36 ELR 10644

ELR
NEWS & ANALYSIS

8-2006

Species Protection Versus State Agency Autonomy: Who Wins Under the California Endangered Species Act?

by Dhananjay Manthripragada

Editors' Summary: States play an important role in protecting endangered and threatened species, particularly those that are listed only under state endangered species acts (ESAs). Much like the federal Endangered Species Act, many state ESAs require agency consultation prior to the permitting of any activities that may result in the take of a listed species. But while this requirement is often clear for private activities, it may be less so for activities taken by state agencies. As such, a state lead agency could conceivably authorize projects that decimate populations of endangered species without seriously considering alternatives or mitigation measures either through consultation or a permitting process. In this Article, Dhananjay Manthripragada argues that agency-to-agency communication obligations currently imposed on state lead agencies by the California Endangered Species Act and other state ESAs do not afford species adequate protection. He therefore proposes policy solutions that, if implemented, would address this concern while minimizing unwelcome intrusion upon state lead agency autonomy.

I. Introduction

In California, it was thought that before a state lead agency funds or carries out a project that takes an endangered species or harms critical habitat, it must both consult with and acquire take authorization from the California Department of Fish and Game (CDFG).[1] Unfortunately for the delta smelt, a finger-length translucent fish found only in the Sacramento-San Joaquin delta,[2] such thinking was decidedly wishful.[3] When the California Department of Water Resources (CDWR) was caught sucking smelt through its pumps, it could produce no CDFG permit authorizing it to do so.[4] Nor could the CDFG explain why it had apparently set no limits on the number of delta smelt that could be killed at the state pumps, a limit that is normally set in a permit.[5] Despite this worrying decimation of a fish that is listed as deserving protection under the California Endangered Species Act (CESA),[6] however, and concessions that CDWR officials did not have explicit authority under state law to kill a protected fish during water export operations,[7] it cannot definitively be said that the CDWR was violating the law. Since 1998, CESA has not expressly required state lead agencies to communicate with the CDFG before authorizing proposed actions that affect listed species. Indeed, the decimation of the delta smelt is but one example among many of the consequences of CESA's failure to require agency-to-agency communication to adequately protect listed species.[8]

Mr. Manthripragada is a third-year law student at the UCLA School of Law. The original research and analysis was conducted upon the request of the California State Senate Natural Resources and Water Committee. The UCLA School of Law's Evan Frankel Environmental Law and Policy Program selected an earlier version of this Article as an important contribution to public policy issues relating to environmental governance and regulation. The author would like to give special thanks to Prof. Jonathan Zasloff for his guidance throughout the writing of this Article.

1. *See* CAL. PUB. RES. CODE §21067 ("[s]tate lead agency" means the state agency, board, or commission which is a lead agency under the California Environmental Quality Act (CEQA), and "lead agency" for CEQA purposes is the "public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment"); *see also* CAL. FISH & GAME CODE §1802 (stating that the CDFG has jurisdiction over the conservation, protection, and management of fish, wildlife, and habitat).
2. Matt Weiser, *Officials Challenged Over Delta Smelt Deaths*, SACRAMENTO BEE, Aug. 24, 2005, at A4.
3. *See* Earthjustice, *Sixty-Day Notice of Violation of the Endangered Species Act and of Intent to Sue for Exceedance of Incidental Take Limits for Sacramento River Winter-Run Chinook Salmon and Delta Smelt, and Other Violations,* http://www.earthjustice.org/library/legal_docs/DeltaPumps60-day.pdf (last visited July 2, 2006).
4. *Delta Species Protection Questioned: Senator Scrutinizes Endangered Species Act Enforcement*, CONTRA COSTA TIMES, Aug. 24, 2005, at B1.
5. *Id.*
6. CAL. FISH & GAME CODE §§2050-2106.5.
7. *See* Weiser, *supra* note 2.
8. *See* Earthjustice, *Delta Water Export Pumps Killing Two Protected Fish Species*, http://www.earthjustice.org/news/press/2002/delta_water_export_pumps_killing_two_protected_fish_species.html

California has 302 threatened and endangered species (79 animals and 223 plants), more than any other state in the lower 48 states.[9] Of the 302 species, around 29 animal species and 33 plant species are state listed but not federally listed,[10] since species that are imperiled across ranges or on a natural scale are also protected by the federal Endangered Species Act (ESA).[11] For state-only listed species, the onus for protecting species is entirely on the state. CESA was authorized in 1970 to protect such native species and continues to serve this function. The statute is administered by the CDFG and currently requires the CDFG to conduct a program to conserve, protect, restore, and enhance any endangered or threatened species and its habitat.[12] CESA further prohibits the take of plant and animal species designated by the California Fish and Game Commission as either threatened or endangered in the state of California. The term "take" in the context of CESA means to hunt, pursue, catch, capture, or kill an individual animal, or attempt to do so, with the intent to hunt or kill constituting a key inquiry.[13] The term "incidental take" refers to the unintentional take of listed species in the course of some otherwise legal activity, with a key aspect being that species death is a predictable consequence. CESA does, however, leave room for the CDFG to authorize incidental take of a listed species either during consultation or via permit.

As evidenced by the ongoing decimation of smelt, CESA fails to adequately balance the countervailing policy goals of protecting endangered and threatened species and respecting state lead agency autonomy, erring on the side of agency autonomy. Currently, state lead agencies that authorize, fund, or carry out projects that may take listed endangered or threatened species are subject to a confusing patchwork of consultation and permitting requirements that does not afford those species adequate protection. Thus, a state lead agency could conceivably authorize projects that decimate populations of endangered species without seriously considering alternatives or mitigation measures either through consultation or a permitting process.

The broad purpose of this Article is twofold: (1) to argue that agency-to-agency communication obligations currently imposed on state lead agencies by CESA and other state endangered species acts (ESAs) do not afford species adequate protection; and (2) to propose and discuss policy solutions that, if implemented, would address this concern while minimizing unwelcome intrusion upon state lead agency autonomy. Section II considers if and why agency-to-agency communication obligations currently imposed on California state lead agencies by CESA are inadequate. Section III makes the same inquiry of other state ESAs. Section IV offers agency-to-agency consultation methods that the California Legislature, and by extension other state legislatures, can consider to remedy the perceived problem, and identifies the preferred option. Section V identifies and discusses flashpoints around which the debate on agency-to-agency communication obligations under CESA or other state ESAs is sure to rage, while identifying the policy options that would best protect species while preserving agency autonomy.

II. Agency-to-Agency Communication Obligations Under CESA

Agency-to-agency communication obligations under CESA are inadequate because they do not exist. Unlike private sector project proponents who must obtain a permit under CESA §2081 when taking a protected species incidental to an otherwise lawful activity, state lead agencies may but are not required to obtain such a permit. The California Environmental Quality Act (CEQA) requires state agencies designated as lead agencies under the Act to consult with the CDFG in assessing their projects' impacts on species.[14] However, under CEQA, a state lead agency consulting with the CDFG is free to ignore the CDFG's recommendations on how to avoid and/or mitigate a project's effect on species.[15] Thus, a California state lead agency could conceivably take an endangered species without seriously considering alternatives or mitigation measures either through consultation or a permitting process.

The failure to address agency-to-agency communication obligations under CESA did not always exist. CESA provisions that required and regulated communication between state lead agencies and the CDFG §§2090-2097 (hereinafter §2090), expired in 1998. Section 2090 required state lead agencies whose projects involved the take of protected species to consult with the CDFG about the project, obtain take authorization, and include appropriate mitigation. Section 2090 consultation was the only direct requirement for state lead agency CESA compliance, and when it sunset, CESA no longer applied directly to state lead agency actions.[16] In effect, the sunset of §2090 shifted the primary responsibility for protecting endangered or threatened species to the private sector. Although many state lead agencies consult with the CDFG voluntarily, it seems inappropriate that state lead agencies are exempt from requirements that private parties must adhere to, especially because, as a matter of good public policy, state lead agencies should be held to higher standards and serve as model stewards of California's environment.

(last visited July 2, 2006) (arguing that yearly exceedances of take limits by the Delta water export projects pose an ongoing threat to the Sacramento River winter-run Chinook salmon and other fish, in violation of state and federal Endangered Species Acts); *see also* Cal. Native Plant Soc'y & the Ctr. for Biological Diversity, *Endangered Species Acts Must Protect Plants Plant Conservation Fact Sheet*, http://www.cnps.org/programs/conservation/files/WhyPlantsFinal2.pdf (last visited June 12, 2006) (indicating that confusion over CESA has led to inconsistent implementation of the law and to the needless and unmitigated loss of many populations of California's listed plants).

9. Cal. Dep't of Fish & Game, The Status of Rare, Threatened, and Endangered Plants and Animals of California 2000-2004 (2005), *available at* http://www.dfg.ca.gov/hcpb/species/t_e_spp/t_esummary.pdf.

10. Erin B. Roberson, *Management of Rare Plants Under State and Federal Endangered Species Law: A CNPS Perspective*, 29 Fremontia 5, 6 (July/Oct. 2001), *available at* http://www.cnps.org/publications/fremontia/authors/Fremontia29-3-4p5-12low.pdf.

11. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.

12. Cal. Fish & Game Code §2052.

13. *Id.* §86.

14. Cal. Code Regs. tit. 14, §§21000 et seq. (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).

15. Jennifer Ruffolo, *Should the Sun Set on State Agency Consultations Under the California Endangered Species Act?,* Cal. Research Bureau, July 13, 1998, at 5.

16. *See* A.B. 524, 1999 Leg. (Cal. 1999), Assembly Committee on Water, Parks, and Wildlife, Committee Analysis of AB 524 (Machado), at 5 (Feb. 18, 1999).

Although some suggest that state lead agencies are currently obligated to communicate with the CDFG under §2081, this reading of CESA is neither obvious nor current.[17] CESA protects threatened and endangered species from private activity through §2080, which prohibits "persons" from taking listed species. California Fish and Game Code §67 defines "person" as any "natural person, partnership, corporation, limited liability company, trust, or other type of association." The definition of person does not include state lead agencies. Thus, although state lead agencies could obtain incidental take permits under §2081, nothing in the Fish and Game Code requires them to do so.

Though several state lead agencies continue to operate under the presumption that §2081 take authorization is necessary,[18] there nevertheless remains a problem of inconsistency. Some state lead agencies get §2081 permits from the CDFG and some do not. Within agencies, some projects receive permits, while others do not. It is also unclear how individual agencies and people within agencies get take authorization, or whether or not state lead agencies are doing the requisite review of determining impact on listed species. For purposes of this Article, the author assumes, as do most advocates and attorneys who study state lead agency obligations under CESA, that state lead agencies are not expressly subject to §2081 as written.

The delta smelt's plight has brought to light the unfortunate fact that state lead agencies can take species without being expressly subject to any CESA consultation or permitting requirements. In a California Senate Natural Resources Committee hearing on the delta smelt issue, Sen. Michael Machado (D-Cal.) suggested that "there was nothing presented . . . that would support compliance with the California Endangered Species Act."[19] Indeed, Senator Machado was correct that the smelt had been taken in violation of CESA's legislative thrust and purpose as expressed in §2052.[20] The Senator was incorrect, however, in assuming that the CDFG or CDWR were out of compliance with CESA; rather, given the Act's lack of an express agency-to-agency communication requirement, it is CESA's statutory language itself that is out of compliance with its own broad mandate to "conserve, protect, restore, and enhance" listed species and their habitat.[21]

17. Telephone Interview with Keith Wagner, Attorney, Office of Bill Yeates (Nov. 16, 2005) (stating that the counterargument that state lead agencies are indeed subject to §2081 is as follows: "If the 'not take' provision of §2080 does not apply to [state lead agencies] because they do not meet the definition of 'person' under CAL. FISH & GAME CODE §67, then §2081(a)'s allowance for the entry of a Memorandum of Understanding (MOU) with [state lead agencies] to allow take for management or scientific purposes does not make sense. Also, §2 of the CAL. FISH & GAME CODE expressly recognizes that the general definitions at the beginning of the FISH & GAME CODE do not apply where the context requires otherwise. In this case, the context requires that the definition of 'person' at §67 be modified to include [state lead agencies], because if 2080 was not intended to prohibit take by such agencies, then the provision of [§]2081(a) for entering MOUs with such agencies would be nonsensical.").

18. Telephone Interview with Bankey Curtis, Deputy Dir., CDFG (Nov. 9, 2005).

19. *See* Weiser, *supra* note 2.

20. CAL. FISH & GAME CODE §2052 states that "[t]he Legislature further finds and declares that it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat . . . ."

21. *Id.*

III. Agency-to-Agency Communication Obligations Under Other State ESAs

Forty-five states have ESAs of their own. Of these 45 state ESAs, only seven obligate state lead agencies to consult with or obtain take authorization from the state wildlife agency when their projects[22] affect listed species: Connecticut, Illinois, Maine, Maryland, Nebraska, Oregon, and Wisconsin.[23] Of these seven states, only Connecticut, Illinois, and Wisconsin have statutes that approach the thoughtfulness and seriousness of CESA on the topic of consultation and incidental take permit authorization, although each statute tends to exempt state lead agencies from any requirements. In the ESAs of the four remaining states, statutory language on consultation and incidental take permits is minimal and by all accounts forgotten or ignored. In all seven states the perception among environmental advocates and state wildlife agency officials is that there exists some disconnect between what is written in each Act and the functioning of such statutory language in practice, especially as applied to state lead agencies. It is instructive for the purposes of making recommendations to interested state legislatures and drafting model legislation to explore how and why this might be so.

A. Illinois

The Illinois Endangered Species Protection Act, as written, requires state agencies to consult with the Illinois Department of Natural Resources (IDNR).[24] In practice, state agencies escape such requirements and the law primarily functions to hold local governments responsible for their projects, whether the locality is carrying out its own project or just approving that of a developer.[25] Absent a penalty for not consulting, however, local officials often either ignore or simply forget the absolute statutory requirement that local governments must consult with the IDNR.[26] Overall, it seems a useful suggestion that there exist more explicit statutory language requiring consultation and setting forth penalties for failure to consult or obtain an incidental take permit.[27]

22. "Projects" refers to any action carried out, and also sometimes funded, permitted, licensed, and/or authorized, by the state lead agency.

23. CONN. GEN. STAT. ANN. §§26-303 to -315; ILL. ANN. STAT. ch. 520, §§10/1-10/11; ME. REV. STAT. ANN. tit. 12, §§12801-12809; MD. NAT. RES. CODE ANN. §§10-2A-01 to –09, §§4-2A-01 to -09 (plants and animals); NEB. REV. STAT. §§37-801 to -811; OR. REV. STAT. §§496.171- 496.992, 498.026 (1995) (there is a similar provision for endangered species of plants under OR. REV. STAT. §§564.115(2), (3), (4)); WIS. STAT. ANN. §§29.415, 29.604.

24. ILL. ANN. STAT. ch. 520, §§10/1 to 10/11.

25. Telephone Interview with Diane Glosser, former official, IDNR (Nov. 23, 2005) (Glosser wrote the administrative rules for the Illinois provision and has 10 years of experience working with the incidental take program).

26. *Id.* ("For example, it is well known that the city of Joliet never consults even upon receiving dozens of letters requesting consultation. Chicago also never complies."). *But see* Telephone Interview with Richard Acker, Attorney, Envtl. Law and Policy Ctr. (Nov. 12, 2005) (pointing out that some opine that state agencies often voluntarily consult with the IDNR although the statute itself is toothless).

27. *See* Glosser, *supra* note 24 (stating that the Illinois statute does make the consultation requirement enforceable through court order (writ of mandamus) by "any adversely affected person," but in actuality it has never sought such orders, partly for legal and partly for practical reasons. Legally, the state cannot sue itself, so efforts to compel

Notwithstanding compliance issues, Illinois requires only the consultation process; the resolution of such process remains voluntary.[28] Although a court can compel an agency or government to consult, it cannot compel the outcome of that consultation. Those who support stronger provisions state that Illinois' provision has only been successful where there was strong citizen activity, a caring local government, or the presence of a federal agency under the federal ESA,[29] i.e., when there was some other pressure to make state lead agencies listen to what the IDNR was saying. Others counter that although there is no obligation to follow the IDNR's recommendations, many state agencies often do. This is an important point to consider in terms of model legislation because the purpose of introducing more stringent requirements is to ensure adequate protection for species when an already compliant state agency and federal pressure do not exist.[30]

Some advocates further posit that Illinois' Act is not optimally effective in practice because it does not stress habitat protection, perhaps because in Illinois many listed species are migratory.[31] Thus, one could destroy habitat and not hurt an individual member of a species if project work is done during the season in which species are not present. Yet, species are indirectly harmed by the loss of habitat during those times when the habitat is needed.

Others claim that Illinois' Act has lost its teeth due to a court decision in *Glisson v. City of Marion*,[32] which did some damage to standing under the Act.[33] *Glisson* holds that a third party must be directly economically injured by loss of the species to bring a suit under the Illinois Endangered Species Protection Act, thereby knocking out individuals who wish to sue for injury to the purely "aesthetic" interest of protecting species.

One big and oft-repeated complaint is that the IDNR suffers a real and unnecessary paper burden because with 90% of projects, endangered species are not implicated.[34]

B. Wisconsin

Incidental take is allowed under §29.604(6m) of the Wisconsin ESA (WESA), pursuant to the project proponent submitting a conservation plan. Under the Act, the Wisconsin Department of Natural Resources (WDNR) also publicizes both the receipt of the application and a brief description of the proposed taking. For example, upon the application for an incidental take permit by a private actor, all of those who placed themselves on the WDNR mailing list receive notification that there has been a request for incidental take.[35] Such notice is helpful to advocacy groups who receive notice at chapter offices and send the notices out to activists who can go to public hearings and the like when incidental takes are proposed.[36] Overall, the WDNR has been receptive to comments. However, the celebrated notice and comment provision is not applicable to Wisconsin state agencies.[37]

Another issue of note is that it is unclear what happens in general once a permit is issued. For example, when a project affects wetlands, mitigation is a requirement. But there is very little follow-up to determine if mitigation has taken place and whether it has succeeded.[38] Follow-up can be a problem because of budget cutbacks and increasing workloads.

