

*Should the Sun Set on State Agency
Consultations Under the
California Endangered Species Act?*

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Should the Sun Set on State Agency Consultations Under the California Endangered Species Act?

The sections of the California Endangered Species Act that require state agency consultations will sunset on January 1, 1999. The sunset could shift the primary responsibility for protecting threatened and endangered species to the private sector. This paper examines the state agency consultation process and the implications of its sunset.

INTRODUCTION

Currently, when a state agency has a project that might affect endangered or threatened species, the California Endangered Species Act (CESA) requires a consultation between the Department of Fish and Game (DFG) and state lead agencies. This consultation ensures that any action authorized, funded, or carried out by the state agency will not jeopardize the continued existence of any endangered or threatened plant or animal species. The Fish and Game Code sections that require this consultation, §2090 through §2097, will sunset on January 1, 1999.

If §§2090 *et. seq.* sunset, there are two other processes that could partly replace the §2090 consultation process. One, under the California Environmental Quality Act (CEQA), is the environmental review process. The other, under CESA, is the incidental take permit.

This Note examines the §2090 consultation process and the implications of its sunset. It also examines the CEQA consultation process, as well as the requirements for the incidental take permit. The analysis shows that the §2090 process is a pragmatic tool for applying CESA's prohibition of taking endangered species to the activities of state agencies. However, it may not protect listed species adequately. It appears that if §§2090 *et. seq.* sunset, there will be no established process by which state agencies will comply with CESA. Without the §2090 consultations, state agency employees and contractors might be criminally liable under CESA unless state agencies obtain incidental take permits. However, the Fish and Game Code does not require state agencies to obtain the incidental take permit. Further, the analysis concludes that neither the CEQA consultation nor the incidental take permit are perfect substitutes for the current §2090 process in their ability to protect listed species.

BACKGROUND

CESA was first authorized in 1970 to protect certain species of native birds, mammals, fish, amphibians, and reptiles.¹ After being amended several times, the current version of CESA requires the DFG to conduct a program to:

1. Conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat; and
2. Acquire lands for habitat for these species.

CESA states that:

“The Legislature further finds and declares that it is the policy of the state that state agencies should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent alternatives available consistent with conserving the species or its habitat which would prevent jeopardy.”²

CEQA requires lead agencies to analyze the environmental impacts of proposed development projects and many other activities conducted by private and public entities throughout the state. CEQA consists of Public Resources Code §21000 *et. seq.*, and the implementing regulations, “CEQA Guidelines,” promulgated by the Secretary of Resources.³ CEQA defines a “lead agency” as “the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.”⁴ CEQA defines a “responsible agency” as “a public agency, other than the lead agency, which has responsibility for carrying out or approving a project.”⁵ Under CEQA, a “lead agency” determines whether an “Environmental Impact Report” (EIR) or “Negative Declaration” should be prepared. The lead agency must prepare and make available for public review the EIR or Negative Declaration, and must respond to comments received during a public comment period. Lead agencies must implement actions recommended by responsible agencies. State agencies usually serve as the lead agency for their own projects.⁶

WHAT IS SECTION 2090 *ET. SEQ.*?

The goal of §2090 consultations is to ensure that state agencies do not carry out projects that could harm threatened or endangered species. To accomplish this, Fish and Game Code §§2090-2097 require state lead agencies under CEQA to consult with DFG before preparing an EIR or Negative Declaration. In this way, DFG can modify projects before they are approved, and thereby avoid harm to endangered or listed species. Section 2090 consultations help to carry out the Legislature’s policy expressed in Fish and Game Code §2055, which states that all state agencies must seek to conserve endangered and threatened species.

In a §2090 consultation, DFG reviews projects proposed by state agencies and prepares a written finding stating its view of:

“...whether a proposed project would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of the species. The written finding shall also include the department’s determination of whether a proposed project would result in any taking of an endangered species or a threatened species incidental to the project. The department shall base its determination on the best available scientific information.”⁷

DFG regulations define “jeopardy” as follows:

“Jeopardize the continued existence of a species” or “cause jeopardy to the continued existence of a species” means to reduce a species’ chances of survival appreciably or to impose a significant impediment to the species’ recovery throughout all or a significant portion of its range....”⁸

If DFG finds that a proposed project or action will cause jeopardy, the state lead agency *must* adopt alternatives to the project, as recommended by DFG. However, the state lead agency may override the alternatives if it finds social, economic, or other benefits of the project as originally planned outweigh the project benefits with the alternatives. State lead agencies cannot approve projects that would likely result in the extinction of a species.

