PERMITTING THE TAKE: AN ANALYSIS OF SECTION 2081 OF THE CALIFORNIA ENDANGERED SPECIES ACT

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INTRODUCTION

California has long been recognized as a leader in the development and implementation of environmental policy.[1] Due to its size and the concentration of wildlife within its borders, California is often the first state with environmental problems serious enough to merit legislative action.[2] In 1984, the legislature enacted the California Endangered Species Act (CESA)[3] in order to provide a comprehensive policy to manage the state's environmental issues. CESA prohibits any person from taking or attempting to take a species listed as endangered or threatened under state law.[4] However, in a recent amendment to CESA section 2081, the legislature granted the California Department of Fish and Game (the Department) the explicit authority to issue permits that authorize the taking of listed species under certain circumstances.[5] This legislative amendment answered the question of whether the Department had the authority to grant incidental take permits, yet it has brought other related issues to the forefront of the environmental take permit debate.

This Article will examine the history behind the take permits authorized under section 2081 and will analyze the issues raised

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1 *See* Lynn E. Dwyer & Dennis D. Murphy, *Fulfilling the Promise: Reconsidering and Reforming the California Endangered Species Act*, 35 NAT. RESOURCES J. 735, 735 (1995).

2 *See id.*

3 CAL. FISH & GAME CODE §§ 2050-2098 (West 1998).

4 *See* CAL. FISH & GAME CODE § 2080.

5 *See* CAL. FISH & GAME CODE § 2081.

by the recent legislative amendment to that section. Part I of this Article explores the legislative and judicial history of section 2081. Part II discusses the problems with the amended section's statutory language and proposes a resolution for these issues. Part III reviews the overall insufficiency of section 2081's implementation and recommends an appropriate modification in procedure. Finally, this Article concludes that the necessary changes will provide greater species protection and place section 2081 well within CESA's purposes and legislative intent.

I
Legislative and Judicial History of Section 2081

CESA's enactment provided the statutory scheme for California's goals and procedures regarding the treatment of plant and wildlife species within the state. CESA explains that the "conservation, protection, and enhancement" of species protected under the act "and their habitat is of statewide concern."[6] In essence, the fundamental purposes of CESA are to "conserve, protect, restore, and enhance" protected species and the habitats upon which they depend for survival.[7]

To serve this objective, CESA prohibits any person from taking or attempting to take a species listed as endangered or threatened under state law.[8] "Take" is defined as "to hunt, pursue, catch, capture or kill" a protected species or attempt any of these actions.[9] Furthermore, the Department has traditionally interpreted this take provision as prohibiting acts that destroy or modify a species' essential habitat, thereby causing harm to that species.[10] Therefore, although CESA's definition of "take" does not include "harm" or "harass" as does the federal Endangered

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[6] Cal. Fish & Game Code § 2051(c).

[7] Cal. Fish & Game Code § 2052.

[8] *See* Cal. Fish & Game Code § 2080.

[9] Cal. Fish & Game Code § 86; *see also* Department of Fish and Game v. Anderson-Cottonwood Irrigation Dist., 8 Cal. App. 4th 1554, 1564 (1992) (holding that irrigation district's killing of the endangered Sacramento River winter-run chinook salmon fry in the course of its lawful pumping activity constituted a prohibited taking).

[10] *See* Tara L. Mueller, Guide to the Federal and California Endangered Species Laws 90 (1994).

Species Act (ESA),[11] the Department's interpretation of the take prohibition serves to align CESA with its federal counterpart.

However, CESA also provides a number of exceptions to its broad take prohibition. The primary exception to CESA's take prohibition can be found in section 2081. Under its original language, section 2081 provided:

> Through permits or memorandums of understanding, the department may authorize individuals, public agencies, universities, zoological gardens, and scientific or educational institutions, to import, export, take or possess any endangered species, threatened species, or candidate species for scientific, educational, or management purposes.[12]

The Department has interpreted the phrase "management purposes" as granting it the broad power "to authorize any 'incidental take' of protected species 'in connection with some other lawful activity. . . .'"[13] Granting take permits under the guise of "management purposes" was the primary means by which the Department allowed local land use planning and species conservation activities to proceed.[14] However, the Department also used these permits to allow the development of commercial and private land. For example, take permits for "management purposes" were issued by the Department to facilitate the development of "an automobile test track facility, gas lines, a business park, a landfill, mines," housing developments, and other private land use activities.[15] In fact, between 1984 and 1997, the Department had issued 136 section 2081 permits covering approximately 582,308 acres.[16]

As a result, many environmental groups argued that the Department's liberal use of section 2081 permits violated CESA's legislative intent because the "management purposes" language

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[11] *See* 16 U.S.C. §1532(19) (1994) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.").

[12] CAL. FISH & GAME CODE § 2081 (West 1984, Supp. 1997). This was the complete language of section 2081 when it was enacted in 1984. As will be seen later in this Part, the California legislature added to this when it amended section 2081 in 1997.

