significant effect on the environment and is therefore covered by CEQA. Provisions for CEQA review, public notice and comment on permit renewals should be added to these regulations. We also suggest that DFG perform a site visit for each permit renewal application and independently determine whether the permit is functioning properly, whether changes need to be made, or whether the permit should be revoked.

We note that these regulations contain no provisions for a term or time limit of permit for ITPs. We are concerned because time limits and resulting permit renewal processes would perform several important functions. They would provide a scheduled opportunity for evaluation of the condition of the covered species and of cumulative impacts to the species in the light of new projects initiated since the original issuance of the ITP. They would provide an opportunity for the DFG to incorporate new scientific information on covered species or mitigation techniques into the ITP. They would provide an opportunity for evaluation of the performance of the permit and of the permittee, and for making any necessary changes in permit terms and conditions. This is particularly important in light of CESA's new requirements for effectiveness monitoring. Periodic permit evaluation and renewal would allow DFG to review results of effectiveness monitoring from the permit to be renewed and from other similar projects and to incorporate lessons learned into terms and conditions of the renewed permit through the adaptive management process. This advantage of the amendments to CESA is discussed in the DED (e.g. p. 4-24-5), but not implemented through the Proposal. We suggest that the regulations incorporate some maximum time limit for permits (e.g. 5 years) or make provisions that ITPs include time limits which vary depending on the number and endangerment of covered species. The regulations should also make clear that requirements to mitigate and monitor are independent of the term or time limit of the permit. Mitigation and monitoring requirements must be performed until monitoring demonstrates that required mitigation has been successfully completed.

Sec. 806 (c) (2) states that DFG may amend a permit "as required by law". This is appropriate language, but it is incomplete and open to interpretation. If mitigation is not functioning successfully, the permit is failing to meet the requirements of CESA §2081 that it minimize fully mitigate all impacts to listed species and their habitat and prevent jeopardy to the species. This section should be clarified to state that if monitoring or other information shows that mitigation is not accomplishing these goals, DFG is required by law to amend the terms and conditions of the permit to bring the permit into compliance with CESA.

#### Sec. 807 Suspension and Revocation

Sec. 807 (c)(3) states that ITPs "shall remain valid and effective pending any final determination on suspension under this subsection". Sec. 807 is replete with extended periods for review, objection by the permittee, and correction of deficiencies that caused permit suspension. By our estimate, it could take up to 150 days simply to suspend a

permit, no matter how gross the failure to comply with its terms and conditions, no matter how severe the impacts or risks to listed species and the environment, and no matter how serious the violations of CESA or other laws. During these months, the permit would remain valid and activities under the permit would continue, despite adverse impacts. This provision should be removed from the Proposal. Permits suspension should immediately revoke privileges and stop activities if a permittee is causing damage to a listed species or its habitat.

#### Sec. 808

This section allows only permittees or permit applicants to request reconsideration or to appeal DFG decisions. This section should be changed to allow members of the public to appeal decisions regarding ITPs. ITPs affect public trust resources and many people other than permittees and applicants have vital interests in their issuance and conditions. The DFG should provide an opportunity for the public to resolve conflicts over ITPs without recourse to expensive and time consuming litigation.

#### Sec. 809

This section appears to allow only permittees to request or view ITP records, including monitoring records. As stated earlier, the public at large has a vital interest in ITPs and in the listed species CESA requires DFG to conserve. These regulations should clarify that the public has the ability to review monitoring records and other information in ITP files.

In summary, our analysis of the Proposal revealed a number of needed changes, additions, deletions, and clarifications, including the following key recommendations:

1. Clarify that NCCP does not authorize take independent of CESA
2. Clarify that the requirements of FGC §2081 are also terms and conditions of ITPs; these include minimization and mitigation of impacts and prevention of jeopardy
3. Clarify throughout that no ITP can be issued unless a finding is made by DFG that all impacts to listed species and their habitats have been minimized and fully mitigated and that the project will not jeopardize the continued existence of any species. Statements of overriding considerations are not allowed for ITPs.
4. Clarify that findings of significance under CEQA are mandatory for all projects involving ITPs.
5. Add procedural requirements ensuring that DFG will be consulted early and will cooperate fully in the development of all CEQA documents that involve ITPs.
6. Add requirements that DFG verify information in ITP applications, including by means of a site visit and field surveys for impacted species.