Sections 2090 *et. seq.* were added to the Fish and Game Code in 1984 with an original sunset date of July 1, 1987. The Legislature extended the sunset date four times, amending the sections in 1986, 1987, 1989, and 1993.⁹ These sections now sunset on January 1, 1999.

How Does the Section 2090 Consultation Process Work?

Although the §2090 consultation has been in the Fish and Game Code since 1984, DFG has not yet adopted regulations governing the process.* Despite the lack of regulations, DFG staff report that the agency receives notice of nearly all proposed projects that should be brought to DFG’s attention.¹⁰ For example, when reviewing Timber Harvest Plans, the Department of Forestry routinely notifies DFG. DFG signed a Memorandum of Understanding (MOU) with Caltrans, under which Caltrans agreed to notify DFG of proposed projects. Because the consultation process is tied to CEQA, DFG receives notice of most projects because of its role as a trustee agency¹¹ with jurisdiction over natural resources affected by projects.¹²

Once DFG is notified of a project, it reviews the project for potential impacts to endangered or threatened species. If DFG finds no potential impacts, the consultation process ends. If DFG finds that the project might affect endangered or threatened species, then DFG works with the agency to modify the project. Most consultations occur on an informal basis during the planning phase. Sometimes, DFG will initiate formal consultation, which requires DFG to prepare a biological opinion. A biological opinion states whether or not the State action is likely to jeopardize the continued existence of listed species or result in the destruction of essential habitat or result in any taking of a listed species. It also contains conditions under which a project can proceed, or changes that the state agency should make to avoid jeopardy to species.

DFG has not yet made a finding of jeopardy in a biological opinion. According to DFG staff, state lead agencies generally consult with DFG early in the development of the proposed project. This allows the project proponent to alter the project and avoid the need for a biological opinion. Or, DFG will issue a biological opinion that finds no jeopardy *as long as* the applicant takes certain steps or employs certain alternatives. As a result, no state lead agency has exercised the authority to override the alternatives recommended by DFG to avoid jeopardy.

* DFG has drafted regulations to standardize current practices for §2090 consultations, should the sunset date be extended. DFG issued a discussion draft of proposed regulations in February, and expects to issue a revised discussion draft this summer.

Section 2090 *et. seq.* consultations do not apply to “categorically exempt” or “ministerial” projects. CEQA defines these projects as being exempt from environmental review. Thus, there is no lead agency, and the provisions of §§2090 *et. seq.* do not apply.

DISCUSSION OF THE SECTION 2090 CONSULTATION PROCESS

Sections 2090 *et. seq.* create a mechanism for DFG to work with state agencies, prior to the preparation of an EIR, and modify proposed projects that could harm endangered species. This approach is generally consistent with the intent of CESA, which is to conserve, protect, restore, and enhance any endangered or threatened species and its habitat. Whether conducted on an informal or formal basis, the consultation process promotes several generally accepted public policy goals:

- It encourages state agencies to coordinate early in the permit process and thereby improves the efficiency of the permitting process;
- It ensures that no jeopardy will result from state actions;
- It allows project applicants an opportunity to work with DFG to incorporate alternatives or mitigation measures to avoid harming listed species; and
- It requires alternatives to proposed activities or projects in order to prevent destruction or adverse modification of essential habitat, as well as taking of listed species.

However, several environmental groups believe the §2090 consultation process does not protect listed species adequately. They point out that DFG can *require* alternatives to a project *only* when it finds that a project will *jeopardize* listed species. On a continuum of possible effects of proposed projects, jeopardy is the most harmful and extreme. With the trigger for requiring mitigation or alternatives set at jeopardy, projects can go forward that harm endangered species or damage their habitat to some degree less than jeopardy. DFG cannot impose alternatives or mitigation measures on such projects. Thus, the environmental groups argue that the §2090 process does not adequately protect species against lesser threats than jeopardy.

In addition, environmental groups argue that §§2090 *et. seq.* allows jeopardy projects to go forward. Section 2092 allows a state lead agency to override DFG’s recommended alternatives if the state agency finds that economic, social, or other conditions make the alternatives infeasible. No standards have been written either in code or in regulation to define “infeasible.” As mentioned above, no state agency has yet overridden DFG’s recommended alternatives under this authority. But in theory, a state lead agency could proceed with a jeopardy project despite the consultation requirements.