[13] Planning and Conservation League v. Dep't of Fish and Game, 67 Cal. Rptr. 2d 650, 654 (1997).

[14] *See* MUELLER, *supra* note 10, at 91.

[15] *Planning and Conservation League*, 67 Cal. Rptr. 2d at 655.

[16] *See* SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE REPORT FOR 1997 CALIFORNIA SENATE BILL NO. 879, 1997-1998 Regular Session, Comments para. 5 (Cal. June 17, 1997).

was never intended to encompass private development and commercial activities.[17] The first serious challenge to the Department's practices occurred in *San Bernardino Valley Audubon Society v. City of Moreno Valley*.[18] This suit challenged the Department's issuance of a section 2081 permit to the city of Moreno Valley allowing the city to take the endangered Stephens' kangaroo rat during construction of a housing development. In particular, the plaintiffs claimed that the project for which the permit was granted was not a "management purpose" under the terms of CESA and that the management purposes language was never intended to include takes incident to the development of private land.[19]

The court found the challenge barred by laches, but, in dicta, noted that if the case were decided on its merits, the issuance of such permits would be invalid under CESA.[20] The court reasoned that the management purposes language allowed the Department to grant permits to allow takes for "scientific resources management" but not for incidental takes unrelated to species conservation, such as the development of private land.[21] Nevertheless, because the action was barred by laches, the Department still retained the authority to issue section 2081 permits for a wide variety of lawful activities.

Soon after, however, another action was brought against the Department challenging its authority to issue such section 2081 permits. In *Planning and Conservation League v. Department of Fish and Game*,[22] the challenged permit was the Emergency Management Measures Permit allowing Californians to take protected species "in connection with public or private activities to 'prevent or mitigate an emergency or natural disaster' or to 'restore any property' to its pre-emergency condition."[23] The court held that the structure and legislative history of CESA confirmed that the California legislature did not intend "management purposes" to bestow upon the Department the authority to issue in-

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[17] *See* MUELLER, *supra* note 10, at 92.

[18] 44 Cal. App. 4th 593 (1996).

[19] *See id.* at 600; *see also Planning and Conservation League*, 67 Cal. Rptr. 2d at 656.

[20] *See San Bernardino Valley Audubon Soc'y*, 44 Cal. App. 4th at 604-05.

[21] *See id.*

[22] 67 Cal. Rptr. 2d 650.

[23] *Id.* at 651.

cidental take permits for merely any lawful activity.[24] The court agreed with the dicta in *San Bernardino Valley Audubon Society*[25] and stated, "[t]he Moreno Valley court clearly believed the issuance of section 2081 permits [i]s incompatible with the Department's management take authority as defined by the legislature and should be declared void."[26] The court concluded that the ability to grant permits for takings incidental to otherwise lawful activities cannot be judicially created out of the "management purposes" language of section 2081, and "it is for the legislature rather than the judicial branch to provide an appropriate remedy."[27]

While this decision was being reviewed by the California Supreme Court, the legislature acted upon the Court of Appeal's advice and granted the Department explicit authority to issue take permits incidental to otherwise lawful activities. Senate Bill 879 amended section 2081 and provided the Department the additional authority to issue permits that authorize the incidental take of protected species under specified conditions.[28] Section 2081 now additionally reads:

> (b) The department may authorize, by permit, the take of endangered species, threatened species, and candidate species if all of the following conditions are met:
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> (1) The take is incidental to an otherwise lawful activity.
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> (2) The impacts of the authorized take shall be minimized and fully mitigated . . . [and] . . .
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> (4) The applicant shall ensure adequate funding to implement the measures required [for mitigation] and for monitoring compliance with, and effectiveness of, those measures.[29]

Furthermore, the amended statute states that a permit should not be granted by the Department if the issuance of the permit "would jeopardize the continued existence of the spe-

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[24] *See id.* at 659-60.

[25] 44 Cal. App. 4th at 605 ("[W]e conclude RCHCA has established a meritorious defense of laches. Nonetheless, if we were faced with deciding the issue on the merits, we would conclude the agency agreement was invalid under CESA.").

[26] *Planning and Conservation League*, 67 Cal. Rptr. 2d at 656-57.

[27] *Id.* at 659-60.

[28] *See* CAL. FISH & GAME CODE § 2081 (West 1984, Supp. 1997), *amended by* CAL. FISH & GAME CODE § 2081 (West 1998).

[29] CAL. FISH & GAME CODE § 2081(b).

cies."[30] Lastly, all permits granted prior to April 10, 1997, excluding the Emergency Management Measures Permit at issue in *Planning and Conservation League*, were grandfathered and considered valid.[31] Accordingly, by amending section 2081, the legislature has made moot questions concerning the Department's statutory authority to issue incidental take permits. Nevertheless, although the legislature has apparently solved one problem, the new legislation amending section 2081 raises other substantial issues that must be addressed.

