

Memorandum 2017-29

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**Fish and Game Law: Activities that Affect Wildlife**

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In this study, the Commission<sup>1</sup> is developing a proposed recodification of the Fish and Game Code. In its prior work in the study, the Commission has considered preliminary staff drafts of Divisions 1-16 of a proposed Fish and Wildlife Code:

- Division 1. General Provisions
- Division 2. Administration
- Division 3. Law Enforcement
- Division 4. Inter-Jurisdictional Compacts
- Division 5. Native American Tribes [Reserved]
- Division 6. Hunting, Trapping, and Fishing Generally
- Division 7. Wildlife Propagation, Domestication, and Possession
- Division 8. Birds
- Division 9. Mammals
- Division 10. Fish
- Division 11. Invertebrates
- Division 12. Amphibians
- Division 13. Reptiles
- Division 14. Plants
- Division 15. Habitat Conservation and Enhancement
- Division 16. Protected and Managed Areas

The Commission has released a “Part 1” tentative recommendation that contains the first five of those divisions. The staff is currently preparing a draft of a “Part 2” tentative recommendation, which is expected to contain Divisions 6 through 15.

The preliminary draft attached to this memorandum presents the first two parts of a proposed Division 17 — “Activities that Affect Wildlife.” A future memorandum will present the remaining parts of that division, addressing

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1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

pollution, water obstruction and diversion, and mining. Once the Commission has had a chance to review all of proposed Division 17, the staff will prepare a draft of a “Part III” tentative recommendation, containing Divisions 16 and 17.

Unless otherwise indicated, all statutory references in this memorandum are to the Fish and Game Code or to the “proposed” provisions of the Fish and Wildlife Code.

#### GENERAL APPROACH

Pursuant to the general practice in this study, the staff has taken a fairly conservative approach in preparing the attached draft. For the most part, the language used in the draft is drawn from existing law verbatim. In some cases, the staff has significantly restated an existing section that is awkwardly phrased or difficult to understand. Such restatements are followed by a Staff Note that sets out the existing language of the restated provision and asks for public comment on whether the restatement would cause any problems.

Consistent with the Legislature’s direction in this study, the attached draft is not intended to include any significant substantive changes in the effect of the law.<sup>2</sup> In addition, the Commission has adopted a generally conservative approach to technical recodification projects of this type. It will only make a change to existing law if the change would meet all three of the following criteria:

- (1) It is plainly beneficial.
- (2) It does not present a significant risk of unintended consequences (i.e., its effects seem straightforward and circumscribed).
- (3) It is not likely to be controversial.<sup>3</sup>

Those limitations still leave plenty of room for nonsubstantive improvement to the organization and expression of existing law (e.g., grouping related provisions, breaking up overlong sections, restating language that is difficult to understand, eliminating redundant and obsolete language, imposing standard statutory style conventions).

As noted above, there are “Staff Notes” following some provisions of the proposed law. Some of the Staff Notes identify issues that may require future attention. Others solicit public comment in response to specific questions. If the

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2. See 2016 Cal. Stat. ch. res. 150.

3. Minutes (Sept. 2016), p. 6.

issue raised in a Staff Note is adequately addressed at this stage of the process, it will not be included in the final recommendation.

## CONTENT

As noted above, the attached draft includes the first two parts of proposed Division 17:

- Division 17. Activities that Affect Wildlife
  - Part 1. California Endangered Species Act
  - Part 2. Planning and Mitigation

The content of those two parts is discussed briefly below.

### **Part 1. California Endangered Species Act**

Part 1 contains the entirety of the California Endangered Species Act.<sup>4</sup> That Act can be roughly divided into three elements:

- (1) A process for administratively “listing” species as endangered, threatened, or candidate species.<sup>5</sup>
- (2) Affirmative protections for listed species (including a prohibition on “take”).<sup>6</sup>
- (3) Express exceptions to those affirmative protections (including an exception for “incidental take” that is minimized and fully mitigated).<sup>7</sup>

As compared with other parts of the Fish and Game Code, the California Endangered Species Act is the subject of a fair amount of appellate case law. The staff reviewed that decisional law to determine whether the cases had raised any issues that would be appropriate to address in this study. In light of the nonsubstantive and conservative character of this study (discussed above), the staff did not find any issues that should be addressed by the Commission.

There is also significant legislative activity relating to the California Endangered Species Act.<sup>8</sup> To allow for possible changes to the statute, the attached draft leaves generous gaps between major elements of the statute (in particular, after the provisions on incidental take).

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4. See proposed Sections 62000-64160.

5. See proposed Sections 62200-62525.

6. See proposed Sections 62600-62605.

7. See proposed Sections 62650-63500.

8. See, e.g., AB 1133 (Dahle) (take of species designated as “experimental population” under federal permit).

## **Part 2. Planning and Mitigation**

Part 2 contains a number of statutes that address the management and mitigation of impacts on wildlife and wildlife habitat, but are not part of the California Endangered Species Act:

- The Natural Community Conservation Planning Act, which provides a mechanism for managing wildlife impacts on a regional, multi-species basis.<sup>9</sup>

An NCCP identifies and provides for the regional protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. Working with landowners, environmental organizations, and other interested parties, a local agency oversees the numerous activities that compose the development of an NCCP.<sup>10</sup>

- Statutes that authorize “advance mitigation planning” and “regional conservation investment strategies,” planning techniques used to address impacts on wildlife.<sup>11</sup>

Advance mitigation is a science-based approach to identify mitigation opportunities to support regional conservation priorities. By considering mitigation development early in the planning process prior to design and permitting phases, proponents can identify higher-quality mitigation opportunities. . . .

Regional Conservation Investment Strategies Program (RCIS) is a new program that encourages a voluntary, non-regulatory regional planning process intended to result in higher-quality conservation outcomes and includes an advance mitigation tool. The program uses a science-based approach to identify conservation and enhancement opportunities that, if implemented, will help California's declining and vulnerable species by protecting, creating, restoring, and reconnecting habitat and may contribute to species recovery and adaptation to climate change, and resiliency.

The program consists of three components: regional conservation assessments (RCAs), regional conservation investment strategies (RCISs), and mitigation credit agreements (MCAs).<sup>12</sup>

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9. See proposed Sections 64500-64660.

10. <<https://www.wildlife.ca.gov/conservation/planning/nccp>>.

11. See proposed Sections 64700-65155.

12. <<https://www.wildlife.ca.gov/Conservation/Planning/Regional-Advance-Mitigation>>.

- Statutes that authorize and regulate “conservation and mitigation banking,” both in general<sup>13</sup> and in the specific context of wetland banking in the central valley region.<sup>14</sup>

A conservation or mitigation bank is privately or publicly owned land managed for its natural resource values. In exchange for permanently protecting, managing, and monitoring the land, the bank sponsor is allowed to sell or transfer habitat credits to permittees who need to satisfy legal requirements and compensate for the environmental impacts of developmental projects. ...

A conservation bank generally protects threatened and endangered species and habitat. Credits are established for the specific sensitive species that occur on the site. Conservation banks help to consolidate small, fragmented sensitive species compensation projects into large contiguous preserves which have much higher wildlife habitat values. ...

A mitigation bank protects, restores, creates, and enhances wetland habitats. Credits are established to compensate for unavoidable wetland losses. Use of mitigation bank credits must occur in advance of development, when the compensation cannot be achieved at the development site or would not be as environmentally beneficial. Mitigation banking helps to consolidate small, fragmented wetland mitigation projects into large contiguous preserves which will have much higher wildlife habitat values. ...<sup>15</sup>

Part 2 also includes provisions that govern project application fees paid to the department, to defray the costs it incurs in managing and protecting fish and wildlife resources.<sup>16</sup>

## CONCLUSION

As always, the staff invites public comment on the content of the attached draft. Are there any other provisions, in the Fish and Game Code or in any other code, that should be located in the attached draft? The staff would also appreciate receiving comment on whether any of the provisions included in the draft present the kinds of problems with consistency, redundancy, or ambiguity

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13. See proposed Sections 65300-65690.

14. See proposed Sections 65800-66115.

15. <<https://www.wildlife.ca.gov/Conservation/Planning/Banking>>.

16. See proposed Sections 66200-66250.

as to program authority or funding sources that the Commission has been tasked with addressing.<sup>17</sup>

Respectfully submitted,

Brian Hebert  
Executive Director

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17. See 2012 Cal. Stat. res. ch. 108.

