



- Board of Directors
Communications and Legislation Committee

3/12/2019 Board Meeting

8-6

Subject

Express support, if amended, to SB 62 (Dodd, D-Napa): Endangered Species: accidental take associated with routine and ongoing agricultural activities; the General Manager has determined that the proposed action is exempt or otherwise not subject to CEQA

Executive Summary

SB 62 would make permanent an exemption from the requirements of the California Endangered Species Act (CESA) for accidental take of endangered species resulting from acts that occur on a farm or a ranch in the course of otherwise lawful routine and ongoing agricultural activities. The exemption is currently set to expire January 1, 2020. As amended, the bill (**Attachment 1**) would also require that any known instances of accidental take be reported to the Department of Fish and Wildlife (DFW) within 10 days. Metropolitan staff recommends supporting the bill, if amended, to extend the exemption up to an additional 5 years to allow the Legislature to evaluate the impacts of the exemption before extending it further or making it permanent. In addition, staff recommends that the exemption be clarified to exclude actions by public agencies.

Details

CESA prohibits the unauthorized take of an endangered or threatened species. Absent a statutory exemption, DFW may authorize the take of listed species pursuant to an incidental take permit if the take is incidental to an otherwise lawful activity, the impacts are minimized and fully mitigated, and the issuance of the permit would not jeopardize the continued existence of the species. Authorization may also be granted pursuant to permits for scientific research, voluntary local programs on farms and ranches, safe harbor agreements, or an approved Natural Community Conservation Plan.

Memorialized in Section 2087 of the Fish and Game Code, CESA includes an exemption for accidental take of candidate, threatened, or endangered species resulting from acts that occur on a farm or a ranch in the course of otherwise lawful routine and ongoing agricultural activities and is not prohibited by CESA. "Accidental" is defined as "unintended or unforeseen." This exemption sunsets on January 1, 2020.

With SB 62, sponsored by the California Farm Bureau Federation (Farm Bureau), the author intends to make this agricultural exemption permanent. The Farm Bureau argues that the exemption is necessary to avoid unfair enforcement actions against its members, and asserts there is no evidence that the exemption has resulted in increased take of endangered species. The Farm Bureau would like to avoid having to seek successive extensions of the law.

Additionally, as recently amended, SB 62 would require reporting of all known accidental take under this exemption to DFW within 10 days. A failure to report accidental take could result in criminal misdemeanor liability.

SB 62 also extends the California State Safe Harbor Agreement Program Act (safe harbor provisions) from January 1, 2020, to January 1, 2024. Extending the safe harbor provisions is good policy because it encourages non-federal landowners to voluntarily preserve and enhance habitat that contributes to the recovery of CESA-listed species. To the extent other landowners participate, it may reduce regulatory burdens on Metropolitan by resulting in de-listing or downlisting of species from endangered to threatened, or by making it easier to show Metropolitan's actions will not result in jeopardy, a condition of both CESA and the federal Endangered Species

Act incidental take permits. Metropolitan supports this language in SB 62. Staff concerns over SB 62 relate to the permanence of the agricultural exemption.

Various forms of the agricultural exemption have been in place since 1997. Apparently, it was enacted, in part, to encourage on-farm species conservation activities by ensuring that neighboring farmers did not object to the attraction of listed species. However, in existing law, there are no requirements to report accidental take, and there is no data on its actual impacts. For this reason, Metropolitan staff recommends supporting the new reporting requirement in SB 62. However, Metropolitan staff is concerned with making this exemption permanent in the absence of any data on its impacts. If accidental agricultural take is significant, water suppliers or the State Water Project may have to mitigate for the decline in species even though they are not the cause. While there is an exception to the exemption for certain types of fish species, including listed Delta fish, there is no data on the impact on listed species generally – terrestrial animals, birds, fish or plants. Thus, staff recommends seeking amendments to collect more data on impacts to other types of species before supporting a permanent extension of this exemption.

The current agricultural exemption is also ambiguous insofar as it applies to any accidental take that occurs “*on a farm or ranch* in the course of otherwise lawful routine and ongoing agricultural activities,” which may include actions by public agencies that may not be consistent with legislative intent. One helpful clarification would be to limit the agricultural exemption to exclude actions by public agencies that may operate irrigation and drainage infrastructure on farms and ranch lands.

Staff recommends supporting the bill if another five-year sunset is added to the bill. Metropolitan could then work with DFW, Farm Bureau, Association of California Water Agencies, and other stakeholders to study the impacts of the current exemption, and to consider whether the language of the exemption needs revision.

Policy

By Minute Item 51418, dated December 11, 2018, the Board adopted State Legislative Priorities and Principles for 2017/18, as amended to support legislation that provides regulatory compliance flexibility, improve clarity and workability of the requirements, and promotes consistency and reduce regulatory duplication, but does not adversely impact public health or the environment

Metropolitan Water District Administrative Code Section 11104: Delegation of Responsibilities

California Environmental Quality Act (CEQA)

CEQA determination(s) for Option #1:

The proposed action is not defined as a project under CEQA because it involves legislative proposals that do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment (Public Resources Code Section 21065 and Section 15378(b)(1) of the State CEQA Guidelines).