C. Connecticut

The major problem with the Connecticut ESA is that its reach, including consultation requirements, is limited to state property, although the statute is generally perceived to work fairly well on state property.[39] If a state action that may affect endangered species on private property is at issue, the Connecticut Department of Environmental Protection does not take endangered species into account.[40] The problem, of course, is that "[m]any species spend the majority of their time on private lands."[41]

D. Oregon

Section 496.182 of the Oregon ESA requires state agency consultation. Statutory language suggests a clear consultation obligation on state land owning agencies. However, as

other state agencies to comply have to be pursued through political venues, i.e., the current executive branch administration. The state can sue local governments, but Illinois has a lot of those, and experts point out that bringing suit is typically not a good way to win friends and allies); *see also* Acker, *supra* note 25 (arguing that lawsuits are expensive and that IDNR officials express that they can put state resources to better use otherwise).

28. Telephone Interview with Keith Shank, Scientist, IDNR (Nov. 23, 2005) (stating that the Illinois General Assembly was very careful to respect the autonomy of state agencies and local governments by requiring them only to consider, not implement, the IDNR's recommendation).
29. *See* Glosser, *supra* note 24; *see also* Shank, *supra* note 27.
30. *See* Glosser, *supra* note 24; Acker, *supra* note 25. According to Acker, similar to the current political situation in California, some Illinois legislators have suggested requiring agencies to adopt the IDNR's alternatives through a permitting process or strengthening the consultation process by giving the IDNR more regulatory authority. Environmental advocates and state agency officials have expressed concern about giving the IDNR more regulatory authority, however, because they fear that consultation would become more adversarial and less collaborative, or that strengthening consultation or adopting a permitting program would erode the science and ecological need basis of their decisions. For example, the IDNR could currently recommend that a local government insist on a 500-foot buffer zone. But the IDNR could never in a permitting program require a 500-foot buffer zone because developers would take such a requirement to court. Regardless of the IDNR's reservations, the author emphasizes that although the agency might suffer from a loss of flexibility in suggesting certain alternatives due to increased regulatory authority, recommendations that are not followed are not particularly useful.
31. Glosser, *supra* note 24.
32. 720 N.E.2d 1034 (Ill. 1999).
33. Telephone Interview with Jack Darin, Envtl. Advocate, Ill. Sierra Club (Nov. 17, 2005).
34. *See* Glosser, *supra* note 24.
35. Telephone Interview with Karen Etter-Hale, Director, Madison Audubon Office (Oct. 28, 2005) (Ms. Etter-Hale worked on WESA's incidental take language and is on a list to get the notices of incidental take).
36. *Id.* (during the drafting of statutory language, builders and realtors were strongly against such notice-and-comment provisions and wanted to limit who would get notice of the take permits in the mail).
37. *Id.* (all environmental advocates flag this aspect of WESA, as applicable to private actors, as helpful and crucial).
38. *See* Darin, *supra* note 32.
39. Conn. Gen. Stat. Ann. §§26-303 to -305. Telephone Interview with Charles Rothenberger, Conn. Envtl. Advocate (Oct. 23, 2005).
40. Perhaps this is because the regulated community is strongly opposed to such a process.
41. Western Governors' Ass'n, Policy Resolution 03-15, at 3 (2003), *available at* http://www.westgov.org/wga/policy/03/esa3-15.pdf.

in Connecticut, there is an argument that the provisions do not apply to privately owned land, but only to state agency owned or leased land. While some constituencies stand by this argument, the state Attorney General's office has noted that the Oregon ESA applies to all land.[42]

In theory, through consultation the agencies are supposed to determine if state land has a role in conservation. If not, consultation ends; if so, then the consultation obligation continues such that the land owning or management agency has to consult with the Oregon Department of Fish and Wildlife (ODFW) to determine what role state land managed by the particular agency can play in conservation. Unfortunately, there is little evidence that agencies are consulting with the ODFW whenever management activities on their land could affect listed fish, and it seems that the provision addressing endangered plants is even more overlooked.[43]

E. Maine

Maine has a "variance" and "certification" program for animals (not for plants) under §12806 of the Maine ESA that appears to be a consultation requirement to avoid significant alteration of habitat or violation of protection guidelines.[44] A variance is granted if the Commissioner of the Maine Department of Inland Fisheries and Wildlife certifies that the project presents no significant risk to species. State agencies and municipal governments are covered. Although Maine has a "decent sounding" plan to avoid the alteration of habitat, consultation rarely ensues.[45]

F. Maryland

Maryland's Nongame and Endangered Species Conservation Act has a consultation requirement that requires agencies to carry out programs for the conservation of endangered species, but it does not give much detail about the process.[46] According to a state agency official, the only way a consultation can be triggered is if there is a state permit needed in terms of a wetland or stream or if an agency impacts a species to the point of extinction, although consultation in this circumstance has never occurred. If no state permit is needed, nothing happens. Although the statute does say that agencies whose projects impact species should consult with the Secretary of the Department of Agriculture or secretaries of other state agencies with a common interest and review all programs administered, in actuality the Maryland statute does not seem to result in consultation.[47]

G. Nebraska

Nebraska has a consultation requirement for state agencies to ensure that actions do not jeopardize species or modify critical habitat, but it does not specify what consultation entails.[48]

The Nebraska statute has not worked as well as one would hope primarily because there exists no penalty for not consulting and no incentive for state agencies to follow the Nebraska Game and Park Commission's suggestions.[49]

H. Summary

Given the experiences of other states, the California Legislature or any other interested state legislature should pay attention to several issues in order to strike an appropriate balance between the competing policy goals of protecting listed species and respecting/preserving state lead agency autonomy. First, agency-to-agency communication obligations should be expressly covered by statutory language; otherwise, state lead agencies will escape their obligations in practice. Also, the scope of the statute should be clearly stated to reach only and all those agency projects that the legislature intends to reach. Second, it should be noted that any communication requirement may be ignored absent penalties or other incentive to participate. On a similar vein, a required process with voluntary resolution often results in little to no species protection, although stringently requiring that agencies adopt certain alternatives poses its own set of problems. Third, the legislature should address the need for habitat protection to avoid indirect harm to species. Fourth, if the legislature intends to give individuals standing to sue for purely aesthetic injuries or to give third parties a right of appeal, it should express such intentions in the statutory language. Fifth, any requirement for agency-to-agency communication will likely create an unwelcome and inefficient paper burden; such requirements will therefore be opposed by the state wildlife agency. Sixth, the interested community must be given notice and the opportunity to comment before the issuance of any sort of take authorization or a decision that take authorization is unnecessary; such a provision, although annoying for state lead agencies, can conceivably result in substantial improvements in species protection. Finally, there is a need to monitor what happens once take authorization is issued.

IV. Competing Methods of Agency-to-Agency Communication

Given the need to balance the competing policy goals of protecting listed species and respecting/preserving state lead agency autonomy, and the need to address the issues identified above, there are several options that the California Legislature and others might consider to strike an appropriate balance. First, the legislature could maintain the status quo, limiting state lead agency obligations to CEQA consultation. Second, the legislature could reincarnate a version of CESA §2090, which imposed consultation requirements on state lead agencies. Third, the legislature could expressly subject state lead agencies to the already

42. Telephone Interview with Brett Brownscombe, Attorney, Or. Trout (Dec. 2, 2005).

43. *Id.*; Telephone Interview with Jay Ward, Conservation Dir., Or. Natural Resources Council (Dec. 2, 2005) (describing the Oregon ESA as "pretty toothless" and "a mess").

44. Me. Rev. Stat. Ann. tit. 12, §12806.

45. Telephone Interview with Carole Haas, Envtl. Advocate, Me. Sierra Club (Oct. 24, 2005).

46. Md. Nat. Res. Code Ann. §§10-2A-01 to -09.

47. Telephone Interview with Janice Graham, Envtl. Advocate, Md. Sierra Club (Oct. 23, 2005) (referencing her conversation with a 30-year veteran official of the Maryland Department of Natural Resources).

48. Neb. Rev. Stat. §§37-801 to -811.

49. Telephone Interview with Ken Winston, Envtl. Advocate, Neb. Sierra Club (Oct. 24, 2005).

present incidental take permit regime applied to the private sector under CESA §2081, the application of which is generally accepted to be limited to private parties. Fourth and most politically expedient, the legislature could institute a separate incidental take permit regime for state lead agencies that holds these agencies to a higher standard consistent with CESA's goal of conserving and protecting species.

This section will first address why consultation is important for preserving state lead agency autonomy and protecting species, while pointing out the shortcomings of simply resurrecting the expired §2090 or settling for CEQA consultation. The section will next explore the possibility of using incidental take permits to protect species, while explaining why simply subjecting state lead agencies to the §2081 incidental take permit regime will not suffice. It recommends that state lead agencies do not need a separate CESA consultation requirement but rather an incentive to incorporate alternatives proposed during CEQA consultation. Such an incentive is best delivered via a new incidental take permit regime that also imposes higher substantive obligations on state lead agencies to protect and conserve species.