II
DIRECT CONCERNS REGARDING THE STATUTORY LANGUAGE OF SECTION 2081

A. *Mitigation*

Perhaps the most important condition to be met before an incidental take permit may be issued is that the "impacts of the take [must] be minimized and *fully mitigated*."[32] However, it is not clear that the impacts of a taking would actually have to be "fully mitigated" under the language of the section.[33] Section 2081 states that the measures required to meet the "fully mitigated" obligation "shall be *roughly proportional* in extent to the impact of the authorized taking on the species."[34] If mitigation must fully offset the impacts of the take, why is the mitigation requirement only "roughly proportional" to the impact?[35] In effect, the roughly proportional standard appears to permit less than the full amount of mitigation required under CESA.[36]

For example, consider the San Joaquin kit fox, which predominantly ranges over thousands of square miles in Califor-

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30 CAL. FISH & GAME CODE § 2081(c).

31 *See* CAL. FISH & GAME CODE § 2081.1.

32 *See* CAL. FISH & GAME CODE § 2081 (emphasis added).

33 *See* SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE REPORT FOR 1997 CALIFORNIA SENATE BILL NO. 879, 1997-98 Regular Session, Comments para. 3 (Cal. Sept. 11, 1997) [hereinafter SENATE COMMITTEE REPORT].

34 CAL. FISH & GAME CODE § 2081 (emphasis added).

35 *See* SENATE COMMITTEE REPORT, *supra* note 33, at Comments para. 3.

36 *See* SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, THIRD READING OF COMMITTEE REPORT FOR 1997 CALIFORNIA SENATE BILL NO. 879, 1997-98 Regular Session, Comments para. 5. (Cal. Sept. 11, 1997) [hereinafter SENATE THIRD READING COMMITTEE REPORT].

nia's Central Valley.[37] If a private agricultural development would destroy one hundred acres of the kit fox's domain, would seventy-five acres set aside for the displaced fox be acceptable to obtain a permit? Obviously, this would require the affected kit fox population to live in a smaller area with potentially fewer food sources. Yet, if no kit foxes are initially harmed by the displacement, the mitigation appears to be roughly proportional to the impact, although not fully mitigated.

In addition, the roughly proportional standard seems to allow an initial harm to the listed species. An incidental killing of a small portion of the kit fox population may be roughly proportional to the impacts as long as a substantial amount of the population still survived the displacement. For instance, the death of ten or even twenty kit foxes out of a population of one hundred may satisfy the roughly proportional standard because a significant number of the population would have survived the initial displacement. Yet, permitting the taking of even a small proportion does not seem to comport with CESA's express requirement that the impacts be "fully mitigated."[38]

Moreover, the term "roughly proportional" is imprecise and will confuse permit applicants about the scope of their mitigation responsibilities.[39] This vague standard will allow permit holders and agencies to fall short of their continuing mitigation responsibilities because they likely will neither fully understand their exact duties nor be concerned about slight harms to listed species. Also, such an imprecise standard is difficult to enforce and will lead to a substantial amount of litigation.[40] It is quite conceivable that an environmental group would challenge an allowance for a set aside of only seventy-five acres for a kit fox population accustomed to a larger domain. Without such challenges, developers could gradually push the envelope of acceptable mitigation and set aside less and less space for affected species. Finally, it will be increasingly difficult for courts to draw the line at what is an acceptable proportion of mitigation. California's already overburdened courts would be faced with the arduous task of de-

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[37] *See* Robert D. Thornton, *Searching for Consensus and Predictability: Habitat Conservation Planning under the Endangered Species Act of 1973*, 21 ENVTL. L. 605, 639 (1991).

[38] *See* SENATE COMMITTEE REPORT, *supra* note 33, at Comments para. 3.

[39] *See id*.

[40] *See id.*

termining exactly what mitigation efforts meet the roughly proportional standard in a variety of very fact specific cases.

Accordingly, the roughly proportional standard does not conform to the full mitigation requirement and will lead to confusion, excessive litigation, and, most importantly, less protection for listed species. Therefore, section 2081 should be amended to provide that mitigation be "fully proportional" to the impacts of the take, rather than simply "roughly proportional." This will align the means to achieve mitigation with the permit's "fully mitigated" requirement. Making the language for mitigation obligations consistent throughout section 2081 will prevent confusion and clarify the necessary duties placed upon developers and agencies enforcing and upholding the standard. Most importantly, though, it will prevent inadequate mitigation efforts and, thus, ensure the proper amount of mitigation essential to allow endangered species to recover.