## FISH AND WILDLIFE CODE

**Note:** This is a preliminary staff draft of a proposed reorganization of specified provisions of the Fish and Game Code.

Statutory cross-references that cannot yet be adjusted (because the referenced provisions have not yet been reorganized) are set out in boldface type, without change. Boldface type is also used to show cross-references to existing provisions that were included in drafts of other parts of the proposed code. Those references will be adjusted later in the process.

A draft of an official Commission “Comment” follows each proposed section. Such Comments will be included in any final recommendation. They serve to indicate the source of each section and to describe how it compares with prior law. Courts have routinely held that the Commission’s Comments are evidence of legislative intent with regard to any legislation that implements a Commission recommendation. For guidance on the terminology used in Commission Comments, see the Comment following proposed Section 20 (attached to Memorandum 2013-12).

There is a “disposition table” at the end of this document. It summarizes, in tabular form, the disposition of every provision that has been included in this draft. If an existing provision would be repealed as unnecessary, the table indicates that provision as “omitted.”

Some provisions of this draft are followed by a “Staff Note.” Staff Notes are intended to be temporary and will not be part of the Commission’s final recommendation. They serve to flag issues requiring special attention or treatment.

The Commission welcomes public comment on any issue relating to the content of this draft. The Commission is particularly interested in comments on any of the following matters:

(1) Responses to any questions posed in “Staff Notes.”

(2) Any inconsistency, obsolescence, ambiguity, or problems relating to program authority and funding, whether *within* the provisions of this draft or *between* the provisions of this draft and other provisions of law.

(3) Provisions that should have been included in this draft but were not (or provisions included in this draft that should have been located elsewhere).

(4) Technical drafting errors.

Comments should be directed to Brian Hebert at bhebert@clrc.ca.gov.

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1           **DIVISION 17. ACTIVITIES THAT AFFECT WILDLIFE**

2           **PART 1. CALIFORNIA ENDANGERED SPECIES ACT**

3           **TITLE 1. GENERAL PROVISIONS**

4           **CHAPTER 1. SHORT TITLE AND LEGISLATIVE FINDINGS**

5           **§ 62000. Short title**

6           62000. This part shall be known and may be cited as the California Endangered  
7           Species Act.

8           **Comment.** Section 62000 continues former Fish and Game Code Section 2050 without  
9           substantive change.

10          **§ 62005. Need for conservation**

11          62005. The Legislature hereby finds and declares all of the following:

12          (a) Certain species of fish, wildlife, and plants have been rendered extinct as a  
13           consequence of human activities, untempered by adequate concern and  
14           conservation.

15          (b) Other species of fish, wildlife, and plants are in danger of, or threatened  
16           with, extinction because their habitats are threatened with destruction, adverse  
17           modification, or severe curtailment, or because of overexploitation, disease,  
18           predation, or other factors.

19          (c) These species of fish, wildlife, and plants are of ecological, educational,  
20           historical, recreational, esthetic, economic, and scientific value to the people of  
21           this state, and the conservation, protection, and enhancement of these species and  
22           their habitat is of statewide concern.

23          **Comment.** Section 62005 continues former Fish and Game Code Section 2051 without  
24           substantive change.

25          **§ 62010. General policy**

26          62010. The Legislature further finds and declares that it is the policy of the state  
27           to conserve, protect, restore, and enhance any endangered species or any  
28           threatened species and its habitat and that it is the intent of the Legislature,  
29           consistent with conserving the species, to acquire lands for habitat for these  
30           species.

31          **Comment.** Section 62010 continues former Fish and Game Code Section 2052 without  
32           substantive change.

33          **§ 62015. Scope of required mitigation**

34          62015. The Legislature further finds and declares that if any provision of this  
35           part requires a person to provide mitigation measures or alternatives to address a

1 particular impact on a candidate species, threatened species, or endangered  
2 species, the measures or alternatives required shall be roughly proportional in  
3 extent to any impact on those species that is caused by that person. Where various  
4 measures or alternatives are available to meet this obligation, the measures or  
5 alternatives required shall maintain the person's objectives to the greatest extent  
6 possible consistent with this section. All required measures or alternatives shall be  
7 capable of successful implementation. This section governs the full extent of  
8 mitigation measures or alternatives that may be imposed on a person pursuant to  
9 this part. This section shall not affect the state's obligations set forth in Section  
10 62010.

11 **Comment.** Section 62015 continues former Fish and Game Code Section 2052.1 without  
12 substantive change.

13 **§ 62020. Project approval and alternatives**

14 62020. (a) The Legislature further finds and declares that it is the policy of the  
15 state that state agencies should not approve projects as proposed that would  
16 jeopardize the continued existence of any endangered species or threatened species  
17 or result in the destruction or adverse modification of habitat essential to the  
18 continued existence of those species, if there are reasonable and prudent  
19 alternatives available consistent with conserving the species or its habitat that  
20 would prevent jeopardy.

21 (b) Furthermore, it is the policy of this state and the intent of the Legislature that  
22 reasonable and prudent alternatives shall be developed by the department, together  
23 with the project proponent and the state lead agency, consistent with conserving  
24 the species, while at the same time maintaining the project purpose to the greatest  
25 extent possible.

26 **Comment.** Section 62020 continues former Fish and Game Code Section 2053 without  
27 substantive change.

28 **§ 62025. Mitigation and enhancement in lieu of infeasible alternatives**

29 62025. The Legislature further finds and declares that, in the event specific  
30 economic, social, or other conditions make alternatives infeasible, individual  
31 projects may be approved if appropriate mitigation and enhancement measures are  
32 provided.

33 **Comment.** Section 62025 continues former Fish and Game Code Section 2054 without  
34 substantive change.

35 **§ 62030. Duty of state entities**

36 62030. The Legislature further finds and declares that it is the policy of this state  
37 that all state agencies, boards, and commissions shall seek to conserve endangered  
38 species and threatened species and shall utilize their authority in furtherance of the  
39 purposes of this part.

40 **Comment.** Section 62030 continues former Fish and Game Code Section 2055 without  
41 substantive change.

1      **§ 62035. Cooperation of landowners**

2      62035. The Legislature further finds and declares that the cooperation of the  
3      owners of land that is identified as habitat for endangered species and threatened  
4      species is essential for the conservation of those species and that it is the policy of  
5      this state to foster and encourage that cooperation in furtherance of the purposes of  
6      this part. Therefore, a landowner of property on which an endangered, threatened,  
7      or candidate species lives shall not be liable for civil damages for injury to  
8      employees of, or persons under contract with, the department if the injury occurs  
9      while those persons are conducting survey, management, or recovery efforts with  
10     respect to those species.

11     **Comment.** Section 62035 continues former Fish and Game Code Section 2056 without  
12     substantive change.

13                    **CHAPTER 2. DEFINITIONS**

14      **§ 62100. Application**

15      62100. The definitions in this chapter govern the construction of this part.

16      **Comment.** Section 62100 continues former Fish and Game Code Section 2060 without  
17     substantive change.

18      **§ 62105. Candidate species**

19      62105. “Candidate species” means a native species or subspecies of a bird,  
20      mammal, fish, amphibian, reptile, or plant that the commission has formally  
21      noticed as being under review by the department for addition to either the list of  
22      endangered species or the list of threatened species, or a species for which the  
23      commission has published a notice of proposed regulation to add the species to  
24      either list.

25      **Comment.** Section 62105 continues former Fish and Game Code Section 2068 without  
26     substantive change.

27      **§ 62110. Conserve, conserving, and conservation**

28      62110. “Conserve,” “conserving,” and “conservation” mean to use, and the use  
29      of, all methods and procedures that are necessary to bring any endangered species  
30      or threatened species to the point at which the measures provided pursuant to this  
31      part are no longer necessary. These methods and procedures include, but are not  
32      limited to, all activities associated with scientific resources management, such as  
33      research, census, law enforcement, habitat acquisition, restoration and  
34      maintenance, propagation, live trapping, and transplantation, and, in the  
35      extraordinary case where population pressures within a given ecosystem cannot be  
36      otherwise relieved, may include regulated taking.

37      **Comment.** Section 62110 continues former Fish and Game Code Section 2061 without  
38     substantive change.

