



Introduction to CESA Incidental Take Permits and Consistency Determinations

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Fish and Game Code Sections Authorizing Take of Listed Species

- **2080.1 Consistency Determinations**
- 2081(a) Research or Management MOU
- **2081(b) Incidental Take Permit**
- 2084 Taking of Candidate Species
- 2086 Voluntary Local Ag Program
- 2087 Routine and Ongoing Ag Activity "Accidental Take"
(set to sunset Jan. 2009)
- 2090 State Agency Consultation (Sunsetted 1999)
- 2112 Recovery Strategy
- 2835 Natural Community Conservation Plans



CESA Basics Part 1: Incidental Take Permits



Intro to Incidental Take Permits (What is it and how do you get one?)

- What is it, what's in it – a.k.a. what does this piece of paper mean?
- Applications – process and timelines
- Developing and Issuing the Permit – Statutory and regulatory standards

Incidental Take Permits, continued

- What is an incidental take permit?
 - Enacted in 1998 to provide a specific permitting tool for incidental take of CESA listed species.
 - It is a permit that allows an exception to the take prohibition in CESA if the Permittee implements certain actions specified by DFG that meet the standards for issuance.
- What does the incidental take permit document?
 - The Permit contains all the conditions that the Permittee must implement in order to be exempt from the take prohibition, and provides an explanation of the evidence that DFG considered in reaching its conclusions about issuing the incidental take permit.

Incidental Take Permits, continued

- Application Phase:
 - Applications are to be submitted to the Regional Manager
 - Application contents are found in section 783.2 of the California Code of Regulations.
 - DFG has 30 days to respond, in writing, to an application. If DFG does not respond, the application is deemed complete.

Incidental Take Permits, continued

■ Processing Times

- 90 days when DFG is responsible agency (60 day extension if necessary)
- 120 days if DFG is lead agency (60 day extension if necessary)
- Note: time lines are from date of acceptance of complete application *or* from approval of CEQA document, whichever is later.

■ Issuance

- Regulatory timeframes are directory – project proponent may not proceed until a permit is issued, even if DFG is past the regulatory deadline.
- DFG issues permit by signature of Regional Manager, Permittee must acknowledge and return copy to DFG to have coverage.
- DFG must make CESA and CEQA Findings (see Cal Code Regs § 783.5 (c)(2))

Incidental Take Permits, continued

Issuance Criteria

Fish & G. Code, § 2081, subds. (b) and (c)

- Take is incidental
- Take is minimized
- Take is fully mitigated
- Funding is ensured and adequate to implement measures required to minimize and fully mitigate, including compliance and effectiveness monitoring
- No permit may be issued if jeopardy would result
- Note: No regulatory equivalent under CESA to federal "No Surprises" assurances.

Common Issues that Arise During Incidental Take Permitting Under CESA

- Required analysis of the extent to which the project could result in take of species proposed to be covered by the permit.
- Coordinating related review by the federal government and addressing differences in take definitions and permitting standards.
- Fully protected species and State non-listed species proposed for coverage.
- Form of security provided for required financial assurances and issues related to who holds the long-term endowment.



CESA Basics Part 2: Consistency Determinations



Consistency Determinations

- What is it?
- When can you use it?
- Request Process
- What to look for and where it can be (BO *or* ITS)
- Fatal Flaws
- Funding
- Timelines (*must* respond)

Consistency Determinations, continued

- What is a consistency determination?
 - Enacted in 1998 (at the same time as 2081(b) took effect) as an effort to allow a streamlining option for permitting.
 - It is a concurrence by DFG that the applicant's federal incidental take authorization can be used for state incidental take authorization in lieu of a separate state permit.
- When can a consistency determination be used?
 - When the federal agency has issued an incidental take statement (in a biological opinion) or incidental take permit (in conjunction with an HCP), *and*
 - When all species are listed under *both* ESA and CESA, *and*
 - When the measures contained in the federal ITS or ITP meet the state issuance criteria in 2081(b)

Consistency Determinations, continued

■ Process Overview:

- Applicant writes letter of request to DFG *Director*; attaches copy of BO/ITS or of HCP/ITP (if there is no ITS or ITP, there is no CD)
- Date received starts 30-day clock
- Regional staff is primary lead for preparation – early coordination is critical
- Determinations are signed by the DFG Deputy Director
- Note: DFG *must* take action on a CD request – consistent, inconsistent, or applicant withdraws. If inconsistent, Applicant has to get a 2081(b) permit*

Consistency Determinations, continued

- Processing:
 - Measures intended to meet the CESA issuance criteria can be in the BO itself *or* in the ITS (section 7)
 - Common fatal flaws: missing or deferred funding, missing DFG in approval loop, lack of timelines, inadequate analysis or inadequate mitigation, presence of or authorization to take fully protected species
 - Note on Funding: Funding assurances (Security) must be of a form that allows DFG full access to draw on it (i.e. letter of credit held by DFG)