B. *Jeopardy Standard*

Section 2081 prohibits the issuance of a permit if "the permit would jeopardize the continued existence of a species."[41] Therefore, even if an applicant meets the requirements to obtain a permit, it should still be denied if the Department determines that the continued existence of a species is in jeopardy. Yet, the federal ESA prohibits the issuance of an incidental take permit if the taking will "appreciably reduce the likelihood of the survival and recovery of the species in the wild."[42] In essence, ESA prohibits a take if it would *likely* jeopardize the continued existence of a species.[43] Consequently, section 2081 has a weaker take standard than its federal counterpart because the Department may still issue a permit even if the take will *likely* jeopardize a species. This creates potential dilemmas due to the inevitable overlapping application of the two acts.

Consider as an example the Stephens' kangaroo rat (SKR), which is listed as an endangered species under both CESA and ESA.[44] The SKR's current range includes much of California's

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[41] CAL. FISH & GAME CODE § 2081(c).

[42] 16 U.S.C. § 1539(a)(2)(B) (1994).

[43] *See* SENATE COMMITTEE REPORT, *supra* note 33, at Comments para. 7 (emphasis added).

[44] *See* Thornton, *supra* note 37, at 634.

Riverside County, an area well suited for affordable housing.[45] Suppose a developer files for an incidental take permit with both the Department in California and the appropriate federal agency, the Fish and Wildlife Service. Furthermore, the developer proposes a project large enough that the continued existence of the SKR will likely be in jeopardy. Under ESA, this developer will be unable to obtain a federal permit because the SKR's existence is likely in jeopardy. However, the developer will be able to obtain a take permit from the Department in California because there is no certainty that it will in fact jeopardize the animal. If there is doubt as to whether the continued existence of a species is in jeopardy, California will likely allow a permit, whereas the federal government will not. Therefore, the difference between the two standards means that the developer has a much lower burden to meet in California because it is substantially more difficult for the Department to establish actual jeopardy than likely jeopardy.

As a result, if the developer initiates the project, she will be well within the law in California, but likely will face federal prosecution.[46] Moreover, because ESA was established to set the minimum standards with which states must comply,[47] there appear to be substantial concerns regarding the validity of California's procedure. Under ESA, states are free to set a higher standard than the federal government requires, but are not permitted to set a standard that is lower than the federally mandated floor.[48]

Additionally, section 2081 does not require that the species survive in the wild, but merely that it survive somewhere.[49] Thus,

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[45] *See id.*

[46] She would be prosecuted under 16 U.S.C. § 1538 (1994) which prohibits, inter alia, the take of any endangered species within the United States. 16 U.S.C. § 1538(a)(1)(B).

[47] *See* 16 U.S.C. § 1535(f) ("Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.").

[48] *See id.*; *see also* MUELLER, *supra* note 10, at 77 ("With respect to dual listed species, [ESA] supersedes (or 'preempts') CESA to the extent that CESA's provisions provide lesser protection for the species in question.").

[49] *See* CAL. FISH & GAME CODE § 2081(c); *see also* SENATE COMMITTEE REPORT, *supra* note 33, at Comments para. 7. ESA, on the other hand, requires that the species continue to survive *in the wild* before a permit may be issued. *See* 16 U.S.C. § 1539(a)(2)(B) (1973) (emphasis added).

a project that proposes to remove all SKRs from the wild and place in a zoo or secluded sanctuary a population large enough to maintain the species' continued existence could obtain a permit from the Department. This result seems contrary to CESA's goal to conserve, protect, restore, and enhance any listed species *and* its habitat because it undercuts CESA's emphasis on maintaining a species' natural habitat. Furthermore, due to the interrelationship of species in ecosystems, removing a species from the wild is likely to have substantial effects on the other wildlife and plant species in that ecosystem.

Accordingly, section 2081's jeopardy standard should be reworded to adhere to ESA's definition. A section 2081 permit should be denied if "the permit would likely jeopardize the continued existence of a species in the wild." This will prevent opposite state and federal decisions regarding the issuance of permits when the two acts overlap. The proposed language also will rectify any concern regarding the validity of California's standard vis-à-vis the more stringent standard set forth in ESA. Finally, requiring that the species survive in the wild will prevent substantial harm to ecosystems and provide a greater opportunity for endangered species to recover in their natural habitat.

C. *The Grandfathering of General Statewide Permits*

The amendment to section 2081 grandfathered all permits issued by the Department prior to April 10, 1997, excluding the Emergency Management Measures Permit at issue in *Planning and Conservation League*.[50] The Emergency Management Measures Permit was a "general" permit that allowed all persons in California to take any candidate or listed species for a period of five years if the take was incidental to restoring or mitigating damage after an emergency.[51] "Emergency" was broadly defined to include such events as accidents and soil or geologic disturbances.[52] Additionally, the permit contained no mitigation measures or other requirements for the protection of listed species.[53] Although the Emergency Management Measures Permit was not grandfathered, another general permit similar in nature was.

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[50] *See* CAL. FISH & GAME CODE § 2081.1.

[51] *See* MUELLER, *supra* note 10, at 50 (Supp. 1996).