1   **§ 62115. Endangered species**

2   62115. (a) “Endangered species” means a native species or subspecies of a bird,  
3   mammal, fish, amphibian, reptile, or plant that is in serious danger of becoming  
4   extinct throughout all, or a significant portion, of its range due to one or more  
5   causes, including loss of habitat, change in habitat, overexploitation, predation,  
6   competition, or disease.

7   (b) Any species determined by the commission as “endangered” on or before  
8   January 1, 1985, is an “endangered species.”

9   **Comment.** Section 62115 continues former Fish and Game Code Section 2062 without  
10 substantive change.

11   **§ 62120. Feasible**

12   62120. “Feasible” means feasible as defined in Section 21061.1 of the Public  
13 Resources Code.

14   **Comment.** Section 62120 continues former Fish and Game Code Section 2063 without  
15 substantive change.

16   **§ 62125. Project**

17   62125. “Project” means project as defined in Section 21065 of the Public  
18 Resources Code.

19   **Comment.** Section 62125 continues former Fish and Game Code Section 2064 without  
20 substantive change.

21   **§ 62130. State lead agency**

22   62130. “State lead agency” means the state agency, board, or commission that is  
23 a lead agency under the California Environmental Quality Act (Division 13  
24 (commencing with Sec. 21000) of the Public Resources Code).

25   **Comment.** Section 62130 continues former Fish and Game Code Section 2065 without  
26 substantive change.

27   **§ 62135. Threatened species**

28   62135. (a) “Threatened species” means a native species or subspecies of a bird,  
29 mammal, fish, amphibian, reptile, or plant that, although not presently threatened  
30 with extinction, is likely to become an endangered species in the foreseeable  
31 future in the absence of the special protection and management efforts required by  
32 this part.

33   (b) Any animal determined by the commission as “rare” on or before January 1,  
34 1985, is a “threatened species.”

35   **Comment.** Section 62135 continues former Fish and Game Code Section 2067 without  
36 substantive change.

1           **TITLE 2. LISTING OF ENDANGERED AND**  
2           **THREATENED SPECIES**

3           **CHAPTER 1. GENERAL PROVISIONS**

4           **§ 62200. Establishment and maintenance of lists**

5           62200. (a) The commission shall establish a list of endangered species and a list  
6 of threatened species.

7           (b) The commission shall add or remove species from either list if it finds, upon  
8 the receipt of sufficient scientific information pursuant to this title, that the action  
9 is warranted.

10          **Comment.** Section 62200 continues former Fish and Game Code Section 2070 without  
11 substantive change.

12          **§ 62205. Criteria**

13          62205. The department shall recommend, and the commission shall adopt,  
14 criteria for determining if a species is endangered or threatened.

15          **Comment.** Section 62205 continues former Fish and Game Code Section 2071.5 without  
16 substantive change.

17          **§ 62210. Notice of pending actions**

18          62210. (a) To provide all interested persons access to information and  
19 notification of pending listing or delisting actions, the commission shall distribute  
20 the related agenda of pending actions and those portions of its minutes of actions  
21 taken under this title to any individuals who have notified the commission, in  
22 writing with their address, of their interest. This notification shall be published in  
23 the California Regulatory Notice Register and shall meet the requirements of  
24 public notice as required for commission action under Section 62270, 62350,  
25 62375, 62450, or 62500.

26          (b) The commission may impose an annual fee on those persons who request  
27 inclusion on the list to be notified in order to offset the cost of establishing and  
28 maintaining the list, and preparing and mailing the notices. Fees received pursuant  
29 to this section shall be deposited in the Fish and Game Preservation Fund.

30          **Comment.** Section 62210 continues former Fish and Game Code Section 2078 without  
31 substantive change.

1                   **CHAPTER 2. LISTING PROCESS**

2                   **Article 1. Petition**

3                   **§ 62250. Guidelines**

4         62250. The commission shall adopt guidelines by which an interested person  
5         may petition the commission to add a species to, or to remove a species from  
6         either the list of endangered or the list of threatened species.

7         **Comment.** Section 62250 continues former Fish and Game Code Section 2071 without  
8         substantive change.

9                   **§ 62255. General content requirements**

10       62255. A petition shall be written, shall be clearly identified as a petition, and  
11       shall clearly indicate the administrative measure recommended.

12       **Comment.** Section 62255 continues former Fish and Game Code Section 2072 without  
13       substantive change.

14                   **§ 62260. Specific content requirements**

15       62260. (a) To be accepted, a petition shall, at a minimum, include sufficient  
16       scientific information that a petitioned action may be warranted.

17       (b) Petitions shall include information regarding the population trend, range,  
18       distribution, abundance, and life history of a species, the factors affecting the  
19       ability of the population to survive and reproduce, the degree and immediacy of  
20       the threat, the impact of existing management efforts, suggestions for future  
21       management, and the availability and sources of information.

22       (c) The petition shall also include information regarding the kind of habitat  
23       necessary for species survival, a detailed distribution map, and any other factors  
24       that the petitioner deems relevant.

25       **Comment.** Section 62260 continues former Fish and Game Code Section 2072.3 without  
26       substantive change.

27                   **§ 62265. Referral of petition to department**

28       62265. Within 10 days of the receipt of a petition from an interested person  
29       under Section 62260, the commission shall refer the petition to the department.

30       **Comment.** Section 62265 continues former Fish and Game Code Section 2073 without  
31       substantive change.

32                   **§ 62270. Publication of notice of petition**

33       62270. (a) The commission shall publish a notice in the California Regulatory  
34       Notice Register of the receipt of a petition prepared pursuant to Section 62260 by  
35       the department, or by an interested party and referred to the department, pursuant  
36       to Section 62265, or the commencement of an evaluation, to add a species to,

1 remove a species from, or change the status of a species on, the list of endangered  
2 species or the list of threatened species pursuant to Section 62275.

3 (b) At a minimum, the notice shall include all of the following:

4 (1) The scientific and common name of the species.

5 (2) Habitat type, if that information is available in the petition.

6 (3) The location where interested persons can submit information to the  
7 department relating to the petitioned species.

8 (c) The commission shall notify interested persons pursuant to Section 62210,  
9 by mail, of the notices prepared pursuant to subdivision (a), and shall mail a copy  
10 of the notice to those persons.

11 **Comment.** Section 62270 continues former Fish and Game Code Section 2073.3 without  
12 substantive change.

13 **§ 62275. Department-initiated petition**

14 62275. (a) The department may, in the absence of a petition from an interested  
15 party, recommend to the commission that it add a species to, or remove a species  
16 from, either the list of endangered species or the list of threatened species.

17 (b) If it makes a recommendation under this section, the department shall  
18 include the information specified in Section 62260.

19 (c) A department recommendation under this section shall be considered by the  
20 commission as a petition with a departmental recommendation to accept and  
21 consider as described in subdivision (b) of Section 62280, and is subject to  
22 Sections 62350 to 62525, inclusive.

23 **Comment.** Section 62275 continues former Fish and Game Code Section 2072.7 without  
24 substantive change.

25 **§ 62280. Department evaluation and recommendation**

26 62280. (a) Within 90 days of receipt of a petition, the department shall evaluate  
27 the petition on its face and in relation to other relevant information the department  
28 possesses or receives, and submit to the commission its written evaluation report  
29 with one of the following recommendations to the commission:

30 (1) Based upon the information contained in the petition, there is not sufficient  
31 information to indicate that the petitioned action may be warranted, and the  
32 petition should be rejected.

33 (2) Based upon the information contained in the petition, there is sufficient  
34 information to indicate that the petitioned action may be warranted, and the  
35 petition should be accepted and considered.

36 (b) Upon the request of the director, the commission may grant the department  
37 an extension of time, not to exceed 30 days, to allow the department additional  
38 time to further analyze and evaluate the petition and complete its evaluation  
39 report.

40 (c) The department's evaluation report shall include copies of, or a list of, all  
41 information submitted to the department pursuant to subdivision (a) of Section

1 62285 during its evaluation of the petition. If copies are not included, the report  
2 shall state where the listed information is available for review.

3 **Comment.** Section 62280 continues former Fish and Game Code Section 2073.5 without  
4 substantive change.

5 **§ 62285. Public input during evaluation**

6 62285. (a) A person may submit information to the department relating to the  
7 petitioned species during the evaluation of the petition pursuant to Section 62280.  
8 The information shall relate to the matters identified in Section 62260.