A. Consultation Is Important, But CEQA and CESA §2090 Are Not Enough

Consultation appears designed to address three levels of ignorance related to endangered species: people do not know (1) where they exist; (2) how human activities harm them; and (3) how to conduct activities while avoiding or minimizing harm.[50] So consultation results in information to state lead agency officials that listed species are present, identification of various ways they are likely to be harmed by a proposed action, and recommendations regarding means to avoid or minimize harm. This type of process avoids mistakes, which means that harming species is at least "a conscious, if not conscientious, decision."[51] Consultation viewed in this light is a plus from an efficiency standpoint even if, due to disregard for alternatives, ineffective from a species protection standpoint.

Consultation is also effective as a mechanism to give the CDFG, the state lead agency charged with protecting species, the authority to review what other agencies are doing. And consultation promotes the generally accepted public policy goals of: (1) encouraging state lead agencies to coordinate early in the permit process, thereby improving the efficiency of the process; and (2) allowing project applicants an opportunity to work with the wildlife agency to incorporate bilaterally acceptable alternatives or mitigation measures into the project to avoid or minimize harm to listed species.[52] Thus, in addition to protecting species, consultation seems a desirable process in terms of minimizing unwanted diminishment of state lead agency autonomy because it fosters cooperation between agencies.

Currently, state lead agencies must consult with the CDFG under CEQA if they are carrying out or approving a project that may have a significant effect upon the environment.[53] CEQA consultation alone, however, falls short of being adequate in several respects. First, CEQA does not give lead agencies an incentive to follow CDFG recommendations. Thus, CEQA allows state lead agencies to proceed with a project despite the project's significant impacts on species. The state lead agency must simply find that overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the species. CESA §2090 allowed a comparable override, but exercising the override privilege required overcoming a higher threshold inquiry, and override was accompanied by mandatory mitigation measures. CEQA mitigation for loss of sensitive species and habitats, however, is not mandatory, making it a "dull knife" when it comes to protecting essential habitat that may be affected by a project.[54] Second, CEQA does not impose special obligations on a lead agency to guarantee that proposed projects do not jeopardize the survival of listed species. A CEQA environmental impact report (EIR) only informs the public and responsible agencies of the environmental consequences of their decisions before those decisions are made. But species protection, as dictated by law, should not be merely a study process akin to CEQA, but an active commitment to substantive protection of organisms. By mandating that state lead agencies should not approve projects that would jeopardize the continued existence of a species, §2090 previously served to establish more substantive obligations to conserve species.[55] Also, CESA specifies criminal penalties for violations of take provisions, while CEQA violations result in civil liabilities. Criminal prosecution can be a real deterrent; in contrast, of those that can afford them, many view fines as just one more cost of doing business.[56]

So why not simply resurrect §2090 under CESA? As delta smelt aficionados can attest, consultation absent formal permitting requirements (resulting in a formal permit subject to third-party review) and public participation is often not enough to provide protection to listed species. Indeed, §2090-type consultation was ineffective to protect smelt. According to Greg Hurner, Deputy Director of the CDFG, "[a number of agreements with the CDWR that ensure that pumping does not harm protected species] and continued collaboration have provided extensive resources to the conservation of the delta smelt."[57] Also, in a State Senate Natural Resources Committee hearing on the delta smelt issue, CDWR Chief Lester Snow testified that his department was working with the CDFG and noted an instance in which the giant pumps at the Sacramento-San Joaquin delta's southern end restricted their input by 75% when scientists found smelt swimming nearby.[58] Snow also testified that water exports are managed with almost constant input from the CDFG to protect smelt.[59] Bankey Curtis, a top CDFG official, has stated that it is clear that "under state law and under the executive office of the Governor, everyone should

50. Shank, *supra* note 27.

51. *Id.*

52. *See* Ruffolo, *supra* note 15, at 4.

53. *See* Cal. Pub. Res. Code §21067 (consultations would occur prior to the preparation of an environmental impact report (EIR) or negative declaration. The CDFG would also review draft EIRs or negative declarations and recommend alternatives or mitigation measures).

54. *See* Ruffolo, *supra* note 15, at 2.

55. Lynn Dwyer & Dennis Murphy, *Fulfilling the Promise: Reconsidering and Reforming the California Endangered Species Act*, 35 Nat. Resources J. 735, 751 (1995).

56. *Id.* at 752.

57. Hank Shaw, *Delta's Health Explored*, Stockton Record, Aug. 24, 2005, at A1.

58. *Id.*

59. *See* Weiser, *supra* note 2.

communicate with CDFG on the delta smelt issue; so all have been consulting."[60] Despite such assertions by CDFG and CDWR officials that the smelt was the subject of extensive consultation similar to that required under §2090, smelt populations continue to plummet.[61]

It also seems politically imprudent to simply resurrect §2090 consultation because several incarnations of §2090 introduced in the California Legislature since 1998 have failed to garner sufficient support. A February 24, 1997, attempt by Sen. Byron Sher (D-Cal.) to postpone §2090 sunset by a year failed.[62] On February 18, 1999, Senator Machado, then Chair of the California Assembly Committee on Water, Parks, and Wildlife, introduced Assembly Bill 524, which reenacted state lead agency consultation under §2090 "with the exception of one provision which allowed a state lead agency to go forward with a project even in the event that jeopardy was found, and specific economic, social or other conditions made the alternatives infeasible."[63] This bill also failed to garner support.

In summary, the inadequacy of CEQA and a renewed §2090 calls for the development of a novel policy regime that: (1) delivers substantive and not just procedural protection to species; (2) requires state lead agencies to follow the CDFG's recommendations notwithstanding override possibilities; (3) requires substantive mitigation if override is allowed; and (4) brings take violations within the ambit of CESA criminal penalties. And, it would be prudent to link this regime with the CEQA consultation that already occurs. CEQA uses a low threshold test to trigger preparation of an EIR—if a "fair argument" can be made that a project will cause environmental harm, an EIR must be prepared. The low CEQA trigger is excellent for achieving species protection because project impacts will be considered earlier and endangered species will be explicitly treated in the process of environmental review. CEQA consultation, as compared with §2090 consultation, could also lessen the administrative burden on agencies. Under §2090, the initiation of formal consultation sometimes required the CDFG to prepare a biological opinion, although the CDFG never once used a biological opinion to halt a project.[64] Eliminating this unnecessary requirement for a written biological opinion would lessen paperwork for the CDFG.

Critics might sound a cautionary note, however, that choosing informal CEQA consultation over formal §2090 consultation requirements could undermine species protection efforts by streamlining the consultation processes through which projects that could harm species are evaluated. Many observers believe that successful implementation of CESA has been hampered by a failure to institutionalize the consultation process as an automatic response to potential endangered species conflicts, as is more generally the case among federal agencies. State lead agencies often fail to make species protection a priority and do not always consult with the CDFG when projects have an impact on threatened or endangered organisms.[65] Insufficient legal and administrative resources, among other factors, have prevented the CDFG from commenting on projects that might pose significant environmental impacts.[66] The proposal put forth below, however, does not eliminate consultation requirements altogether; rather, it eliminates the need for duplicative consultation under both CEQA and CESA while providing serious incentives for reluctant lead agencies to consult with the CDFG and consider proposed alternatives.

B. An Incidental Take Permit Regime Is Necessary, as §2081 Is Not Enough

State lead agencies that fund or carry out projects that take threatened or endangered species should be expressly required to first obtain an incidental take permit. A new incidental take permit regime would reinsert substantive species-protective standards into CESA, serve as an incentive to adopt alternatives resulting from CEQA consultation, and maximize administrative ease since state lead agency obligations for each project would all be listed in one comprehensive document. Adopting an incidental take permit regime would also provide a clear and direct application of CESA to state lead agencies. Without such revision of CESA, a winning argument could be made that the state legislature did not intend to obligate state lead agencies to communicate with the CDFG prior to the take of listed species. And such an exemption for state lead agencies would be contrary to declared CESA policy.[67]

Requiring incidental take permit authorization is a common and accepted method of imposing substantive requirements on projects that must necessarily take listed species.[68] In addition to CEQA procedural protection, substantive protection to species is necessary if the state lead agency ignores CDFG alternatives during CEQA consultation and the proposed project might take listed species. An incidental take permit regime can provide such substantive protection by giving the CDFG the authority to mandate mitigation measures and allowing it to deny permits outright to avoid a take in certain situations. An incidental take permit regime would also work well in concert with CEQA environmental review, thereby preserving state lead agency autonomy; state lead agencies would still have an opportunity to work with the CDFG to incorporate alternatives, and incidental take permits would only be necessary if the state lead agency opted to ignore CDFG alternatives. Also, if, as recommended, the permitting process is tied to CEQA, the CDFG would receive early notice of projects because of its role as the trustee agency with jurisdiction over natural resources affected by projects.[69] And the proposed permit procedures would give CEQA consultation more bite because it would give state lead agencies an incentive to take consulta-

60. Curtis, *supra* note 18.

61. *See, e.g.*, William A. Bennett, *Critical Assessment of the Delta Smelt Population in the San Francisco Estuary, California*, 3 San Francisco Estuary & Watershed Sci. (2005), http://repositories.cdlib.org/jmie/sfews/vol3/iss2/; Matt Weiser, *New Low for Tiny Delta Fish: Fall Count Shows Steep Decline in Smelt Population, Raising Fears of Extinction and Calls to Curtail Water Exports*, Sacramento Bee, Oct. 31, 2005, at A3; Mike Taugher, *Environmental Sirens in the Delta Are Screaming*, Contra Costa Times (May 1, 2005). *See also* Earthjustice, *supra* note 8.