[52] *See id.*

[53] *See id.*

In 1994, the Department issued the Fire Protection Management Measures Permit. This general statewide permit allows the taking of candidate or listed species for a period of five years if the taking is incidental to certain fire protection measures.[54] Likewise, the permit requires no mitigation measures or other preventive actions to reduce the potential harm to listed species.[55] The legislature's decision to grandfather this permit raises numerous issues.

First, the permit does not comport with the goals and policies of CESA and may be contributing to the extinction of species. It does not seem to uphold the Department's duty to "conserve, protect, restore, and enhance" listed species.[56] Allowing all individuals in California to take listed species without any specific mitigation measures would hardly benefit any species; rather, such actions seem quite detrimental. Granting the public broad authority to take species over a five-year period could predictably lead to the accidental destruction of many endangered species in or near a variety of fire prone areas.

Second, many terms in the permit are vague and ambiguous and could lead to an abuse of the privileges granted thereunder.[57] For example, acceptable fire measures, as defined by the permit, include clearing around any "structure" whether it is occupied or not.[58] Hypothetically, then, under the guise of fire protection, an individual could build a structure for the sole purpose of clearing habitat for development. It appears counterintuitive to allow someone to erect a structure and then, in order to continue development activities, legally take species that were not

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[54] The permit's fire protection measures included:

> (1) maintenance of up to a thirty foot (and in certain circumstances, up to a 100 foot) firebreak around any building or structure located in, upon or adjacent to any mountainous area; forest, brush, or grass lands; or any land covered by flammable material; (2) maintenance of a ten or more foot firebreak around certain specified electrical equipment; (3) clearing of flammable vegetation and other material from a railroad right of way on forest, brush or grass lands; and (4) use of fire protection and abatement measures authorized by a cooperative agreement between a local agency, the Department, and the USFWS.

MUELLER, *supra* note 10, at 41-42 (Supp. 1995) (citing CALIFORNIA DEPARTMENT OF FISH AND GAME, CALIFORNIA ENDANGERED SPECIES ACT PERMIT FOR FIRE PROTECTION MANAGEMENT MEASURES (Sept. 12, 1994)).

[55] *See* MUELLER, *supra* note 10, at 42 (Supp. 1995).

[56] CAL. FISH & GAME CODE § 2052.

[57] *See* MUELLER, *supra* note 10, at 43 (Supp. 1995).

[58] *See id.*

originally harmed by the structure but are now within the acceptable clearing zone.[59] Thus, the permit provides a loophole for landowners to develop certain areas without consulting the Department or providing appropriate mitigation measures.

Finally, the Fire Protection Management Measures Permit is at odds with the current language of section 2081. Section 2081 requires that the impacts of a take be fully mitigated,[60] yet as presently worded, the permit contains virtually no mitigation requirements or general protections for species.[61] Moreover, section 2081 contemplates a person or agency applying for a permit, rather than the Department simply issuing one without considering the impacts of a specific activity. It is practically impossible for the Department to consider the impacts of a take on listed species and their habitats when the taking activities are occurring over a five-year period throughout the many ecosystems found in California. Similarly, because there is no applicant, the permit cannot satisfy section 2081's requirement that adequate funding be provided for mitigation activities.[62] In these ways, the permit does not adhere to the amended language of section 2081 and seems contrary to the legislature's intent.

When amending section 2081, the legislature granted the Department limited power to issue permits under specified conditions predetermined by the legislature. However, the legislature's sanctioning of this permit may be interpreted by courts to mean that the legislature intended the Department to have the broader authority to issue general statewide permits.[63] There are two ways in which the legislature should address the issues raised by its grandfathering of the Fire Protection Management Measures Permit.

One option is for the legislature to explicitly state that it does not intend the Department to have the power to issue general statewide permits. This would foreclose any potential misinterpretation by California courts as to the validity of future general permits. However, this would not rectify the fact that the current permit does not conserve, protect, restore, or enhance endangered species and, even worse, provides a loophole for

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[59] *See id.*

[60] *See supra* Part II.A.

[61] *See id.* at 42.

[62] *See* CAL. FISH & GAME CODE § 2081(b)(4).

[63] *See* SENATE THIRD READING COMMITTEE REPORT, *supra* note 36, at Comments para. 9.

landowners to initiate development projects without Department regulations or approval. Thus, a more effective method would be for the legislature to require the Department to recall the permit. This would certainly apprise the courts as to the legislature's intent with regard to general statewide permits, and it also would prevent the unmitigated taking of listed species once deemed acceptable under the permit.