9 (b) Within 10 days after receiving information pursuant to subdivision (a), the  
10 department shall notify the petitioner regarding its content.

11 **Comment.** Section 62285 continues former Fish and Game Code Section 2073.4 without  
12 substantive change.

13 **§ 62290. Amendment of petition**

14 62290. (a) A petitioner may amend a petition at any time prior to the beginning  
15 of the meeting held by the commission pursuant to Section 62350.

16 (b) If the commission determines that an amendment is substantive, the  
17 commission shall resubmit the petition to the department for review pursuant to  
18 Section 62280, publish notice of the amendment pursuant to Section 62270, and  
19 renote or continue any hearing scheduled pursuant to Section 62350 in order to  
20 provide adequate opportunity for public comment.

21 **Comment.** Section 62290 continues former Fish and Game Code Section 2073.7 without  
22 substantive change.

23 Article 2. Public Hearing and Meeting

24 **§ 62350. Scheduling**

25 62350. The commission shall schedule a petition for consideration at its next  
26 available meeting, but not sooner than 30 days after receipt of the petition and  
27 public release of the evaluation report, and distribute its pending agenda to  
28 interested persons pursuant to Section 62210. The commission also shall make the  
29 petition, evaluation report, and other materials received available for review.

30 **Comment.** Section 62350 continues former Fish and Game Code Section 2074 without  
31 substantive change.

32 **§ 62355. Public hearing**

33 62355. At the meeting scheduled pursuant to Section 62350, the commission  
34 shall hold a public hearing on the petition and shall receive information, written or  
35 otherwise, and oral testimony.

36 **Comment.** Section 62355 continues the first sentence of former Fish and Game Code Section  
37 2074.2(a) without substantive change.

1      **§ 62360. Closure of public hearing and record**

2      62360. (a) After the conclusion of oral testimony from the commission and  
3      department staff, the petitioner, or any other persons, the commission may close  
4      the public hearing and administrative record for the commission's decision  
5      pursuant to this section.

6      (b) After the commission closes the public hearing, the administrative record for  
7      the commission's decision is closed and it shall not be reopened except as  
8      provided in Section 62365.

9      (c) Once the public hearing is closed, no person shall submit further information  
10     to the commission for consideration on that petition and the commission shall not  
11     accept any further information for consideration on that petition except as  
12     provided in Section 62365.

13     **Comment.** Subdivision (a) of Section 62360 continues the second sentence of former Fish and  
14     Game Code Section 2074.2(a) without substantive change.

15     Subdivisions (b) and (c) continue former Fish and Game Code Section 2074.2(b) without  
16     substantive change.

17      **§ 62365. Reopening administrative record**

18      62365. The administrative record for the commission's decision pursuant to  
19      Section 62360 shall not be reopened once the commission closes the public  
20      hearing unless one of the following occurs prior to the commission's decision:

21      (a) There is a change in state or federal law or regulation that has a direct and  
22      significant impact on the commission's determination as to whether the petition  
23      provides sufficient information to indicate that the petitioned action may be  
24      warranted.

25      (b) The commission determines that it requires further information to evaluate  
26      whether the petition provides sufficient information to indicate that the petitioned  
27      action may be warranted. If the commission makes that determination during its  
28      deliberation, the commission may request, on the record at the scheduled meeting  
29      or at a continued meeting, further information on any issue relevant to making its  
30      determination as to whether the petition provides sufficient information to indicate  
31      that the petitioned action may be warranted. Any request by the commission  
32      pursuant to this subdivision shall specify a date by which the information must be  
33      submitted to the commission and shall serve to reopen the administrative record  
34      for the limited purpose of receiving further information relating to the issues  
35      specified by the commission in the request. Commission and department staff, the  
36      petitioner, or any other person may submit information in response to a request  
37      pursuant to this subdivision. If the commission reopens the record pursuant to this  
38      section, it shall provide an opportunity for public comment on the submitted  
39      information prior to the issuance of its decision.

40     **Comment.** Section 62365 continues former Fish and Game Code Section 2074.2(c) without  
41     substantive change.

1   **§ 62370. Continuation of meeting**

2   62370. (a) In its discretion, the commission may continue a meeting on a  
3   petition to a later date, which shall be no later than 90 days after the meeting  
4   scheduled pursuant to Section 62350, and subject to applicable notice and agenda  
5   requirements.

6   (b) If the public hearing has not yet closed, the meeting shall be continued for  
7   further public hearing and then deliberations.

8   (c) If the public hearing has been closed, the meeting will be continued for the  
9   purpose of deliberation, without further public hearing. In this case, a person shall  
10   not submit, and the commission shall not receive, further information relating to  
11   the petition except as provided in Section 62365.

12   **Comment.** Section 62370 continues former Fish and Game Code Section 2074.2(d) without  
13   substantive change.

14   **☞ Staff Note.** Proposed Section 62370 would restate existing Section 2074.2(d) to improve its  
15   clarity, without changing its substantive effect. The existing provision reads as follows:

16   “In its discretion, the commission may either close the public hearing and continue the meeting  
17   on the petition for the purpose of deliberation or continue both the public hearing and the meeting  
18   on the petition to a subsequent date, which shall be no later than 90 days after the meeting  
19   scheduled pursuant to Section 2074, and subject to applicable notice and agenda requirements.

20   If the commission closes the public hearing but continues the meeting for the purpose of  
21   deliberation, a person shall not submit, and the commission shall not receive, further information  
22   relating to the petition except as provided in subdivision (c).”

23   **The staff invites comment on whether that restatement would cause any problems.**

24   **§ 62375. Commission findings**

25   62375. (a) At the meeting scheduled pursuant to Section 62350 or at a continued  
26   meeting scheduled pursuant to Section 62370, the commission shall consider the  
27   petition, the department’s written report, written comments received, and oral  
28   testimony provided during the public hearing, and the commission shall make and  
29   enter in its record one of the following findings:

30   (1) If the commission finds that the petition does not provide sufficient  
31   information to indicate that the petitioned action may be warranted, the  
32   commission shall publish a notice of finding that the petition is rejected, including  
33   the reasons why the petition is not sufficient.

34   (2) If the commission finds that the petition provides sufficient information to  
35   indicate that the petitioned action may be warranted, the commission shall publish  
36   a notice of finding that the petition is accepted for consideration. If the accepted  
37   petition recommends the addition of a species to either the list of endangered  
38   species or the list of threatened species, the commission shall include in the notice  
39   that the petitioned species is a candidate species. The commission shall maintain a  
40   list of species that are candidate species.

41   (b) The commission shall publish and distribute the findings relating to the  
42   petition pursuant to Section 62210.

**Comment.** Section 62375 continues former Fish and Game Code Section 2074.2(e)-(f) without substantive change.

## **§ 62380. Notice of acceptance**

62380. If a petition is accepted by the commission for consideration, all reasonable attempts shall be made to notify affected and interested parties and to solicit data and comments on the petitioned action from as many persons as is practicable. In addition to commission efforts to provide notification through distribution of the commission agenda and minutes pursuant to Section 62210, the department shall immediately undertake efforts to notify affected and interested parties. Methods of notification may include, but are not limited to, correspondence, newspaper notices, and press releases, and notification shall include notice to owners of that land that may provide habitat essential to the continued existence of the species, unless the director determines that ownership is so widespread, fragmented, or complex as to make individual notice impractical.

**Comment.** Section 62380 continues former Fish and Game Code Section 2074.4 without substantive change.

### Article 3. Department Review

## **§ 62400. Review**

62400. If the Commission accepts a petition for consideration, the department shall promptly commence a review of the status of the species concerned in the petition.

**Comment.** Section 62400 restates the first sentence of former Fish and Game Code Section 2074.6 without substantive change.

**☒ Staff Note.** The first clause of proposed Section 62400 was added to clarify the application of the provision. The staff invites comment on whether that addition would cause any problems.

## **§ 62405. Timing**

62405. (a) Within 12 months of the date of publication of a notice of acceptance of a petition for consideration pursuant to paragraph (2) of subdivision (a) of Section 62375, the department shall produce and make publicly available on the department's Internet Web site a final written report.

(b) The revised report shall be posted on the department's Internet Web site for a minimum of 30 days for public review prior to the hearing scheduled pursuant to Section 62450.