Further, some environmental groups believe that state lead agencies have too much discretion in the area of alternatives and mitigation measures. Section 2091 calls for DFG to recommend “reasonable and prudent alternatives” and “reasonable and prudent mitigation measures” that would avoid jeopardy. Section 2092 states that lead agencies must implement reasonable alternatives and appropriate measures to avoid taking of listed species if the project would cause jeopardy, but the section does not specifically call for those measures and alternatives recommended by DFG under §2091.

Land owners and business interests are generally neutral on the question of §2090 consultations. A representative of the Resource Land Coalition, an association of large land owners in the state, stated that his members don't generally use the §2090 process. Representatives of the Forest Resources Council had no opinion on §2090 consultations. They are waiting to see how the incidental take permit regulations (discussed below) develop to determine which process would be more advantageous to their members.

Stronger Authority Over State Agency Projects

Sections 2090 *et. seq.* give DFG stronger authority over projects carried out or authorized by state agencies than over projects carried out by private entities.¹³ When a private entity or individual proposes a project, DFG comments on the project under CEQA as a responsible agency. However, as discussed below, CEQA lacks the same mandate as in §§2090 *et. seq.* for lead agencies to incorporate DFG's recommended alternatives and/or mitigation measures. According to DFG staff, their comments and recommendations are frequently ignored during the CEQA review process.

Comparison with the Federal Endangered Species Act

DFG's authority under §§2090 *et. seq.* is essentially the same as that given to the US Fish and Wildlife Service (FWS) and US National Marine Fisheries Service (NMFS) under the federal Endangered Species Act (ESA).¹⁴ Under the ESA, federal agencies must consult with the Services in order to obtain an incidental take authorization and proceed with a project. NMFS or FWS prepares a biological opinion that specifies actions which should be taken by the federal agency to avoid jeopardy and minimize take of listed species. The biological opinion is not binding on the federal agency, but disregarding the Services' recommendations can lead to lawsuits challenging the federal agency's action.

Why Hasn't the Sunset Been Extended?

The environmental community disagrees over the need to continue the §2090 consultations. Because of the previously described problems with the §2090 process, some environmental groups believe that endangered species would fare better under the new §2081(b) incidental take permit process than under §2090 consultations. In particular, the incidental take permit requires full mitigation for the impacts of projects, which is a higher mitigation standard than that required under §2090 consultations.

The Planning and Conservation League offered to support an extension of §§2090 *et. seq.* on two conditions. First, they wanted to see a requirement to mitigate for the full range of project impacts to listed species, not just jeopardy impacts. Second, they wanted to eliminate the provision that allows state agencies to override the finding of jeopardy for economic, social, or other considerations. As of this writing, no legislator has introduced a bill to extend the life of the §2090 process or to enact these amendments.

The business community generally would not oppose continuation of the §2090 process. Some representatives said they expect at least a one year extension to allow the Legislature to sort out the differences between the §2090 consultations and the new incidental take permit. Others said it

would not be in their interests to allow §§2090 *et. seq.* to sunset, which could place a greater burden on private entities to conserve species.

ALTERNATIVES TO THE SECTION 2090 CONSULTATION

If §§2090 *et. seq.* sunset at the end of this year, two other processes might take the place of project review under CESA. Under CEQA, lead agencies must continue to consult with DFG prior to preparing an EIR. And under Fish and Game Code §2081(b), DFG may now issue a permit for incidental take. These processes are described below.

Consultations Under CEQA:

- Public Resources Code §21080.3 requires lead agencies to consult with all responsible agencies and “any other agency which has jurisdiction by law over natural resources affected by the project which are held in trust for the people of the State of California...”¹⁵
- Fish and Game Code §1802 states that DFG has jurisdiction over the conservation, protection, and management of fish, wildlife, and habitat. It requires DFG, as trustee for fish and wildlife resources, to consult with lead and responsible agencies and to comment on environmental documents and project impacts.

If Section 2090 *et. seq.* were to sunset, state lead agencies would still consult with DFG under CEQA. Consultations would occur prior to the preparation of an EIR or Negative Declaration. DFG also would review draft EIRs or Negative Declarations, and recommend alternatives or mitigation measures. However, CEQA does not require lead agencies to follow DFG’s recommendations, as does the §2090 process.