III
Overall Insufficiency of Section 2081's Implementation

> "The loss of habitat is universally cited as the major cause for the extinction of species worldwide."[64]

The single most important contributor to species extinction is loss of habitat.[65] This principle has been a cornerstone of the science of wildlife biology for the last half century.[66] Recognizing this, the California legislature found that the conservation, protection, and enhancement of species and their habitats are of statewide concern.[67] Yet, section 2080 (prohibiting takes) and section 2081 are both silent as to whether habitat destruction is considered a taking of a species.[68] This silence makes it unclear to what extent take mitigation under section 2081 will apply to the direct and indirect effects of habitat loss to an individual member of a species.[69]

Rather than preserving the habitat or biological community a species lives in, section 2081 focuses on protecting one species at a time.[70] Although CESA's fundamental purpose is to protect essential habitats, all of the regulatory mechanisms adopted in

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[64] Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. Colo. L. Rev. 277, 296 (1993) (quoting S. Rep. No. 93-307, at 1-2 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989).

[65] *See id.*; *see also* Dan Tarlock, *Biodiversity Federalism*, 54 Md. L. Rev. 1315, 1317 (1995) ("The chief threat to biodiversity protection is habitat loss.") (citing Edward O. Wilson, The Diversity of Life 243-80 (1992)).

[66] *See* Houck, *supra* note 64, at 296 (citing Eugene P. Odum, Fundamentals of Ecology 8 (1971) ("living organisms and their non-living (abiotic) environments are inseparably interrelated and interact upon each other")).

[67] *See* Cal. Fish & Game Code § 2051.

[68] *See* Senate Committee Report, *supra* note 33, at Comments para. 6.

[69] *See id.*

[70] *See* Craig Manson, *Natural Communities Conservation Planning: California's New Ecosystem Approach to Biodiversity*, 24 Envtl. L. 603, 610 (1994); *see also* Thornton, *supra* note 37, at 642.

CESA, including section 2081, are species specific and are only triggered by the listing of individual species.[71] For example, a developer has no state obligation to protect any unlisted species because the ban on taking does not apply until the species becomes listed.[72] Furthermore, the listing process has taken on an ad hoc quality, inhibiting the Department from using the listing process in any strategic manner to protect endangered ecosystems.[73] The ad hoc nature of the permit process also prevents the Department from developing mitigation plans which protect habitats. Most take permits issued under section 2081 focus on a single species and are concerned almost exclusively on establishing reserves for the species' survival rather than on detailing restrictions for development projects within the species' habitat.[74]

For instance, if a take permit is granted, it appears unnecessary to fully mitigate the harm done to the habitat of the species as long as the species roughly maintains its current population.[75] A private developer may fully mitigate the harm to a species by moving the species to a smaller and even less diverse or less suitable habitat as long as the species can survive in its new home. As an illustration, consider three tiers of habitat: (1) the entire geographic area that can be occupied by a species; (2) a more restricted area necessary for the "conservation" of a species which, under section 2061, includes habitat necessary to bring the species to recovery;[76] and (3) a minimum area necessary for "survival."[77] In tier one, for example, the Stephens' kangaroo rat (SKR) may potentially occupy all of western California.[78] This potential is not expressly protected by CESA because otherwise little or no development could occur in that area. In tier two, the SKR probably will need several breeding populations in various locations in order to recover to the point where it is no longer

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71 *See* Thornton, *supra* note 37, at 641-42.

72 *See* CAL. FISH & GAME CODE § 2080.

73 *See* Thornton, *supra* note 37, at 643.

74 *See* Manson, *supra* note 70, at 610.

75 *See supra* Part II.A.

76 *See* CAL. FISH & GAME CODE § 2061 ("'[C]onservation' mean[s] to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.").

77 *See* Houck, *supra* note 64, at 301 (categorizing the three tiers of habitat identified by ESA).

78 *See id.*

endangered.[79] For tier three, however, the SKR may require only a few locations or, perhaps, only one to "survive."[80] It appears that section 2081 allows the Department to require mitigation only to the level of tier three because take mitigation concentrates solely on individual species and not the overall habitat in which the species is found. This will prevent species from properly recovering and will keep them perpetually listed as endangered. Similarly, this ignores CESA's purpose of recovering endangered species until they no longer require the act's protection.[81]

The fact that mitigation measures in section 2081 do not expressly take into account habitat, the most important factor for species survival, is quite curious. Supporters of amended section 2081 maintain that it "indirectly ties habitat destruction to take."[82] Yet, should this not be made explicit to ensure that habitat, rather than a single species, becomes the crucial issue to consider when protecting that species? Moreover, the consequences of the single species focus of section 2081 reach beyond the individual species at issue. The current emphasis restrains the Department's ability to prevent unlisted species from becoming endangered and inhibits the Department from providing the necessary assurances to permit holders that subsequent mitigation measures will not be required if additional species are listed in the future.[83]

Again, consider a hypothetical involving the SKR, a listed species whose range includes much of California's western Riverside County.[84] After a lengthy dispute over the appropriate level of development in the fast growing county, the Department requires the county to dedicate certain areas as SKR reserves.

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[79] *See id.*

[80] *See id.*

[81] *See* CAL. FISH & GAME CODE § 2061.