(c) The commission may grant an extension of up to six months if the director determines an extension is necessary to complete independent peer review of the report, and to provide a minimum of 30 days for public review of the peer reviewed report prior to the public hearing specified in Section 62450.

1       **Comment.** Subdivision (a) of Section 62405 continues the first part of the second sentence of  
2 former Fish and Game Code Section 2074.6 without substantive change.

3       Subdivision (b) continues the fourth sentence of former Fish and Game Code Section 2074.6  
4 without substantive change.

5       Subdivision (c) continues the fifth sentence of former Fish and Game Code Section 2074.6  
6 without substantive change.

7       **§ 62410. Draft status review report**

8       62410. Prior to releasing a final written report, the department shall have a draft  
9 status review report prepared and independently peer reviewed. Upon receiving  
10 the peer reviewers' input, the department shall evaluate and respond in writing to  
11 the independent peer review and shall amend the draft status review report as  
12 appropriate.

13      **Comment.** Section 62410 continues the third sentence of former Fish and Game Code Section  
14 2074.6 without substantive change.

15      **§ 62415. Final report**

16      62415. The final report, which shall be based on the best scientific information  
17 available to the department, shall indicate whether the petitioned action is  
18 warranted, make a preliminary identification of the habitat that may be essential to  
19 the continued existence of the species, recommend management activities, and  
20 make other recommendations for recovery of the species.

21      **Comment.** Section 62415 restates the second part of the second sentence of former Fish and  
22 Game Code Section 2074.6 without substantive change.

23      **§ 62420. Scope of inquiry**

24      62420. This title does not impose any duty or obligation for, or otherwise  
25 require, the commission or the department to undertake independent studies or  
26 other assessments of any species when reviewing a petition and its attendant  
27 documents and comments. However, the department shall seek independent  
28 scientific peer review of the department's draft status review report. The director  
29 may approve an extension of time for completion of the status report if necessary  
30 for the purposes of obtaining independent peer review pursuant to this article.

31      **Comment.** Section 62420 continues former Fish and Game Code Section 2074.8 without  
32 substantive change.

33      **☒ Staff Notes.** (1) The second sentence of existing Section 2074.8 requires that the  
34 department's "status report" be peer reviewed. Presumably, this refers to the "draft status review  
35 report" required by existing Section 2074.6 (proposed Section 62410). If so, that language is  
36 redundant, as Section 2074.6 already requires that the draft status review report be peer reviewed.  
37 **The staff invites comment on whether that language can be deleted without causing**  
38 **problems.**

39      (2) The second sentence of existing Section 2074.8 provides that the director may extend the time  
40 for completion of the "status report." Presumably, this refers to the *final* report required by  
41 existing Section 2074.6 (proposed Section 62405), because there is no deadline specified for  
42 completion of the *draft* status review report. That rule seems to be at odds with the last sentence

of existing Section 2074.6 (proposed Section 62405(c)), which authorizes the Commission to grant an extension to the deadline for completion of the final report. **The staff invites comment on whether both the director and the Commission are authorized to extend the time for completion of the final report.**

## Article 4. Commission Decision

## **§ 62450. Meeting**

62450. The commission shall schedule the petition for final consideration at its next available meeting after receipt of the departmental report provided pursuant to Section 62405 and shall distribute the pending agenda for that meeting pursuant to Section 62210. The commission shall make the department's report, or copies thereof, which was provided, pursuant to Section 62405, available for review upon request.

**Comment.** Section 62450 continues former Fish and Game Code Section 2075 without substantive change.

## **§ 62455. Public hearing**

62455. At the meeting scheduled pursuant to Section 62450, the commission shall hold a public hearing on the petition and shall receive information, written or otherwise, and oral testimony.

**Comment.** Section 62455 continues the first sentence of former Fish and Game Code Section 2075.5(a) without substantive change.

## **§ 62460. Closure of public hearing and record**

62460. (a) After the conclusion of oral testimony from the commission and department staff, the petitioner, or any other persons, the commission may close the public hearing and the administrative record for the commission's decision pursuant to this section.

(b) After the commission closes the public hearing, the administrative record for the commission's decision is closed and it shall not be reopened except as provided in Section 62465.

(c) Once the public hearing is closed, a person shall not submit further information to the commission for consideration on that petition and the commission shall not accept any further information for consideration on that petition except as provided in Section 62465.

**Comment.** Subdivision (a) of Section 62460 continues the second sentence of former Fish and Game Code Section 2075.5(a) without substantive change.

Subdivisions (b) and (c) continue former Fish and Game Code Section 2075.5(b) without substantive change.

1      **§ 62465. Reopening administrative record**

2      62465. The administrative record for the commission's decision pursuant to  
3      Section 62475 shall not be reopened once the commission closes the public  
4      hearing unless one of the following occurs prior to the commission's decision:

5      (a) There is a change in state or federal law or regulation that has a direct and  
6      significant impact on the commission's determination as to whether the petitioned  
7      action is warranted.

8      (b) The commission determines that it requires further information to evaluate  
9      whether the petitioned action is warranted. If the commission makes that  
10     determination during its deliberation, the commission may request, on the record  
11     at the scheduled meeting or at a continued meeting, further information on any  
12     issue relevant to making its determination as to whether the petitioned action is  
13     warranted. Any request by the commission pursuant to this subdivision shall  
14     specify a date by which the information must be submitted to the commission and  
15     shall serve to reopen the administrative record for the limited purpose of receiving  
16     further information relating to the issues specified by the commission in the  
17     request. Commission and department staff, the petitioner, or any other person may  
18     submit information in response to a request pursuant to this subdivision.

19     **Comment.** Section 62465 continues former Fish and Game Code Section 2075.5(c) without  
20     substantive change.

21      **§ 62470. Continuation of meeting**

22      62470. (a) In its discretion, the commission may continue a meeting on a  
23      petition to a later date, which shall be no later than 90 days after the meeting  
24      scheduled pursuant to Section 62450, and subject to applicable notice and agenda  
25      requirements.

26      (b) If the public hearing has not yet closed, the meeting shall be continued for  
27      further public hearing and then deliberations.

28      (c) If the public hearing has been closed, the meeting will be continued for the  
29      purpose of deliberation, without further public hearing. In this case, a person shall  
30      not submit, and the commission shall not receive, further information relating to  
31      the petition except as provided in Section 62465.

32     **Comment.** Section 62470 continues former Fish and Game Code Section 2075.5(d) without  
33     substantive change.

34     **☞ Staff Note.** Proposed Section 62470 would restate existing Section 2075.5(d) to improve its  
35     clarity, without changing its substantive effect. The existing provision reads as follows:

36     “The commission, in its discretion, may either close the public hearing and continue the  
37     meeting on the petition for the purpose of deliberation or continue both the public hearing and the  
38     meeting on the petition to a subsequent date which is no later than 90 days after the meeting  
39     scheduled pursuant to Section 2075, and subject to applicable notice and agenda requirements. If  
40     the commission closes the public hearing but continues the meeting for the purpose of  
41     deliberation, a person shall not submit, and the commission shall not receive, further information  
42     relating to the petition except as provided in subdivision (c).”

1   **The staff invites comment on whether that restatement would cause any problems.**

2   **§ 62475. Commission findings**

3   62475. At the meeting scheduled pursuant to Section 62450, or at a continued  
4   meeting scheduled pursuant to Section 62470, the commission shall make one of  
5   the following findings:

6   (a) The petitioned action is not warranted, in which case the finding shall be  
7   entered in the public records of the commission and the petitioned species shall be  
8   removed from the list of candidate species maintained pursuant to Section 62375.

9   (b) The petitioned action is warranted, in which case the commission shall  
10   publish a notice of that finding and a notice of proposed rulemaking pursuant to  
11   Section 11346.4 of the Government Code, to add the species to, or remove the  
12   species from, the list of endangered species or the list of threatened species.  
13   Further proceedings of the commission on the petitioned action shall be made in  
14   accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of  
15   Division 3 of Title 2 of the Government Code.

16   **Comment.** Section 62475 continues former Fish and Game Code Section 2075.5(e) without  
17   substantive change.

18   **§ 62480. Writ of mandate**

19   62480. A finding made pursuant to Section 62475 is subject to judicial review  
20   under Section 1094.5 of the Code of Civil Procedure.