62. S.B. 598, 1997 Leg. (Cal. 1997), Senate Committee on Environmental Quality (Sher), at 2 (Feb. 24, 1997).

63. *See* A.B. 524, *supra* note 16.

64. Tara L. Mueller, Guide to the Federal and California Endangered Species Laws 82-83 (1994).

65. *See* Dwyer & Murphy, *supra* note 51, at 752.

66. *Id.* at 754.

67. *See* A.B. 524, *supra* note 16.

68. *See, e.g.*, 16 U.S.C §1539(a)(1)(B); Haw. Rev. Stat. Ann. §P15D-A; Mass. Gen. Law Ann. ch. 131A, §5; Or. Rev. Stat. Ann. §496.172; Wis. Stat. Ann. §29.415(6).

69. Cal. Fish & Game Code §1802.

tion seriously or face the more onerous requirements statutorily imposed via incidental take permits. Given that mitigation is not always successful, most wildlife experts would prefer that state lead agencies avoid a take by following CDFG alternatives and only resort to mitigation if there are no acceptable alternatives.

Finally, there is some indication that state lead agencies would not be opposed to the introduction of a permitting process. During the delta smelt hearings, CDWR Chief Snow stated that he would like to have an incidental take permit regime because it would clean up the compliance paperwork—"[o]ur compliance . . . is in too many places, and we're on a path to change that."[70]

In the case of the delta smelt, an incidental take permit would have given the CDFG explicit authority to set operating parameters for the pumps to minimize smelt deaths and would also have required the CDWR to perform mitigation activities to atone for smelt deaths that would still occur unavoidably (although state officials insist that those things had been going on in earnest for years and an incidental take permit would not have improved the situation).[71]

Although §2081 currently imposes an incidental take permit regime on the private sector, there are reasons for not simply including state lead agencies within the ambit of §2081. First, although §2081 imposes a high mitigation standard, i.e., the impacts of the take must be minimized and fully mitigated, it does not require the use of project alternatives to avoid take altogether.[72] Such an omission represents a deviation from and a disregard for the principles of conservation and preservation that state lead agencies are statutorily obligated to uphold under CESA.[73] In addition to ambivalence regarding §2081's efficacy in avoiding a take, there is a political reason for not simply subjecting state lead agencies to the requirement of this provision. State lead agencies in particular are to be held to the highest standard due to a compromise negotiated on September 15, 1997, whereby environmental groups conceded several points regarding §2081 in exchange for a promise that CESA would subject state lead agencies to standards higher than those imposed on the private sector under §2081.[74] Stemming from this promise, environmentalists expect a higher conservation standard for state lead agencies, which would require that state lead agencies whose projects affect endangered species take actions to ensure the recovery of those species and not just mitigate the impacts of their projects. Thus, any attempt to extend the reach of §2081 to include state lead agencies would likely meet with tremendous political opposition from environmental advocates.

In summary, state lead agencies, when pursuing their capital projects, should be subject to a more onerous incidental take permit regime than that imposed on private property owners and other private entities. The combination of CEQA consultation and incidental take permits will provide a means for state lead agency projects to be reviewed with regard to their potential impacts on threatened or endangered species.[75] Consultation by itself is not enough. There has to be a way to introduce a higher conservation standard for state lead agencies for three reasons: (1) the state should adhere to its 1997 compromise agreement with environmental groups and business interests; (2) CESA explicitly states conservation as its legislative purpose under §2052[76]; and (3) certain state lead agencies have expressed a preference for incidental take permit authorization because that puts their obligations down on one document. Further, consultation without substantive guarantees serves as nothing but an education tool that informs the public and responsible agencies of the environmental consequences of their decisions. And as one state lead agency official pointed out, "[l]ots of paper and money isn't worth spending for [this type of] education—it's just a secondary benefit."[77]

V. Flashpoints for Debate, Regardless of Chosen Communication Method

As argued above, incidental take permits should be required whenever a proposed project takes a listed species incident to an otherwise lawful activity. Regardless of which agency-to-agency communication method the California Legislature eventually chooses, however, there are certain flashpoints around which debate is sure to rage (for ease of reading, discussion will be couched in terms of incidental take permits). When should the incidental take permit regime be triggered? And besides legalizing projects that receive incidental take permits, what substantive species-protective requirements should all incidental take permits impose on state lead agencies? Finally, what role should the public play before the CDFG awards or denies an incidental take permit, and what rights should the public have to legally challenge such permits?

A. When Should the Incidental Take Permit Regime Apply?

1. To What Projects Should the Incidental Take Permit Regime Apply?

CESA §2090 required consultation for any action "authorized, funded, or carried out" by the state lead agency. This low threshold subjected a wide array of private activity to requirements that were intended to be applied against state lead agencies. For example, a private project requiring the state lead agency to sign off on a permit application becomes "authorized" by the state, although all funding and other resources remain of private origin. It seems unfair that a similar private project not requiring a state permit would be exempt from more onerous species-protection requirements simply because it was not subject to permit regulations, especially because permits are often required for reasons other than protecting species. Dropping the term "authorized" from "authorized, funded, or carried out" would remove such inequities by exempting mostly private activity from incidental take permit requirements.

Environmentalists in California have indicated that this narrowed language maintains the spirit of the compromise

70. *See* Weiser, *supra* note 2.

71. *Id.*

72. *See* Ruffolo, *supra* note 15, at 4.

73. Gregory Maxim, *Chapter 567: Paving the Road to Extinction With Good Intentions*, 29 McGeorge L. Rev. 583, 588 (2001).

74. *See* A.B. 524, *supra* note 16, at 4.

75. *See* A.B. 524, *supra* note 16.

76. Cal. Fish & Game Code §2052 (stating that "[t]he Legislature further finds and declares that it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat . . . .").

77. Shank, *supra* note 27.

struck in 1997.[78] It should also be noted that projects "authorized" by state lead agencies will still be subject to CEQA consultation requirements, and as long as "authorized" constitutes state action and the project being authorized lessens protections for a species, an impact analysis will be necessary under CEQA.[79]

2. When Should the Incidental Take Permit Regime Not Apply?

☐ *Local Government and Local Agency Projects.* Projects by local governments or agencies are currently not covered under CESA[80] and should not be. Although environmentalists have expressed that it is most important for local agencies to be subject to tough standards under state ESAs, there are good reasons why species protection should remain almost exclusively a federal and state mandate in California. To protect species, local government must deflect harmful activities from sensitive lands and facilitate intensive site management of reserves. Unfortunately, there are substantial constraints on the ability of local government to actively promote biodiversity in California. Since the imposition in 1978 of California's Proposition 13, which constrains property tax revenues, local and regional governments and agencies have been starved for funds for facilities and services. As a result, cities and counties fight for revenue-producing developments to enrich the local tax base. Because local and regional governments are revenue driven when establishing planning priorities, open-space and habitat reserves that generate no revenue are largely unwanted. A second major constraint to action is that the jurisdictional boundaries of localities often do not relate to the distributions of species or the habitats that support them. Successful biodiversity protection is regional, not local in breadth. So, it seems appropriate that local government agencies continue to be exempted from the higher standard with which state lead agencies must comply.

☐ *Ongoing Projects.* Another concern is whether new legislation should apply to ongoing projects. If the California Legislature does not specify the answer to this question, or grandfather certain projects authorized under the categories of permits, memoranda of understanding, plans, plan agreements, and amendments, many currently operating projects would suddenly be operating in violation of CESA. Caution is necessary, however, because a broad grandfathering clause may unknowingly authorize activities that are not in keeping with the goals and policies of CESA and are contributing to the extinction of species. For example, the CDWR and CDFG operated under a memorandum of understanding when taking delta smelt, and that taking was arguably not in accord with the proposal argued for here. Also, absent a clear grandfathering provision, it would become unclear what effect any new statutory language would have on the Delta Wetlands, Headwater Forest, and a myriad of other activities that CDFG entered into, certified, or consulted on.[81] Thus, the legislature should generally exempt ongoing projects to minimize the burden on state lead agencies, while being vigilant not to authorize large, harmful projects that are obviously and continuously decimating species.