CEQA allows state lead agencies to proceed with a project, despite the project’s significant environmental impacts. The lead agency must simply find that overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment. And unlike §§2090 *et. seq.*, CEQA does not require mitigation if the lead agency overrides DFG’s recommendations. Consequently, it is possible that CEQA consultations could have less influence on proposed projects than §2090 consultations.

Incidental Take Permits under CESA Section 2081(b)

CESA prohibits take of endangered or threatened species. The term “take” comes from the hunting and fishing lexicon, meaning that a person would hunt, pursue, catch, capture, or kill an individual animal, or attempt to do so.¹⁶ *Intent* to hunt or kill is key to the meaning of take. The term “incidental take” refers to the *unintentional* capture or kill of an animal in the course of some otherwise legal activity. A key aspect of incidental take is that deaths of animals are predictable outcomes or byproducts of the otherwise legal activity.

Fish and Game Code §2081(b) was enacted in 1997¹⁷ to give DFG the authority to issue a permit for incidental take for otherwise lawful activities. Under this section, DFG may authorize incidental take, but the take must be minimal and permittees must fully mitigate the impacts. DFG cannot issue permits for projects that would jeopardize the continued existence of the species.

Both §2081(b) and §§2090 *et. seq.* require that state agencies mitigate for impacts on listed species or their habitat. However, under §2081(b), impacts of taking must be “fully mitigated”

and “roughly proportional in extent to the impact of the authorized taking.” Environmental groups believe that the requirements for full mitigation and mitigation of habitat impacts make the incidental take permit preferable to the §2090 process. Business and land owner groups believe the “roughly proportional” clause imposes a more reasonable standard, but they are waiting to see how DFG’s regulations implement these terms.

DFG’s discussion draft of implementing regulations call for a mandatory “finding of significance” under CEQA. This means that DFG, as the lead agency, has presumed that all activities requiring incidental take permits will have a significant effect on the environment. Therefore, applicants will have to prepare an EIR (or its functional equivalent) for the activity requiring an incidental take permit. Presumably, this requirement will also lead to a public comment period and response to comments on the incidental take permit, as required under CEQA. However, DFG does not elaborate on these details in the proposed regulations.

WHAT ARE THE IMPLICATIONS OF THE SUNSET OF §§2090 *ET. SEQ.*?

The sunset of §§2090 *et. seq.* will give rise to several issues concerning the implementation of CESA. These issues are:

- CESA will not apply to state agency activities, but state employees and contractors could be criminally liable for violation of CESA;
- DFG’s authority to modify state agency projects will be limited to CEQA comments; and
- Biological opinions issued under §2092 will become invalid, leaving state agencies with no authority for incidental take for current activities.

Each of these issues is described below.

Application of CESA to State Agency Activities

If §§2090 *et. seq.* sunset, CESA’s application to state agency activities will be murky at best. CESA protects threatened and endangered species through Fish and Game Code §2080, which prohibits “persons” from killing, possessing, buying, selling, or otherwise harming listed species. Fish and Game Code §67 defines “person” as any “natural person, partnership, corporation, limited liability company, trust, or other type of association.” The definition does not include state agencies.

Without §§2090 *et. seq.*, there will be no *direct* application of CESA to state agency actions. State agencies *could* obtain incidental take permits under §2081(b), but nothing in the Fish and Game Code or the proposed regulations *requires* them to do so. DFG might resolve these issues when it issues draft regulations. However, the Fish and Game Code does not give DFG the authority to require state agencies to obtain an incidental take permit. DFG cannot create such authority through the administrative rulemaking process. The question of DFG’s authority to require state agencies to obtain an incidental take permit will remain unresolved unless the Legislature amends the Fish and Game Code.

The sunset of §§2090 *et. seq.* may mean that CESA only applies to employees and contractors of state agencies, not the agencies themselves. Taking endangered or threatened species is a crime punishable by a fine of as much as \$5,000 and one year in jail. Without a §2090 biological

opinion, the liability for take shifts to employees and contractors. The courts might find that employees or contractors of a state agency are criminally liable for taking endangered or threatened species in the course of implementing an approved project.

DFG staff expect that state agencies will obtain incidental take permits to protect their employees and contractors. However, there is no guarantee that they will do so.