[82] SENATE COMMITTEE REPORT, *supra* note 33, at Comments para. 6.

[83] *See* Thornton, *supra* note 37, at 643.

[84] The hypothetical is modeled after the Short-Term Habitat Conservation Plan for the Stephens' Kangaroo Rat issued under ESA in 1989, and the San Bruno Mountain Habitat Conservation Plan issued under ESA in 1982. The Short-Term Habitat Conservation Plan for the Stephens' Kangaroo Rat (Apr. 6, 1989) is available through the United States Fish and Wildlife Service, Department of the Interior, offices in Portland, Oregon and Washington, D.C. The San Bruno Mountain Habitat Conservation Plan (1982) is available through the United States Fish and Wildlife Service, Department of the Interior, Federal Fish and Wildlife Permit (Mar. 4, 1983).

These areas are designated based upon what is believed to be the best remaining occupied habitat of the SKR. Then, a year after the final conveyance of the appropriate reserves, the Department must list another species, the California gnatcatcher, as endangered due to the loss of habitat caused by the development activities already underway. Furthermore, the habitat that the gnatcatcher requires simply for its survival substantially overlaps all of the remaining areas in the county previously designated for development.

It becomes readily apparent that the single species focus of section 2081's permit process fails to protect the interests of other species that will be indirectly affected by a take permit. The process ignores the needs of unlisted species that depend on other habitats for survival. Moreover, developers and private companies understandably will be reluctant to agree to significant land use restrictions to protect one species when the listing of another a year later will result in the imposition of new and different requirements. There will be very little enthusiasm in the development community for the expenditure of the enormous resources necessary to protect the SKR if it must turn around and confront the same set of problems after the gnatcatcher is listed. While laws that protect endangered species need not be fashioned to suit developers, it is in the best interests of endangered species conservation to encourage large landowners and companies to provide the funding necessary to ensure the survival of species through mitigation measures because these resources cannot be funded solely by governmental agencies.[85]

Consequently, the permit process under section 2081 must face the issue of whether it is beneficial or even sufficient to address endangered species problems on a single species basis. It appears that permits work best and will better adhere to the state's policy of conserving, protecting, restoring, and enhancing species[86] and their habitats when the permits consider other potentially affected species, whether listed or not. Taking into account the impacts on other species will require the Department to focus on preserving the habitats and ecosystems necessary to prevent listed and unlisted species from becoming extinct. Also, it will encourage landowners and developers to enter into agreements with the Department because there will be less likelihood

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[85] *See* Thornton, *supra* note 37, at 639-40.

[86] *See* CAL. FISH & GAME CODE § 2052.

that other mitigation requirements will later be imposed upon them. This will allow for the development needs of our growing population, while providing the necessary funding to conserve listed species and allow them to recover without jeopardizing other species and their habitats.

In fact, the legislative history behind ESA's incidental take permits[87] specifically contemplates the need for agreements between landowners and the Fish and Wildlife Service.[88] According to its conference report, section 1539(a) of ESA:

> requires "a unique partnership between the public and private sectors" and that "in order to provide sufficient incentives for the private sector to participate in the development of such long-term conservation plans . . . adequate assurances must be made to the financial and development communities that a . . . permit can be made available for the life of a project."[89]

Thus, ESA's drafters intended the Fish and Wildlife Service to provide covenants to developers that no additional mitigation measures for species would be further imposed.[90]

In order to accomplish this goal, the conference report further stated that "'[a]lthough the conservation plan is keyed to the permit provisions of [ESA] which only apply to listed species, the Committee intends that conservation plans may address both listed and unlisted species.'"[91] The report went on to conclude, "'[i]n enacting [ESA], Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element.'"[92] The conference report, therefore, considered a multi-species, ecosystem approach the most beneficial means to provide the necessary assurances to landowners because this approach would address habitats and other species that might later affect development activities.

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87 *See* 16 U.S.C. § 1539(a) (1994).

88 *See* Thornton, *supra* note 37, at 624-25.

89 *Id.* at 624 (quoting H.R. REP. NO. 97-835, at 31 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2831).

90 See *id.* at 625.

91 *Id.* at 640 (quoting H.R. REP. NO. 97-835, at 30 (1982) *reprinted in* 1982 U.S.C.C.A.N. 2869, 2871).