7. Clarify that DFG must take all necessary steps, including testing of mitigation projects before take occurs, to design and ensure implementation of successful mitigation programs that comply with CESA. CESA requires ITPs to fully mitigate impacts to listed species.
8. Add provisions encouraging review of effectiveness monitoring data from ITPs and increasing use of adaptive management.
9. Add requirements for increased public notice for ITP applications and extensions of public comment periods where necessary.
10. Add requirements for DFG review of permit transfers.
11. Add requirements that DFG amend permits to bring them into compliance with CESA whenever mitigation ceases to function successfully
12. Add requirements for time limits on take permitted under ITPs.
13. Add requirements that permits be suspended immediately if a permittee's failure to comply with terms and conditions adversely impacts listed species or their habitats.
14. Add provisions for public appeal of ITP decisions.

### **Comments on Draft Environmental Document and Initial Statement of Reasons**

We disagree with the conclusion of the ISR and the DED that adoption of the regulations will not result in significant environmental effects. Adoption of these regulations will result in the issuance of dozens, probably hundreds, of incidental take permits. They will result in the alteration or destruction of thousands of acres of listed species habitat. DFG has been regulating take and management of state listed species since 1984. Adoption of the regulations as written will essentially continue most current practices of DFG in regulating take, according to the DED. Also, according to the DED (Table 3.1-1, p. 3-2), current practice has resulted in a disgraceful and dangerous situation where 73% of listed Threatened and Endangered plant species and 43% of listed animal species are in either "stable to declining" or in outright "declining" condition. Almost half of state listed plant species (49%) are in "declining" condition. Clearly, DFG management of listed species and issuance of ITPs has had and will continue to have significant impacts on listed species and on the environment. These regulations will determine the pattern of management of listed species and their habitats throughout California which will have significant direct and cumulative impacts on listed species, their habitats, and the environment as a whole. These impacts should be fully disclosed in the ED as required by CEQA.

We also are disappointed that the examination of alternatives in this ED was so cursory. The only alternatives evaluated were to not issue regulations, which would be illegal under FGC §2081(d), not to adopt a certified regulatory program, or to adopt the previously issued "discussion draft" of these CESA regulations. These are not

meaningful alternatives. Why was no alternative presented that included provisions, such as those suggested in our comments above, designed to enhance conservation of listed species beyond the level provided by the Proposal? There is nothing in CESA that requires the DFG to issue regulations that provide the minimum conservation to listed species possible under FGC §2081. We suggest that an alternative be added to the ED examining regulations which take advantage of the discretion allowed by SB 879 to more aggressively conserve and recover listed species in California.

Finally the ED contains several erroneous statements. A footnote to Table 3.3-2 on page 3-27 states that "[p]lants are often considered through the CEQA process and may not be subject of a §2081 permit." This is incorrect. State-listed Threatened and Endangered Plants are clearly covered by take prohibitions under CESA and therefore their take must require a §2081 permit.

On page 4-6, the DED states "...authorization of take may be subject to the California Environmental Quality Act". The use of the word "may" is inaccurate. As noted earlier in these comments, not only are all take authorizations subject to CEQA, they require a finding of significance.

On page 4-7, the DED states "[i]f significant effects cannot be avoided, DFG would make findings consistent with PRC §21081 (c)." We assume that the DED is referring to §21081 (b). As noted earlier in these comments, statements of overriding considerations for significant impacts to listed species or their habitats are not allowed under CESA. All references implying that statements of overriding considerations may be used to permit significant unmitigated impacts to listed species or their habitats should be removed from the regulations and the ED.

We appreciate the opportunity to submit comments on these documents. Please contact me with any questions. We request that CNPS be notified when the Office of Administrative Law approves these regulations.

Sincerely,

Emily B. Roberson, Ph.D.  
CNPS Senior Land Management Analyst