DFG Authority Limited to CEQA Comments.

When §§2090 *et. seq.* sunset, DFG will lose its authority to require a state lead agency to incorporate alternatives or mitigation measures into proposed projects. Under §2091, DFG must recommend such measures when it finds that a project will result in jeopardy to a species or destruction of essential habitat. DFG has no similar authority to require alternatives when considering an incidental take permit. These issues are discussed separately below.

Projects that Might Jeopardize Listed Species.

Under §§2090 *et. seq.*, state lead agencies must meet two conditions before they can approve activities that would cause jeopardy:

1. The state lead agency *must require mitigation and enhancement measures to minimize the impacts* of the project on species or essential habitat;
and
2. The state lead agency must find that the benefits of the project as proposed clearly outweigh the benefits if the project were to be carried out with the alternatives, *and* that no irreversible commitment of resources has been made to the project which has the effect of foreclosing the opportunity for implementing the alternatives.¹⁸

It is important to note that DFG has never issued a jeopardy biological opinion. Nor has any state lead agency overridden the DFG-recommended alternatives and mitigation measures. However, without the authority of §§2090 *et. seq.*, state lead agencies may not have the same incentives to work with DFG to modify projects and avoid jeopardy.

In contrast, under CEQA,¹⁹ lead agencies can approve projects with significant environmental impacts, including jeopardy, if they *either*:

1. Avoid the impact or require mitigation;
or
2. Find that the overriding economic, legal, social, technological, or other benefits of the project without the alternatives outweigh the significant effects on the environment.

CEQA does not require mitigation measures if the lead agency makes the finding of overriding considerations. The conditions under which a state agency may authorize a project despite a jeopardy finding are more stringent under §§2090 *et. seq.* than under CEQA. If §§2090 *et. seq.* sunset, there could be more occasions when state agencies approve or implement jeopardy projects.

In contrast, Fish and Game Code §2081(b) does not allow DFG to issue an incidental take permit for a project that will jeopardize the continued existence of a species. Unlike the §2090 and CEQA consultations, there is no override provision that would allow a jeopardy project to proceed. Applicants must fully mitigate all impacts of their projects to obtain the incidental take permit. However, the Fish and Game Code does not require state agencies to obtain the incidental take permit.

In summary, if §§2090 *et. seq.* sunset, DFG will have limited authority to assure that state agencies will not implement jeopardy projects.

Consideration of Project Alternatives.

The §2090 process gives DFG the authority to modify projects that cause jeopardy. No other section of the Fish and Game Code or CEQA confers similar authority on DFG. If §§2090 *et. seq.* sunset, there would be no other statutory requirement to first avoid, then mitigate, impacts to listed species.

Wildlife biologists and environmental groups are generally cautiously supportive of mitigation. Mitigation plans call for actions such as replanting vegetation, recreating tidal or seasonal wetlands, propagating individual species, and replanting forests. However, mitigation cannot guarantee that ecosystems will recover. Given the uncertainty of success of mitigation, most wildlife experts prefer to *avoid* impacts, and only resort to mitigation if there are no acceptable alternatives. For this reason, some environmental groups prefer the §2090 consultation process, although they recognize that it does not have authority to modify projects that would not cause jeopardy.

The §2081(b) incidental take permit requires permittees to fully mitigate impacts on listed species. In particular, §2081(b)(2) calls for full mitigation of all impacts related to the taking, which would include modification or destruction of essential habitat. While this mitigation standard appears to be higher than that contained in §§2090 *et. seq.*, it does not require the use of project alternatives to avoid impacts altogether.

Invalid Biological Opinions Issued Under Section 2091

Under Fish and Game Code §§2090 *et. seq.*, DFG has issued more than 700 biological opinions that allow state lead agencies to implement or approve projects that will harm listed species or essential habitat. Some projects are complete, but others have yet to be implemented. Some are ongoing activities requiring authorization under CESA.

DFG staff are concerned that projects authorized through biological opinions will have no legal standing if §§2090 *et. seq.* expire. They believe that projects authorized by biological opinions are not covered under Fish and Game Code §2081.1. This provision “grandfathers” other agreements that allow take or incidental take as long as DFG entered or approved the agreement or plan by April 10, 1997. Without the biological opinions, many state agency activities that result in take will lack authority. State agency employees or contractors may be criminally liable for taking listed species while conducting previously authorized activities.