21   **Comment.** Section 62480 continues former Fish and Game Code Section 2076 without  
22   substantive change.

23   **☒ Staff Note.** Existing Section 2076 provides for mandamus review of “any finding pursuant to  
24   this section.” That reference to “this section” appears to be an error, as Section 2076 does not  
25   provide for any findings. The staff believes that Section 2076 was intended to refer to the  
26   preceding provision, Section 2075.5. That would make sense, as Section 2075.5(e) provides for a  
27   final commission decision on whether to list a species as endangered or threatened. Proposed  
28   Section 62480 has been revised to refer to proposed Section 62475, which would continue  
29   existing Section 2075.5(e). **The staff invites comment on whether that revision correctly**  
30   **captures the intended meaning of Section 2076.**

31   **§ 62485. Emergency regulation**

32   62485. (a) Notwithstanding Sections 62250 to 62475, inclusive, the commission  
33   may adopt a regulation that adds a species to the list of endangered species or to  
34   the list of threatened species as an emergency regulation pursuant to **Chapter 3.5**  
35   (**commencing with Section 399**) of **Division 1** if the commission finds that there  
36   is any emergency posing a significant threat to the continued existence of the  
37   species.

38   (b) The commission shall notify affected or interested persons of the adoption of  
39   the emergency regulation pursuant to the methods described in Section 62380.

40   **Comment.** Section 62485 continues former Fish and Game Code Section 2076.5 without  
41   substantive change.

1                   Article 5. Ongoing Review

2                   **§ 62500. Five-year review of listed species**

3         62500. (a) The department shall review species listed as an endangered species  
4         or as a threatened species every five years to determine if the conditions that led to  
5         the original listing are still present.

6         (b) The review shall be conducted based on information that is consistent with  
7         the information specified in Section 62260 and that is the best scientific  
8         information available to the department.

9         (c) The review shall include a review of the identification of the habitat that may  
10        be essential to the continued existence of the species and the department's  
11        recommendations for management activities and other recommendations for  
12        recovery of the species.

13        (d) The department shall notify any person who has notified the commission, in  
14        writing with their address, of their interest, and the department may notify any  
15        other person.

16        **Comment.** Section 62500 continues former Fish and Game Code Section 2077(a) without  
17        substantive change.

18                   **§ 62505. Five-year review of species listed by both Commission and US Department of  
19                   Interior**

20        62505. Review of species that are listed by both the commission and the United  
21        States Department of Interior will be conducted in conjunction with the five-year  
22        review process of the United States Department of Interior.

23        **Comment.** Section 62505 continues former Fish and Game Code Section 2077(b) without  
24        substantive change.

25                   **§ 62510. Timing of initial five-year review**

26        62510. (a) Initial review of those species listed by the commission before  
27        January 1, 1982, that are not listed by the federal government shall be undertaken  
28        and completed by July 1, 1987.

29        (b) Initial review of those species listed by the commission after January 1,  
30        1982, that are not listed by the federal government shall be undertaken and  
31        completed within five years of the date the species was originally listed by the  
32        commission.

33        **Comment.** Section 62510 continues former Fish and Game Code Section 2077(c) without  
34        substantive change.

35                   **§ 62515. Written report of five-year review results**

36        62515. (a) The department shall report in writing to the commission the results  
37        of its five-year review for each listed species.

38        (b) The commission shall treat any report of the department under this section  
39        that contains a recommendation to add a species to, or remove a species from, the

1 list of endangered species or the list of threatened species as a department  
2 recommendation submitted pursuant to Section 62275.

3      **Comment.** Section 62515 continues former Fish and Game Code Section 2077(e) without  
4 substantive change.

5      **§ 62520. Discretionary review**

6      62520. Notwithstanding any other provision of this article, the commission or  
7 the department may review a species at any time based upon a petition or upon  
8 other data available to the department and the commission.

9      **Comment.** Section 62520 continues former Fish and Game Code Section 2077(d) without  
10 substantive change.

11     **§ 62525. Triennial report**

12     62525. (a) The department shall, by January 30 of every third year, beginning  
13 January 30, 1986, prepare a report summarizing the status of all state listed  
14 endangered, threatened, and candidate species, and shall post the report on the  
15 commission's Internet Web site.

16     (b) The report shall include, but not be limited to, a listing of those species  
17 designated as endangered, threatened, and candidate species, a discussion of the  
18 current status of endangered, threatened, or candidate species, and the timeframes  
19 for the review of listed species pursuant to this title.

20     **Comment.** Section 62525 continues former Fish and Game Code Section 2079 without  
21 substantive change.

22                    **TITLE 3. TAKE, IMPORTATION,**  
23                    **EXPORTATION, OR SALE**

24                    **CHAPTER 1. PROHIBITION**

25     **§ 62600. Take, possession, purchase, or sale**

26     62600. No person shall import into this state, export out of this state, or take,  
27 possess, purchase, or sell within this state, any species, or any part or product  
28 thereof, that the commission determines to be an endangered species or a  
29 threatened species, or attempt any of those acts, except as otherwise provided in  
30 this part, the **Native Plant Protection Act (Chapter 10 (commencing with**  
31 **Section 1900) of this code)**, or the California Desert Native Plants Act (Division  
32 23 (commencing with Section 80001) of the Food and Agricultural Code).

33     **Comment.** Section 62600 continues former Fish and Game Code Section 2080 without  
34 substantive change.

1      **§ 62605. Candidate species**

2      62605. The provisions of this title shall apply to any species designated as a  
3      candidate species under Section 62375 if notice has been given pursuant to Section  
4      62380.

5      **Comment.** Section 62605 continues former Fish and Game Code Section 2085 without  
6      substantive change.

7                    **CHAPTER 2. GENERAL EXCEPTIONS**

8      **§ 62650. Take for scientific, educational, or management purposes**

9      62650. The department may authorize acts that are otherwise prohibited  
10     pursuant to Section 62600, through permits or memorandums of understanding,  
11     the department may authorize individuals, public agencies, universities, zoological  
12     gardens, and scientific or educational institutions, to import, export, take, or  
13     possess any endangered species, threatened species, or candidate species for  
14     scientific, educational, or management purposes.

15     **Comment.** Section 62650 continues former Fish and Game Code Section 2081(a) without  
16     substantive change.

17     **§ 62655. Take of fish authorized by specified provisions**

18     62655. This part does not apply to the taking of fish otherwise authorized  
19     pursuant to **Part 3 (commencing with Section 7600) of Division 6**.

20     **Comment.** Section 62655 continues the first clause of former Fish and Game Code Section  
21     2083 without substantive change.

22     **§ 62665. Take of fish authorized by Commission**

23     62665. The commission may authorize, subject to terms and conditions it  
24     prescribes, the taking of any candidate species, or the taking of any fish by hook  
25     and line for sport that is listed as an endangered, threatened, or candidate species.

26     **Comment.** Section 62665 continues former Fish and Game Code Section 2084 without  
27     substantive change.

28     **§ 62670. Take authorized by department**

29     62670. (a) Nothing in this part or in any other provision of law prohibits the  
30     taking or the incidental taking of any endangered, threatened, or candidate species  
31     if the taking was authorized by the department through a permit or memorandum  
32     of understanding, or in a natural communities conservation plan, habitat  
33     conservation plan, habitat management plan, or other plan or agreement approved  
34     by or entered into by the department, or in an amendment to a permit,  
35     memorandum of understanding, plan, or agreement and all of the following  
36     conditions are met:

37        (1) The application process commenced on or before April 10, 1997.

1       (2) The department approved the permit, memorandum of understanding, plan,  
2 agreement, or amendment thereto within either of the following timeframes:

3           (A) On or before April 10, 1997.

4           (B) Between April 10, 1997, and January 1, 1998, and the department also  
5 certifies that the permit, memorandum of understanding, plan, agreement, or  
6 amendment thereto meets the substantive criteria of subdivision (a) of Section  
7 62700.

8           (b) The permits, memoranda of understanding, plan, agreements, and  
9 amendments thereto described in this section are deemed to be in full force and  
10 effect, as of the date approved or entered into by the parties insofar as they  
11 authorize the take of species.

12          (c) This section does not apply to the “Emergency Management Measures  
13 Permit” issued by the department on March 15, 1995.

14       **Comment.** Section 62670 continues former Fish and Game Code Section 2081.1 without  
15 substantive change.