B. What Standards Should the Incidental Take Permit Regime Impose?

1. The Jeopardy Standard: Species Existence Versus Species Recovery

At question here is the minimum level of protection CESA wishes to afford species, since incidental take permits are the only lawful alternative for project proponents who cannot avoid take and who have refused less harmful alternatives proposed during CEQA consultation. CESA §2081, which applies to the private sector, states that a permit may not be issued if the issuance of that permit "would" jeopardize the continued "existence of species." In addition to specifying when an application for an incidental take permit must be denied outright, the jeopardy standard also determines when the CDFG can require alternatives to a state lead agency project and when it can require mitigation efforts. The expired §2090 program imposed a similar jeopardy standard, with jeopardy being reached if the continued existence of the species is threatened, through direct take or the destruction or adverse modification of essential habitat.[82]

On a continuum of possible jeopardy standards, "existence of species" is the most harmful and extreme to species conservation efforts.[83] Under this standard, projects can go forward that harm endangered species or damage their habitat to some small degree less than annihilating the species entirely. And, since the standard is not met until the project jeopardizes the survival of species, the CDFG would be powerless to require alternatives or demand mitigation measures. The use of "would" rather than "is likely to" in the jeopardy standard causes further concern, as it is far more difficult to definitively show that a project "would" jeopardize the continued existence of a species rather than showing it "is likely to" jeopardize the continued existence of a species.

Thus, the legislature should abandon the current "existence of species" jeopardy standard as the minimal level of protection accorded to listed species. In order to be consistent with the 1997 compromise agreement reaffirming that public agencies have a larger responsibility than private landowners in protecting and restoring endangered and

78. Telephone Interview with Kim Delfino, Attorney, Defenders of Wildlife (Cal.) (Oct. 4, 2005).

79. *See* Mountain Lion Found. v. Fish & Game Comm'n, 51 Cal. Rptr. 2d 408 (Cal. App. 1996), *aff'd*, 939 P.2d 1280 (1997) (holding that before delisting the state threatened Mojave ground squirrel under CESA, the state Fish and Game Commission must prepare a report under CEQA, reasoning that an impact analysis was necessary when a state action lessened protections for a species, as would occur through delisting).

80. CEQA defines "public agency" to include any state agency, board, or commission, any county, city and county, city, regional agency, public district, redevelopment agency, or other political subdivision, and defines "local agency" to mean "any public agency other than a state agency, board, or commission." Thus, mandatory consultation for a "state lead agency" with the department prescribed by CESA §2090 did not apply to local agencies. CESA §2081 applies to private projects only.

81. *See* S.B. 879, 1997 Leg. (Cal. 1997), Senate Committee on Natural Resources and Wildlife, Committee Analysis of SB 879, at 4 (June 17, 1997).

82. *See* CAL. FISH & GAME CODE §§2053, 2090(b), 2091.

83. *See* Ruffolo, *supra* note 15, at 7.

threatened species and their habitat,[84] as well as CESA's principle to "conserve, protect, restore, and enhance" as stated as policy in California,[85] the new regime should insist that incidental take permits be denied if the project "is *likely to* jeopardize the *recovery* of the species." Absent the word "recovery," the established policy of the state is undermined.[86]

2. The State Lead Agency Override Privilege

State lead agencies should maintain some autonomy, although not to the complete detriment of species. During CEQA consultation, the state lead agency should be allowed to offer its own alternatives that can be approved by the CDFG as consistent with the Act's stated goals. Such a provision was present in CESA §2090 and exists in §2081, and warrants little discussion because it incites little opposition. But what happens when the state lead agency and the CDFG do not settle upon an alternative and the incidental take permit is denied because the CDFG determines that a project "would jeopardize the continued existence of the species" or "is likely to jeopardize the recovery of the species"?[87] Should the state lead agency be able to "override" the CDFG's determination that the project is inconsistent with the statute as written and proceed without having to obtain an incidental take permit? What if the project is of such social and economic importance that the state lead agency views the loss of species as a necessary, if unfortunate, consequence?

It could be argued that the California Legislature, by penning escape-hatch phrases and terms into the statutory language, including "reasonable" and "prudent," intended to allow implementation of CESA to be informed in part by economic and social consequences.[88] CEQA allows for a jeopardy-override, as did the expired CESA §2090.[89] Previous legislative attempts to reintroduce a version of §2090 that excluded the jeopardy-override provision have failed.[90] Thus, it seems historically and legislatively infeasible to exclude a jeopardy-override provision from agency consultation requirements presumably because such a move would be too great an affront to state lead agency autonomy. Under what conditions a state lead agency can override a jeopardy finding, and what must be done upon override, however, are questions that remain subject to debate.

The jeopardy-override provisions of §2090 and CEQA differ, with CEQA equipping state lead agencies with the most powerful override provision. Section 2090 allowed a state lead agency to override the CDFG's recommended alternatives if the agency found that economic, social, or other conditions made the alternatives infeasible.[91] Upon jeopardy-override, the CDFG was to recommend "reasonable and prudent alternatives" and "reasonable and prudent mitigation measures," and state lead agencies were to implement reasonable alternatives and appropriate measures.[92] Environmental groups argue that §2090 consultation gave state lead agencies too much discretion because state lead agencies could choose their own alternatives and mitigation measures over those recommended by the CDFG. However, the CEQA override privilege is even more powerful, allowing the state lead agency to override the CDFG's recommendations without consequence. CEQA allows state lead agencies the discretion to proceed with a project despite the project's significant environmental impact if the state lead agency finds that the project's overriding economic, legal, social, technological, or other benefits outweigh the significant effects on the environment. CEQA's balancing test is an easier hurdle for state lead agencies to overcome than §2090's mandate that alternatives be "infeasible." And CEQA does not mandate mitigation upon override.

CEQA's powerful override provision means that CEQA consultation has no teeth. Under CEQA, a state lead agency could simply find that overriding benefits of the project outweigh effects on species and proceed with the project without doing any mitigation. Such a provision entirely favors agency autonomy over species protection.[93] Since state lead agencies operated without complaint under the slightly more onerous jeopardy-override provisions of CESA §2090 before that provision sunset, it is reasonable to resurrect that jeopardy-override provision. Thus, alternatives must be "infeasible" and mitigation must be mandatory. Perhaps the state lead agency should also be required to adopt the mitigation measures recommended by the CDFG rather than implement their own, since the CDFG has the mandate and recognized expertise under CESA to oversee species protection.

An anticipated issue is that no standards have been written either in code or in regulation to define "infeasible."[94] In anticipation of litigation on this issue, the CDFG should adopt regulations to define "infeasible." A final point in support of allowing for state lead agency "override" is expressed by Bankey Curtis, Deputy Director of the CDFG:

> One of the frustrations I have had is that the law is inflexible. There are times when it's difficult to make things work—adding more flexibility [would allow for] more net benefit over time. A project can benefit species over time [although] there is take early on. Added flexibility would allow mitigation [to take place] over a long[er] period of time.[95]

The override provision gives the state lead agency the needed flexibility while mandatory mitigation assures that species are given serious consideration.

3. Habitat

Should state lead agencies and the CDFG be required to consider habitat destruction or modification when determining a project's impact on species or when implementing mitigation measures? Given CESA's directive to conserve

84. *See* A.B. 524, *supra* note 16.

85. *See generally* CAL. FISH & GAME CODE §2052.

86. *Id.*

87. See *supra* Part V.A.1., for a discussion of jeopardy thresholds.

88. CAL. FISH & GAME CODE §2091 (calling for the CDFG to recommend "reasonable and prudent alternatives" and "reasonable and prudent mitigation measures").

89. CESA §2081 does not allow for jeopardy override because it is applicable only to private projects.

90. *See* A.B. 524, *supra* note 16.

91. *See* Ruffolo, *supra* note 15 (no state agency ever overrode the CDFG's recommended alternatives under this authority. In theory, however, they could do so).

92. CAL. FISH & GAME CODE §2092.

93. *See* A.B. 524, *supra* note 16.

94. *See* Ruffolo, *supra* note 15, at 4.

95. Curtis, *supra* note 18.

and protect species, the answer is an unequivocal "yes," and CESA's current failure to address this issue is inexcusable.

The loss of habitat is universally cited as the major cause for the extinction of species worldwide.[96] The U.S. Fish and Wildlife Service (FWS) has not yet been able to routinely monitor the status of listed species or the effects of recovery plans. However, a report released in 1990 indicated that the species that have recovered best are those that were threatened by single factors like over-exploitation or pollution; those threatened because of habitat loss (the vast majority) have not recovered.[97] Habitat destruction is not considered a "take" under California law. This silence would, absent express mention of habitat loss in the statutory language, make it unclear exactly what role habitat loss plays in requiring incidental take permits, allowing override, and determining appropriate mitigation. Given the severe impact habitat loss has on species, habitat destruction or modification should be expressly tied to a take to ensure that there is no misinterpretation regarding this crucial issue.