SUMMARY

None of the three processes (the §2090 consultation, the CEQA consultation, and the incidental take permit) examined in this paper are perfect tools for protecting endangered or threatened species. The main strengths and weaknesses of each are as follows:

- Sections 2090 *et. seq.* give DFG the authority to modify projects, thereby avoiding take of endangered or threatened species or damage of essential habitat. But under §2090 and CEQA consultations, state lead agencies can override DFG recommended project alternatives or mitigation measures if they find sufficient economic or social benefits in so doing.
- The CEQA process allows the override to occur without mitigation of significant environmental impacts, while §§2090 *et. seq.* requires mitigation of impacts.
- The incidental take permit program requires permittees to mitigate all impacts, including damage to essential habitats. But it does not give DFG the authority to require alternatives to projects and avoid take.
- The Fish and Game Code does not require state agencies to obtain incidental take permits.

Despite the imperfections in the §2090 consultation process, it is the only direct requirement for state agencies to comply with CESA. If it sunsets, CESA will not apply directly to state agency actions. The liability for take would then shift to state employees and contractors.

Endnotes

¹ Statutes of 1970, Chapter 1510. CESA consists of Chapter 1.5 of the Fish and Game Code, §2050 to §2098. For an overview of CESA and reform issues, see “California Endangered Species Act: Overview of Issues in the Reform Debate,” Helen Roland, California Research Bureau, California State Library, March 1996.

² Fish and Game Code §2053.

³ Title 14, Section 21000 *et. seq.*, California Code of Regulations.

⁴ Public Resources Code §21067.

⁵ Public Resources Code §21069.

⁶ The introduction to the CEQA Guidelines (Governor’s Office of Planning and Research, 1997) provides an overview of CEQA.

⁷ Fish and Game Code §2090. Added by Statutes of 1984, Chapter 1240 (AB 3309, Costa) and amended by the Statutes of 1987, Chapter 286.

⁸ California Department of Fish and Game, “Discussion Draft of Regulations Relating to the California Endangered Species Act.” Article 1, Section 51(r). Available from World Wide Web <http://www.dfg.ca.gov/chpt6draft.html>.

⁹ The sunset date was amended in Statutes of 1986 Chapter 30 §1, Statutes of 1987 Chapter 286 §3, Statutes of 1989 Chapter 423 §1, and Statutes of 1993 Chapter 337 §1.

¹⁰ A series of internal memoranda and guidelines instructed DFG staff how to consult with state agencies. According to DFG staff, the Department did not issue regulations earlier because the Legislature has frequently revised CESA. In particular, over the last few years there have been repeated calls for reforming CESA, and DFG believed it would be more efficient to promulgate regulations after the Legislature completed its reforms. DFG staff now believe the revision period is over.

In January, DFG issued a discussion draft of regulations to standardize both the §2090 and the new §2081(b) (incidental take permit) processes. DFG received between 40 and 50 comments on the discussion draft, and is now revising their proposal. Some comments focused exclusively on the §2090 process. Most, however, suggested that DFG need not bother with §2090 regulations because of the impending sunset, and focused their comments on the incidental take permit process.

Although the formal draft regulations have not been released for public comment, the process proposed for §2090 consultations generally reflects current DFG practice. The proposed regulations would create standard processes for both formal and informal consultation with state agencies, and would define state agencies’ responsibilities for incorporating DFG’s findings. DFG plans to release a revised discussion draft of the regulations this summer.

¹¹ CEQA Guidelines, Section 15386.

¹² Under §21080.3 of the Public Resources Code, lead agencies must consult with DFG, as a trustee agency, prior to determining whether an Environmental Impact Report (EIR) or Negative Declaration is required for a project.

¹³ Section 2055 of the Fish and Game Code states that it is the policy of the state that “...all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of this chapter.” Thus, state agencies have a clear duty to conserve species.

¹⁴ 16 USC §§1531 *et. seq.*

¹⁵ CEQA Section 21104.2 also calls for state lead agencies to consult with DFG. However, this section calls for consultation pursuant to DFG Code Section 2090, and presumably would be repealed if §§2090 *et. seq.* sunset.

¹⁶ Fish and Game Code §86.

¹⁷ SB 879, Johnston, Statutes of 1997, Chapter 567.

¹⁸ Fish and Game Code §2092.

¹⁹ Public Resources Code §21081.