Consistency Determinations, continued

- Issuance:
 - If DFG determines the federal authorization is consistent, Applicant receives a "Determination" that documents the elements of that authorization that meet the CESA issuance criteria.
 - If DFG determines the federal authorization is not consistent, the Applicant will first be allowed the opportunity to withdraw the request. If the Applicant does not withdraw, DFG will issue a determination of "Inconsistency" and the Applicant will have to obtain State coverage by applying for a CESA permit (2081(b))

2080.1 vs 2081(b)



- Request to Director: BO and ITS (section 7) or HCP and ITP (section 10) must be included
- 30 days to make Determination
- Miss deadline = approved
- All species must be jointly listed
- Cannot add or change conditions
- Not considered a "discretionary approval" subject to CEQA
- BO must contain measures necessary to meet CESA issuance criteria
- Application to Regional Manager
- 120-180 days to issue*
- Miss deadline = no automatic approval
- Species can be jointly listed or state listed
- Department specified Terms and Conditions
- Issuance of an permit is a "discretionary approval" subject to CEQA (Department must document its compliance with CEQA)



State-Federal Permitting Coordination: Consistency Determinations



photo: Shana Dodd



Photo
by
Richard
A. Arnold

ESA Definition of Take

- "*Harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct*"
- Harass means activities that create the likelihood of injury by disrupting normal behavior patterns, including breeding, feeding, and sheltering.
- Harm includes activities that actually kill or injure, including "significant" habitat modification or degradation.
- So.... ESA includes activities that disrupt or injure listed species but may not cause mortality. How might this complicate your permitting efforts?

Federal Incidental Take Authorization Overview (Sections 7 and 10)

- Section 7: "consultation" with FWS or NMFS where a *federal nexus* exists (federal funding, 404 permit, etc); triggered by "may affect" listed species (plant or animal) or critical habitat; required to minimize and not jeopardize; funding assurances not required
- Section 10: Habitat Conservation Plan when no federal nexus; triggered by "likely to result in take" of listed species (animals); required to minimize and mitigate to the extent practicable; funding assurances required

Section 7/10 Comparison

- Section 7
- Federal hook (action, permit, money, land)
- Trigger: *may affect* listed species
- Wildlife and plants
- BA is federal agency's document (not public)
- EA or EIS is federal Lead Agency's document (public review)
- BO Jeopardy or No Jeopardy
- Incidental take statement
- Threshold: Not jeopardize the continued existence of listed species; not result in destruction or adverse modification of designated critical habitat
- Legal time limits: 135 days from BA to BO
- Duration: Consultation may be reopened if project changes
- Section 10
- Nonfederal lead (state, local, private) Internal USFWS/NOAA Section 7
- Trigger: likely to result in take
- Wildlife only but plants under internal Section 7
- HCP is applicant's document
- EA or EIS prepared by applicant for USFWS/NOAA (public review)
- Section 10(a)(1)(B) permit issuance or denial
- Incidental take permit
- Threshold: Not appreciably reduce likelihood of survival and recovery of the species in the wild
- Processing time guidelines
- Permit life is set at time of issuance (some as long as 100 years)

Pros and Cons: section 7 vs. 10

- Is section 7 even available? Federal nexus
- Section 7 consultations are faster
- Public participation (NEPA) in Section 10, none in Section 7
- Long-term benefits (no surprises assurances) in Section 10, no assurances in Section 7

HCP/Section 7 and Consistency Determinations

- Application: where a Biological Opinion addresses species listed under **both** ESA and CESA
 - Pro: very streamlined process for applicant
 - Con: DFG cannot change or add any conditions to meet CESA fully mitigated standard

HCP/Section 7 and Consistency Determinations, continued

- Section 7 Federal agency consultation
 - no jeopardy
 - **Minimize** level of take
 - No assurances
- Section 10 conservation planning (HCP)
 - Minimize level of take
 - Mitigate take to **maximum extent practicable**
 - Funding required
 - “No surprises” assurances
- CESA 2080.1
 - No jeopardy
 - Funding required
 - *Minimize* level of take
 - **Fully mitigate** impacts of take



Consistency Determinations, continued

- Other notes:
 - Programmatic BOs – how to handle
 - What if it's inconsistent? Options.
 - Plants – DFG will issue Determinations for plants if the measures meet the CESA criteria
 - "not likely to affect" determinations – how to respond

Keys to Success

- Work closely with Federal counterparts
 - "Coordinate early and often"
- Ensure that the HCP/Section 7 biological opinion meets CESA standard
 - Full Mitigation
 - Ensured Funding