A simple example illustrates the importance of tying habitat loss to take. Under CESA §2081, which does not mention habitat loss, the project proponent 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.[98] Now 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 CESA §2061, includes habitat necessary to allow the species to recover[99]; and (3) a minimum area necessary for "survival."[100] Clearly, tier one is too broad to be favored by CESA as it might encompass all of western California, allowing little or no development to occur. On the other extreme, tier three, which is currently favored by CESA, allows for the decimation of all habitat save one location. Thus, CESA's current tier-three approach would prevent listed species from properly recovering and would keep them perpetually listed as endangered. The tier-three approach blatantly ignores CESA's purpose of recovering endangered species until they no longer require the Act's protection.[101] By expressly tying habitat to take, CESA can favor the more reasonable tier-two approach, which requires various locations for several breeding populations so that a species can recover to the point where it is no longer endangered.

Protecting habitat is also arguably beneficial to landowners and developers, particularly because habitat often concomitantly supports several species. CESA sometimes requires the expenditure of enormous resources to protect a species from a project's impact. Imagine the consternation of the developer who, after such expenditure, is required to confront the same set of problems after another species is listed due to that species being indirectly affected by the habitat destruction.[102] Opponents, of course, might argue that it is unnecessary to write habitat destruction or modification into the statute because the CDFG has traditionally interpreted CESA's take provision as prohibiting acts that destroy or modify a species' essential habitat.[103] But if that is indeed the case, writing habitat destruction into CESA should warrant little opposition because it would simply be incorporating CDFG's current interpretation into the statute and eliminate a common source of confusion.

4. Protecting Species "In the Wild"

The federal ESA prohibits a take if "it would likely jeopardize the continued existence of the species" defined as "appreciably reducing the likelihood of survival and recovery of the species in the wild." Similarly, it is important that CESA expressly require that the continued existence or recovery of a species be "in the wild." A species' prospects for survival and recovery are linked to its habitat and its biological relationship in the wild to other species.[104] The absence of "in the wild" in the statutory language could lead to a permit that would, for example, allow the taking and extinction of wild-running Chinook salmon by "mitigating" the impacts by releasing hatchery-raised fish.[105] Requiring that species be protected "in the wild" would remove the perverse possibility that species raised in captivity could substitute for those naturally occurring in the wild.[106]

5. Mitigation Versus Conservation

By definition, those receiving an incidental take permit will be taking species. How then should they atone for such take? Should CESA require that permit holders roughly restore species numbers or habitat to the status quo (mitigation), or should permit holders be required to leave species in a better position to atone for whatever harms they impose (conservation)?

CESA explains that the "conservation, protection, and enhancement of these species and their habitat is of statewide concern,"[107] and that the fundamental purposes of

96. *See generally* 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). *See also* Robert J. Vincze, Fed. Document Clearinghouse Congressional Testimony, Mar. 20, 1996 (arguing that "species diversity is positively correlated with habitat area. A corollary of this relationship is that if habitat is substantially reduced in area or degraded, species occurring in the wild will be lost."); *Many Species Imperiled in State—Shrinking Habitats Endanger Plants, Animals, Report Says*, SACRAMENTO BEE, Oct. 8, 1997, at A4 (declaring that a quarter of all plant and animal species will become extinct within the next 50 years if habitat decline continues and noting that California has lost 99% of its native grasslands, 85% of its coastal redwoods, and 80% of its coastal wetlands with the result that 46 California species have vanished and 205 more are listed as threatened or endangered.").

97. Peter J. Bryant, *Biodiversity and Conservation: A Hypertext Book, Chapter 8: Endangered Species Conservation*, http://darwin.bio.uci.edu/~sustain/bio65/lec08/b65lec08.htm (last visited June 12, 2006).

98. Brad D. Kern, *Permitting the Take: An Analysis of §2081 of the California Endangered Species Act*, 8 N.Y.U. ENVTL. L.J. 74, 86-87 (1999).

99. *See* CAL. FISH & GAME CODE §2061.

100. *See* Houck, *supra* note 92, at 301 (categorizing the three tiers of habitat identified by the ESA).

101. *Id.*

102. *See* Kern, *supra* note 94, at 86-87.

103. *See* CAL. FISH & GAME CODE §§2080, 86; MUELLER, *supra* note 60, at 82.

104. *See* Susan George et al., *State Endangered Species Acts: Past, Present, and Future, app. B* (1998), http://www.defenders.org/pubs/sesa00b.html.

105. *See* Tara Mueller, *Wreaking Havoc, Calling It Help; Environment: Two Bills Before the State Senate Would Do Irreparable Harm to Endangered Species in California*, L.A. TIMES, Sept. 12, 1997, at B9 (citing a 1993 University of California study).

106. *See* Maxim, *supra* note 69.

107. *See* CAL. FISH & GAME CODE §2051(c).

CESA is to "conserve, protect, restore, and enhance" protected species and the habitats upon which they depend for survival.[108] Under the California Fish and Game Code, conservation means "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 [CESA] are no longer necessary."[109]

To be true to its stated goals, CESA demands that the proponent of the project be required to do more than just "mitigate;" incidental take permit holders should be required to not only return species and habitat to the status quo, but also to take positive steps to assist species to reach the point at which CESA protection becomes unnecessary. Positive steps might include the contribution of land or money to support a centralized CDFG plan to conserve and recover the species.

At the least, if a state lead agency is not required to participate in the conservation of species that it is taking, it should be required to fully mitigate its take activities. Anything less than "full" mitigation means that a species would inevitably be left in a worse position than when the project was initiated. Given CESA's sweeping goal of conserving and enhancing species, leaving species in a worse position should surely be unacceptable. Further, private parties are required to "fully mitigate" under §2081, so the state lead agency should not, in all fairness, be held to a lesser standard.

However, there should be an effort to distinguish "fully mitigate" under the new provision from that of the current §2081. 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."[110] The §2081 definition causes confusion,[111] and given the compromise negotiations whereby state lead agencies are to be held to a higher standard than private entities, "fully mitigate" under the new provision should not be susceptible to the potential §2081 reading that allows for less than full mitigation.[112] In effect, the roughly proportional standard appears to permit less than the full amount of mitigation required under CESA.[113] It is thus recommended that if a mitigation standard is chosen over a conservation standard, then state lead agency mitigation efforts should be expressly required by statutory language to be "fully proportional" to the impact of its project. Moreover, a nexus between the mitigation activity and the taking must be made.[114]

6. Compliance With Mitigation or Conservation Mandates

Species-protective mitigation or conservation mandates are only useful insofar as they are implemented. Unfortunately, an examination of mitigation compliance pursuant to §2081 incidental take permits indicates that compliance is generally poor and alerts us to potential problems with mitigation or conservation compliance under the proposed incidental take permit regime. For §2081 permits, CDFG regulations state that a permit may only be issued if the Director finds that "[t]he applicant has ensured adequate funding to implement the measures required under the permit to minimize and fully mitigate the impacts of the taking, and to monitor compliance with, and the effectiveness of, the measures." Management endowment fees are supposed to be collected as part of the agreement for incidental take permits. The endowment is used to manage any lands set aside to protect listed species and for biological mitigation monitoring of these lands, typically over a five-year period.

There is evidence that land bought through mitigation funds is often mismanaged or run over by invasive species,[115] leading one environmentalist to comment, "mitigation is rarely monitored or evaluated for effectiveness."[116] A recent report by the Planning and Conservation League (PCL), a statewide, nonprofit environmental organization, suggests that regardless of the substantive mitigation requirements expressed in the statutory language, mitigation is often not carried through in actuality.[117] In some cases, mitigation land was never purchased; if it was purchased money was never spent on managing it in any way. There is reportedly a significant sum of money piling up because each agreement is a unique dedication of funds, and CDFG officials feel hamstrung because they cannot combine the money.[118]

The following are just some of the problems identified in the PCL report: of the 131 permits PCL reviewed, 118 failed to describe the location of mitigation habitat, whether mitigation lands were ever acquired, or whether required security deposits and enhancement and maintenance fees had actually been paid; of the 44,301 acres that permit holders had promised to transfer to the CDFG in mitigation, the CDFG Legal Office's records only accounted for a total of 2,115 acres; and in one instance, only $3,780 of a permit holder's promised $75,000 for enhancement and long-term management of mitigation lands was received.

There is additional evidence concerning the failure of mitigation programs. In a May 2004 letter addressed to the CDFG, the citizen group "Friends of Swainson's Hawk" pointed out that the city of Elk Grove had collected $1.8 million in fees to provide mitigation for impacts of new development on foraging habitat, while acquiring no land. Basically, the 1:1 mitigation ratio expected in the adopted environmental documents had not been delivered and the fees as charged could not at then-current market rates provide the necessary mitigation land. The group requested the CDFG to suspend current agreements that allow payment of fees instead of providing mitigation land.[119]

Another complication detailed in PCL's report is that there are many other programs that have a mitigation com-

108. *See id.* §2052.

109. *See id.* §2061.

110. *See id.* §2081.

111. *See* S.B. 879, *supra* note 77, at 4.

112. *See id.* at 86-87 (arguing that "roughly proportional": (1) seems to allow an initial harm to the listed species if only a small proportion of a population was incidentally killed while a substantial amount of the population survived; and (2) will confuse permit applicants about the scope of their mitigation and will allow permit holders and agencies to fall short of their continuing mitigation responsibilities).

113. *See id.*, *supra* note 77, at 4.