The proposed action is also not defined as a project under CEQA because it involves continuing administrative activities, such as general policy and procedure making (Section 15378(b)(2) of the State CEQA Guidelines). In addition, where it can be seen with certainty that there is no possibility that the proposed action in question may have a significant effect on the environment, the proposed action is not subject to CEQA (Section 15061(b)(3) of the State CEQA Guidelines).

CEQA determination for Option #2:

None required

Board Options

Option #1

Express support, if amended, to SB 62, Endangered Species: accidental take associated with routine and ongoing agricultural activities.

Fiscal Impact: Unknown

Business Analysis: Allows Metropolitan to seek a further sunset provision in the law that would provide time for additional study and negotiation amongst stakeholders

Option #2

Take no action.

Fiscal Impact: Unknown

Business Analysis: With no position, Metropolitan may not be able to negotiate any amendments to the bill.

Staff Recommendation

Option # 1



Susan Sims
Manager, External Affairs

3/6/2019

Date



Jeffrey Kightlinger
General Manager

3/6/2019

Date

Attachment 1 – Senate Bill 62 as amended 02/25/2019

Ref# ea12665392

AMENDED IN SENATE FEBRUARY 25, 2019

SENATE BILL

No. 62

Introduced by Senator Dodd

January 3, 2019

An act to amend ~~Section~~ *Sections 2087 and 2089.26* of the Fish and Game Code, relating to endangered species.

LEGISLATIVE COUNSEL'S DIGEST

SB 62, as amended, Dodd. Endangered species: accidental take associated with routine and ongoing agricultural ~~activities~~. *activities: state safe harbor agreements.*

~~Existing~~

(1) Existing law, the California Endangered Species Act, prohibits the taking of an endangered or threatened species, except in certain situations. Under the act, the Department of Fish and Wildlife may authorize the take of listed species pursuant to an incidental take permit if the take is incidental to an otherwise lawful activity, the impacts are minimized and fully mitigated, and the issuance of the permit would not jeopardize the continued existence of the species. The act requires the department to adopt regulations for the issuance of incidental take permits. *Existing law also provides that a violation of the Fish and Game Code is a crime.*

The act also provides, until January 1, 2020, that the accidental take of candidate, threatened, or endangered species resulting from acts that occur on a farm or a ranch in the course of otherwise lawful routine and ongoing agricultural activities is not prohibited by the act.

This bill would make this exception permanent. *The bill would also require a person, when an accidental take is known to occur under these provisions, to report the take to the department within 10 days.*

By creating a new reporting requirement, the violation of which would be a crime, the bill would impose a state-mandated local program.

(2) The California State Safe Harbor Agreement Program Act establishes a program, until January 1, 2020, to encourage landowners to manage their lands voluntarily, by means of state safe harbor agreements approved by the Department of Fish and Wildlife, to benefit endangered, threatened, or candidate species without being subject to additional regulatory restrictions as a result of their conservation efforts.

This bill would extend the act to January 1, 2024. By extending the provisions of the act, the violation of which would be a crime, the bill would impose a state-mandated local program.

(3) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: ~~no~~-yes.

The people of the State of California do enact as follows:

1 SECTION 1. Section 2087 of the Fish and Game Code is
2 amended to read:

3 2087. (a) Accidental take of candidate, threatened, or
4 endangered species resulting from an act that occurs on a farm or
5 a ranch in the course of otherwise lawful routine and ongoing
6 agricultural activities is not prohibited by this chapter.

7 (b) *When an accidental take is known to occur under subdivision*
8 *(a), the person shall report the take to the department within 10*
9 *days.*

10 ~~(b)~~

11 (c) For purposes of this section, “accidental” means unintended
12 or unforeseen.

13 SEC. 2. Section 2089.26 of the Fish and Game Code is amended
14 to read:

15 2089.26. This article shall remain in effect only until January
16 1, ~~2020~~, 2024, and as of that date is repealed, unless a later enacted

3

1 statute, that is enacted before January 1, ~~2020~~, 2024, deletes or
2 extends that date.

3 *SEC. 3. No reimbursement is required by this act pursuant to*
4 *Section 6 of Article XIII B of the California Constitution because*
5 *the only costs that may be incurred by a local agency or school*
6 *district will be incurred because this act creates a new crime or*
7 *infraction, eliminates a crime or infraction, or changes the penalty*
8 *for a crime or infraction, within the meaning of Section 17556 of*
9 *the Government Code, or changes the definition of a crime within*
10 *the meaning of Section 6 of Article XIII B of the California*
11 *Constitution.*

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