92 *See id.*

This congressional intent is exemplified and, in fact, derived from the San Bruno Mountain Habitat Conservation Plan,[93] a convincing demonstration that this type of approach is not only feasible, but beneficial. The San Bruno Mountain Plan grew out of a long conflict between promoters of a development project and two species of endangered butterflies.[94] In 1976, a permit authorized the development of the mountain, but required the landowner to set aside two-thirds of the mountain as a park.[95] Two weeks after the final conveyance of the property to the state park foundation, the Fish and Wildlife Service proposed to list the callippe silverspot butterfly as an endangered species.[96] The butterfly's habitat on the mountain substantially overlapped all of the remaining areas designated for development.[97] After intense negotiations, a plan was created to allow the development to proceed, but also to protect the butterflies and other related species.[98]

The San Bruno Mountain Plan addressed the ecological community on the mountain as a single ecosystem, rather than focusing on any single species.[99] The plan centered around the conflict between the butterflies and the development, yet consciously sought to preserve a diversity of species and attempted to anticipate and resolve any conflicts that might arise over other biological resources located on the mountain.[100] Under the plan, there were detailed restrictions for development projects within the butterflies' habitat, and private development became a source of funds for managing these habitats.[101] Congress considers the San Bruno Mountain Plan an appropriate model because, by addressing a multitude of species and their habitats, the plan ensured that other species would not become listed and hamper development. With this certainty in hand, the Fish and Wildlife

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93 The San Bruno Mountain Habitat Conservation Plan (1982) is available through the United States Fish and Wildlife Service, Department of the Interior, Federal Fish and Wildlife Permit (Mar. 4, 1983).

94 *See* Thornton, *supra* note 37, at 621. For a discussion of the San Bruno Mountain Plan controversy, *see* Friends of Endangered Species, Inc. v. Jantzen, 589 F. Supp. 113 (N.D. Cal. 1984), *aff'd*, 760 F.2d 976 (9th Cir. 1985).

95 *See* Thornton, *supra* note 37, at 621.

96 *See id.*

97 *See id.* at 621-22.

98 *See id.* at 622.

99 *See id.*

100 *See id.*

101 *See id.* at 622, 626.

Service could assure the landowners that no further mitigation costs would arise.[102]

Section 2081 should adhere to the intent behind ESA's take permits and explicitly recognize the legitimacy of mitigation efforts that protect biodiversity.[103] In order to accomplish this, a multi-species approach that considers listed and unlisted species and their habitats should be adopted and implemented by the Department when granting take permits and prescribing mitigation efforts. To return to the SKR example, rather than establishing reserves in Riverside for the SKR, section 2081 should focus on conserving and managing a diversity of habitat types in that area, including the habitats utilized by the California gnatcatcher and other species. The benefits of this approach would be twofold.

First, the approach would create a shorter list of endangered species. Currently listed species would have a better opportunity to recover, and there would be a reduction in the number of species that would have to be listed in the future. Mitigation efforts that are properly focused in this way allow listed species to recover rather than simply survive while preventing an outbreak of future listings. Moreover, this appears to be more in accord with CESA's over-arching goal of conserving, protecting, restoring, and enhancing listed species and their habitats.[104]

Second, a multi-species approach would assure landowners that further mitigation costs and requirements would not be imposed. These assurances could be made because a multi-species focus likely would prevent additional species from becoming listed and, thus, requiring the protection of CESA. Therefore, landowners would be more willing to engage in development activities that would provide the large funding necessary for endangered species conservation efforts. Substantial funding commitments will be necessary for the success of the ambitious regional conservation plans currently in preparation.[105] Assurances provided by the Department that the rules and mitigation requirements set forth in its section 2081 permits will not funda-

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[102] *See id.* at 643.

[103] *See id.* at 642 ("The ESA needs to explicitly recognize the legitimacy of conservation plans which protect biodiversity.").

[104] *See* CAL. FISH & GAME CODE § 2052.

[105] *See* Thornton, *supra* note 37, at 645.

mentally be changed would help guarantee a larger and more steady flow of money for these new conservation plans.[106]

Conclusion

The recent legislative amendment to section 2081 resolved the issue of whether the Department has authority to grant incidental take permits, yet it has brought other related issues to the forefront of the environmental take permit debate. Significant action must be taken in order to address the problems that naturally accompany such a substantial change in statutory language.

Initially, the explicit language of section 2081 must be further amended or clarified. Section 2081's mitigation requirement and its jeopardy standard must be made consistent within the section as well as with ESA. Furthermore, the remaining general statewide permit should be revoked as both contrary to legislative intent and to section 2081's current language. These solutions will prevent further environmental challenges to the section's statutory language and will make it more consonant with CESA's intent of conserving, protecting, restoring, and enhancing species and their habitats.

Finally, the section's implementation must be revised in order to adhere to the current scientific tenets of appropriate endangered species conservation. There is a fundamental tension between the single species focus of section 2081 and the practical and biological needs of addressing habitats and their multitude of listed and unlisted species. Currently, the single species regulatory measures of section 2081 are inadequate to achieve CESA's purpose of protecting California's diverse ecosystems. One solution to this dilemma is to shift the section's focus from the protection of individual species to the protection of the habitats upon which they depend. Accordingly, section 2081 would provide greater assurance to landowners, and, more importantly, provide listed species the opportunity to recover to the point where they no longer require CESA's protection.

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106 *See id.*