16       **§ 62675. Sale of organism by person who possessed it before it was listed**

17       62675. This part does not prohibit the sale of any endangered species or  
18 threatened species, or any part or product thereof, when the owner can  
19 demonstrate that the species, or part or product thereof, was in the person’s  
20 possession before the date upon which the commission listed the species as an  
21 endangered species or threatened species or as an endangered animal or rare  
22 animal prior to January 1, 1985, and shall not prohibit the sale of that part or  
23 product by an individual not normally engaged in that sale if it was originally  
24 possessed by the seller for the seller’s own use and so used by that seller.  
25 However, it shall be unlawful to sell any species, or part or product thereof, if that  
26 sale would have been unlawful prior to the date upon which the commission added  
27 the species to the listing of endangered species or threatened species or to the  
28 listing of endangered animals or rare animals prior to January 1, 1985.

29       **Comment.** Section 62675 continues former Fish and Game Code Section 2082 without  
30 substantive change.

31       **§ 62680. Possession of animal possessed before it was listed**

32       62680. This part does not apply to the possession of individual animals that were  
33 lawfully possessed before the commission listed the species as an endangered  
34 species or as a threatened species or as an endangered animal or rare animal prior  
35 to January 1, 1985.

36       **Comment.** Section 62680 continues the second clause of former Fish and Game Code Section  
37 2083 without substantive change.

1

## CHAPTER 3. INCIDENTAL TAKE

2     **§ 62700. Incidental take**

3     62700. (a) The department may authorize acts that are otherwise prohibited  
4     pursuant to Section 62600, by a permit for the take of endangered species,  
5     threatened species, and candidate species if all of the following conditions are met:

6       (1) The take is incidental to an otherwise lawful activity.

7       (2) The impacts of the authorized take shall be minimized and fully mitigated.  
8     The measures required to meet this obligation shall be roughly proportional in  
9     extent to the impact of the authorized taking on the species. Where various  
10    measures are available to meet this obligation, the measures required shall  
11    maintain the applicant's objectives to the greatest extent possible. All required  
12    measures shall be capable of successful implementation. For purposes of this  
13    section only, impacts of taking include all impacts on the species that result from  
14    any act that would cause the proposed taking.

15      (3) The permit is consistent with any regulations adopted pursuant to former  
16    Fish and Game Code Sections 2112 and 2114, as added by Chapter 974 of the  
17    Statutes of 1996.

18      (4) The applicant shall ensure adequate funding to implement the measures  
19    required by paragraph (2), and for monitoring compliance with, and effectiveness  
20    of, those measures.

21      (b) No permit may be issued pursuant to subdivision (a) if issuance of the permit  
22    would jeopardize the continued existence of the species. The department shall  
23    make this determination based on the best scientific and other information that is  
24    reasonably available, and shall include consideration of the species' capability to  
25    survive and reproduce, and any adverse impacts of the taking on those abilities in  
26    light of (1) known population trends; (2) known threats to the species; and (3)  
27    reasonably foreseeable impacts on the species from other related projects and  
28    activities.

29      (c) The department shall adopt regulations to aid in the implementation of  
30    subdivision (a) and the requirements of Division 13 (commencing with Section  
31    21000) of the Public Resources Code, with respect to authorization of take. The  
32    department may seek certification pursuant to Section 21080.5 of the Public  
33    Resources Code to implement subdivision (a).

34      **Comment.** Section 62700 continues former Fish and Game Code Section 2081(b)-(d) without  
35    substantive change.

36      **☞ Staff Note.** Existing Section 2081(b)(3) refers to "regulations adopted pursuant to Sections  
37    2112 and 2114." Both of the referenced sections appear to have been repealed by the operation of  
38    former Section 2115.5. Proposed Section 62700(a)(3) would continue the effect of the cross-  
39    reference, by referring to the "former" provisions. **The staff invites comment on whether that is**  
40    **the correct way to address the reference to the repealed provisions.**

1      **§ 62705. Incidental take authorized by federal entity**

2      62705. (a) Notwithstanding any other provision of this part, or **Chapter 10**  
3      (**commencing with Section 1900**) or **Chapter 11 (commencing with Section**  
4      **1925) of Division 2**, but subject to subdivision (c), if any person obtains from the  
5      Secretary of the Interior or the Secretary of Commerce an incidental take  
6      statement pursuant to Section 1536 of Title 16 of the United States Code or an  
7      incidental take permit pursuant to Section 1539 of Title 16 of the United States  
8      Code that authorizes the taking of an endangered species or a threatened species  
9      that is listed pursuant to Section 1533 of Title 16 of the United States Code and  
10     that is an endangered species, threatened species, or a candidate species pursuant  
11     to this part, no further authorization or approval is necessary under this part for  
12     that person to take that endangered species, threatened species, or candidate  
13     species identified in, and in accordance with, the incidental take statement or  
14     incidental take permit, if that person does both of the following:

15     (1) Notifies the director in writing that the person has received an incidental take  
16     statement or an incidental take permit issued pursuant to the federal Endangered  
17     Species Act of 1973 (16 U.S.C.A. Sec. 1531 et seq.).

18     (2) Includes in the notice to the director a copy of the incidental take statement  
19     or incidental take permit.

20     (b) Upon receipt of the notice specified in paragraph (1) of subdivision (a), the  
21     director shall immediately have published in the General Public Interest Section of  
22     the California Regulatory Notice Register the receipt of that notice.

23     (c) Within 30 days after the director has received the notice described in  
24     subdivision (a) that an incidental take statement or an incidental take permit has  
25     been issued pursuant to the federal Endangered Species Act of 1973, the director  
26     shall determine whether the incidental take statement or incidental take permit is  
27     consistent with this part. If the director determines within that 30-day period,  
28     based upon substantial evidence, that the incidental take statement or incidental  
29     take permit is not consistent with this part, then the taking of that species may only  
30     be authorized pursuant to this part.

31     (d) The director shall immediately publish the determination pursuant to  
32     subdivision (c) in the General Public Interest Section of the California Regulatory  
33     Notice Register.

34     (e) Unless deleted or extended by a later enacted statute that is chaptered before  
35     the date this section is repealed, this section shall remain in effect only until, and is  
36     repealed on, the effective date of an amendment to Section 1536 or Section 1539  
37     of Title 16 of the United States Code that alters the requirements for issuing an  
38     incidental take statement or an incidental take permit, as applicable.

39     **Comment.** Section 62705 continues former Fish and Game Code Section 2080.1 without  
40     substantive change.

1                   **CHAPTER 4. RENEWABLE ENERGY**

2                   **Article 1. Definitions**

3                   **§ 63000. Application**

4         63000. The definitions in this article govern the construction of this chapter.

5         **Comment.** Section 63000 generalizes the introductory clause of former Fish and Game Code  
6         Section 2069(a) without substantive change.

7                   **§ 63005. Desert Renewable Energy Conservation Plan**

8         63005. “Desert Renewable Energy Conservation Plan” means the completed  
9         conservation plan in the Mojave and Colorado Desert regions adopted pursuant to  
10       the Natural Community Conservation Planning Act (Part 2 (commencing with  
11       Section 64500)), and covers the geographical area described in the Draft Planning  
12       Agreement, as amended by, and among, the department, Energy Commission,  
13       United States Bureau of Land Management, and United States Fish and Wildlife  
14       Service for the Desert Renewable Energy Conservation Plan.

15         **Comment.** Section 63005 continues former Fish and Game Code Section 2069(a)(1) without  
16       substantive change.

17                   **§ 63010. Eligible project**

18         63010. “Eligible project” means a solar thermal powerplant, photovoltaic  
19       powerplant, wind powerplant, or geothermal powerplant meeting the requirements  
20       of subdivision (a) or (b) of Section 63050 or meeting the definition of a “covered  
21       activity” in the final Desert Renewable Energy Conservation Plan, as approved by  
22       the department.

23         **Comment.** Section 63010 continues former Fish and Game Code Section 2099(a)(1) and part  
24       of the first sentence of Section 2099.5(a) without substantive change.

25                   **§ 63015. Energy Commission**

26         63015. “Energy Commission” means the State Energy Resources Conservation  
27       and Development Commission.

28         **Comment.** Section 63015 continues former Fish and Game Code Sections 2069(a)(2) and  
29       2099(a)(2) without substantive change.