114. *Id.*

115. Delfino, *supra* note 74.

116. *See* Dwyer & Murphy, *supra* note 51, at 752.

117. The PCL Report can be found with the CDFG or Keith Wagner, *supra* note 17.

118. Curtis, *supra* note 18 ("[the CDFG has] a lot of endowment funds. Internally [the CDFG is] struggling with how to administer those funds.").

119. Friends of Swainson's Hawk, http://www.swainsonshawk.org (last visited June 12, 2006).

ponent, including CESA §§1802, 2080, and 2835 permits, and that many of these mitigation lands are managed by third parties such as The Nature Conservancy. Ideally, all mitigation and enhancement efforts would be coordinated to maximize benefit to endangered or threatened species. The CDFG's Habitat Conservation Planning Branch had, at the time PCL's report was issued, a database that attempted to track all aspects of these permit issuances, including verification that fees were paid, that lands were acquired, and that monitoring had been implemented. The author could find no evidence of such a database today, let alone a fully updated database.

In light of this data, the author recommends that the California Legislature compel the CDFG to identify all habitat preservation and mitigation efforts within the state, to track and monitor all public and private habitat mitigation in the state, and to make all nonconfidential information on mitigation within the state available to the public via the internet.[120] Such actions would allow for a more coordinated and transparent mitigation and conservation effort, which is surely to the benefit of species.

C. What Role Should the Public Play?

1. Notice-and-Comment Requirements

To increase cooperation, the law must enable stakeholders to participate directly in the important decisions of endangered species protection. In particular, stakeholders should participate in determining whether an agency should get an incidental take permit and in developing the implementation plans that carry out recovery and conservation.[121] Often, local activists or business groups might have better information about species and habitats in their local area and be aware of relevant circumstances that the CDFG should consider. Also, any party whose interests or economic rights will be affected by the acceptance or denial of an incidental take permit application should be given a place at the negotiation table.

Section 2090 did not require the solicitation of public comments, and they are not required under §2081. As one environmental advocate pointed out:

> There must be some sort of formal notice and comment for the public, because imagine if the Secretary would be able to single-handedly declare, without soliciting public input or providing sound scientific rationale, that specific projects would not "take" endangered species, or even authorize a take with no public input.[122]

Notice and comment should also be efficient and encourage participation. Former CDFG regulations under §2090 provided for "Public Review and Comment," but the application and analysis was only available for public review at the headquarters of the region in which the application was submitted after distribution of a notice of public availability. In short, they were difficult to access. It is also very difficult and time-consuming for the public to determine who has a permit. For example, in 2002, the Sierra Club asked the CDFG for all copies of §2081 permits from the years 1999 to 2001. The public record fact request took over one year to complete, and it required the Sierra Club to pay a fee.[123]

The California Legislature should require notice and comment similar to that required under Wisconsin's ESA, which would notify interested parties about proposed permits via mail and allow opportunities for comment.[124] Currently there is no such provision in California.[125] More stakeholder participation in state lead agency projects will give both environmental and business groups a chance to influence decisions that directly or indirectly impact their interests. It should be noted, however, that notice-and-comment requirements will likely be seen as a burden by state lead agencies.

2. Standing

"Standing" is a legal concept that essentially means that one bringing a lawsuit must have a sufficient stake in the controversy to obtain judicial resolution of that controversy. The strongest advocates for species protection (members of environmental groups or citizens groups) often suffer injury to their psychological enjoyment of undisturbed habitat and uninjured species but have no direct economic tie to habitat or species. Indeed, the U.S. Supreme Court has held that aesthetic and environmental well-being are important ingredients of quality of life and that harm to aesthetic well-being may amount to an "injury-in-fact" sufficient to lay the basis for standing under the federal ESA.[126] Yet in Illinois, environmental advocates claim that the Illinois Endangered Species Protection Act has lost its teeth due to the Illinois Supreme Court's decision in *Glisson*, holding that a third party must suffer a direct economic injury stemming from the loss of a species to bring a suit under the Act, thereby knocking out individuals who wish to sue for purely "aesthetic" interests.[127] To prevent an Illinois-type situation from occurring in California to the detriment of species, the legislature should include a provision that allows third parties to sue for aesthetic as well as economic injuries. To be consistent with other areas of California law, the state lead agency should be required to justify its decision by substantial evidence in the record—less than a preponderance of evidence but more than a mere scintilla of evidence. The legislature should also provide for the awarding of attorneys fees.

Some might argue that allowing third parties to pursue claims under CESA for aesthetic as well as economic injuries allows such parties, whether private persons, corporations, other governments, or nonprofit environmental or civic organizations, a means to compel state lead agencies to

120. Wagner, *supra* note 17.

121. *See* Western Governors' Ass'n, *supra* note 40, at 3.

122. Delfino, *supra* note 74.

123. *Id.*

124. See *supra* Part III.B., for a discussion of Wisconsin's notice-and-comment requirements.

125. *See* S.B. 879, *supra* note 77.

126. Sierra Club v. Morton, 405 U.S. 727, 734, 2 ELR 20192 (1972). The *Sierra Club* case states:

> Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process . . . [T]his type of harm may amount to an "injury-in-fact" sufficient to lay the basis for standing.

Id.

127. See *supra* Part III.A., for more on this decision.

take certain actions. It is unclear whether it is beneficial for third parties to have such influence over agency decisions, resulting in a commandeering of the agency decisional process and/or a waste of agency resources. However, frivolous suits are unlikely since the best a party could hope for is to compel the state lead agency to engage in consultation or an incidental take permitting process; the outcome of the process cannot be influenced. The funds devoted to a frivolous suit must be regarded as wasted unless they result in such serious political embarrassment as to fundamentally change agency policies or to replace state lead agency officials, in which case future agency decisions may be more environmentally friendly. Thus, a third-party right of appeal is not likely to be abused for the above-stated reasons and remains important to protect species.

D. A Political Analysis of the Proposed Reworking of CESA

The proposed policy solutions set forth in this Article should gain the strong support of environmentalists around the country because they impose clear obligations on state lead agencies to protect endangered or threatened species, establish conservation rather than only mitigation as a substantive requirement for state lead agencies that engage in take of species, and give environmentalists a place at the negotiating table through extensive notice-and-comment provisions.

The most likely objection from business groups, such as the Farm Bureau and the Building Industry Association, will be the higher "conservation" standard imposed on projects funded by state lead agencies. They would argue that the new standard might considerably raise the probability that a state lead agency consultation would cause interference with normal agricultural activities or other projects. However, narrowing the scope of any legislation to reach only those projects that are funded or carried out by the state lead agencies should allay their concerns. Projects "authorized" by state lead agencies, which businesses are more concerned about, should be exempted from the requirements of this proposed legislation since the goal is to shift primary responsibility for species protection to state lead agencies. Indeed, business interests might welcome increased obligations for state lead agencies because this might lessen the pressure on them when they independently engage in projects.

State lead agencies might prove to be the proposals' strongest opponents, as species-protective policies will likely impinge on their autonomy. Any requirement for agency-to-agency communication will likely create an unwelcome and inefficient paper burden on state lead agencies and state wildlife agencies such as the CDFG. If the experience in Illinois is telling, 90% of the paperwork arriving at state wildlife agencies will be useless because it will involve projects that do not take endangered or threatened species. However, the proposed legislation significantly expands state wildlife agency regulatory authority to recommend alternatives and mitigation measures. And the proposed legislation leaves ample room for state lead agency autonomy by providing state lead agencies the ability to propose their own alternatives and, more importantly, by providing each state lead agency with a powerful override privilege to be used at its discretion. Such provisions should assure state lead agencies and state wildlife agencies that the proposed legislation will, in practice, minimize any intrusion on their autonomy while making adjustments to better protect threatened and endangered species.

VI. Conclusion

CESA explains that the "conservation, protection, and enhancement of threatened and endangered species and their habitat is of statewide concern,"[128] and that the fundamental purpose of the Act is to "conserve, protect, restore, and enhance" protected species and the habitats upon which they depend for survival.[129] Comparable to the federal ESA, CESA is written in sweeping terms—it recognizes that "certain . . . species of fish, wildlife, and plants are in danger or threatened with extinction" because of factors such as "habitat destruction, adverse modification, or curtailment."[130]

The proposals in this Article are mindful of CESA's sweeping mandate, are consistent with the sound public policy of shifting the burden of species protection from the private sector to the state, and are sensitive to political opposition that might stall legislative action. Also, the proposals are careful to preserve state agency autonomy by providing state lead agencies ample discretion and override privileges.

Most importantly, the suggested reworking of CESA as it applies to state lead agencies is necessary to protect species. The obvious lack of explicit delta smelt take authorization for the mega-project to ship water south and to restore the Sacramento-San Joaquin delta suggests that other smaller California state agency projects have likely proceeded with insufficient consultation, permitting, and mitigation. The proposals outlined above provide maximal protection to species given today's political climate and the need to preserve agency autonomy, providing a win-win scenario for everyone under CESA.

128. *See* Cal. Fish & Game Code §2051(c).

129. *See id.* §2052.

130. *See* Dwyer & Murphy, *supra* note 51, at 743.