30                   **Article 2. Mitigation**

31                   **§ 63050. Mitigation actions**

32         63050. The department, in consultation with the Energy Commission and, to the  
33       extent practicable, the United States Fish and Wildlife Service and the United  
34       States Bureau of Land Management, may design and implement actions, including  
35       the purchase of land and conservation easements, to protect, restore, or enhance  
36       the habitat of plants and wildlife that can be used to fully mitigate the impacts of

1 the take of endangered species, threatened species, or candidate species, for  
2 purposes of paragraph (2) of subdivision (a) of Section 62700 and Chapter 6  
3 (commencing with Section 25500) of Division 15 of the Public Resources Code,  
4 resulting from solar thermal, photovoltaic, wind, and geothermal powerplants in  
5 the Desert Renewable Energy Conservation Plan planning area that meet either of  
6 the following requirements:

7 (a) Either the Energy Commission determines that the application for  
8 certification is complete by December 31, 2011, or the lead agency for purposes of  
9 the California Environmental Quality Act (Division 13 (commencing with Section  
10 21000) of the Public Resources Code) has determined the project permit  
11 application is complete or has issued a notice of preparation of an environmental  
12 impact report by December 31, 2011.

13 (b) The developer or owner of the proposed powerplant or generation facility  
14 has applied for, and would qualify for, funding under the federal American  
15 Recovery and Reinvestment Act of 2009 (Public Law 111-5). For purposes of this  
16 subdivision, “funding” means a loan guarantee made pursuant to Section 406 of  
17 the act (42 U.S.C. Sec. 16516) or a grant for specified energy property in lieu of a  
18 tax credit provided pursuant to Section 1603 of Division B of the act, which  
19 Division is titled the American Recovery and Reinvestment Tax Act of 2009.

20 **Comment.** Section 63050 continues former Fish and Game Code Section 2069(b) without  
21 substantive change.

22 **§ 63055. Limitation on use of mitigation action**

23 63055. (a) A mitigation action may only be used for the mitigation purposes  
24 described in Section 63050 if it meets one of the following conditions:

25 (1) The department has implemented the mitigation action and determined that  
26 the action has resulted in the protection, restoration, or enhancement of the habitat  
27 of one or more species that are proposed to be covered by the Desert Renewable  
28 Energy Conservation Plan, and that are located in the planning area, and, based  
29 upon that determination, can be used, for purposes of subdivision (b) of Section  
30 63050, to fully mitigate for the impacts of the take of those species from one or  
31 more projects that meet the requirement of Section 63050.

32 (2) The mitigation action is included in an interim mitigation strategy for  
33 projects that meet the requirement of Section 63050.

34 (b) An interim mitigation strategy pursuant to paragraph (2) of subdivision (a)  
35 shall be developed by the department, in consultation with the Energy  
36 Commission and, to the extent practicable, the United States Fish and Wildlife  
37 Service and the United States Bureau of Land Management, and shall include all  
38 of the following:

39 (1) A description of specific mitigation areas and specific actions on public or  
40 private land within the Desert Renewable Energy Conservation Plan planning area  
41 that are to be implemented, including a focus on habitat preservation, while also  
42 including enhancement or restoration actions that will do all of the following:

1       (A) Contribute to the conservation of each candidate species, threatened species,  
2 or endangered species for which a permit is issued.

3       (B) Adopt a regional planning perspective that provides a foundation for, or that  
4 will complement, any conservation strategy to be developed for the Desert  
5 Renewable Energy Conservation Plan.

6       (C) Implement mitigation actions within a reasonable period of time relative to  
7 the impact to the affected candidate species, threatened species, or endangered  
8 species, including, where feasible, advance mitigation. For purposes of this clause,  
9 “advance mitigation” means mitigation implemented before, and in anticipation  
10 of, future impacts to natural resources.

11      (D) Include a description of the species that would be benefited by each  
12 mitigation action and how it would be benefited.

13      (E) A cost estimate for each action, whether on public or private land, using total  
14 cost accounting, including, as applicable, land acquisition costs, conservation  
15 easement costs, monitoring costs, transaction costs, restoration costs, the amount  
16 of a perpetual endowment account for land management or easement stewardship  
17 costs by the department or other management entity, and administrative costs.

18      **Comment.** Section 63055 continues former Fish and Game Code Section 2069(c) without  
19 substantive change.

20      **§ 63065. Interim mitigation strategy**

21      63065. (a) An interim mitigation strategy shall be based on best available  
22 science and shall be reviewed by the Desert Renewable Energy Conservation Plan  
23 independent science advisers.

24      (b) The department shall seek and consider comments from the Desert  
25 Renewable Energy Conservation Plan independent science advisers in the design  
26 and location of each mitigation action implemented pursuant to this article. If the  
27 department elects to not incorporate comments of the independent science advisers  
28 into mitigation actions, the department shall explain the reasons for that decision  
29 in writing.

30      (c) The interim mitigation strategy shall be completed by the department no later  
31 than 60 days following the operative date of the act that added former Fish and  
32 Game Code Section 2069.

33      **Comment.** Section 63065 continues former Fish and Game Code Section 2069(d)-(e) without  
34 substantive change.

35      **§ 63070. Effect on specified requirements**

36      63070. This article does not modify the requirements of Section 62700,  
37 including the requirement to avoid and minimize impacts, where feasible, or the  
38 requirements of Division 13 (commencing with Section 21000) of, or Chapter 6  
39 (commencing with Section 25500) of Division 15 of, the Public Resources Code,  
40 or affect the existing authority of the department to authorize mitigation actions to  
41 comply with this part.

1      **Comment.** Section 63070 continues former Fish and Game Code Section 2069(f)(1) without  
2      substantive change.

3      **§ 63075. Limitations on specified applicants**

4      63075. (a) With respect to an applicant described in subdivision (c), the sole  
5      effect of a mitigation action described in Section 63055, and paid for through the  
6      deposit of fees as described in Article 3 (commencing with Section 63100), is to  
7      relieve the applicant of the obligation to directly take actions that are taken instead  
8      by the department or its contractor or designee pursuant to Section 63050 to meet  
9      the applicant's obligations with respect to mitigating the powerplant's impacts to  
10     species and habitat.

11     (b) The mitigation action and deposit of fees shall not relieve the applicant of  
12     any other obligation. Nor shall it relieve the Energy Commission or the lead  
13     agency of any existing requirements to analyze, avoid, minimize, or mitigate  
14     impacts to species and habitat, or make specified findings under Division 13  
15     (commencing with Section 21000) of, or Chapter 6 (commencing with Section  
16     25500) of Division 15 of, the Public Resources Code.

17     (c) This section applies to the following entities and applicants:

18     (1) With respect to the Energy Commission, an applicant seeking certification  
19     for a solar thermal or geothermal powerplant pursuant to Chapter 6 (commencing  
20     with Section 25500) of Division 15 of the Public Resources Code.

21     (2) With respect to a lead agency, as defined in Section 21067 of the Public  
22     Resources Code, in the case of an applicant seeking approval of a renewable  
23     energy powerplant not subject to the Energy Commission's jurisdiction.

24     **Comment.** Section 63075 restates former Fish and Game Code Section 2069(f)(2) without  
25     substantive change.

26      **Staff Note.** Proposed Section 63075 would restate existing Section 2069(f)(2) to improve its  
27     clarity, without changing its substantive effect. The existing provision reads as follows:

28     "With respect to the Energy Commission, in the case of an applicant seeking certification for a  
29     solar thermal or geothermal powerplant pursuant to Chapter 6 (commencing with Section 25500)  
30     of Division 15 of the Public Resources Code, or a lead agency, as defined in Section 21067 of the  
31     Public Resources Code, in the case of an applicant seeking approval of a renewable energy  
32     powerplant not subject to the Energy Commission's jurisdiction, the sole effect of a mitigation  
33     action described in subdivision (c), and paid for through the deposit of fees as described in  
34     Section 2099, is to relieve an applicant of the obligation to directly take actions that are taken  
35     instead by the department or its contractor or designee pursuant to subdivision (b) to meet the  
36     applicant's obligations with respect to mitigating the powerplant's impacts to species and habitat.  
37     The mitigation action and deposit of fees shall not relieve the applicant of any other obligation, or  
38     the Energy Commission or the lead agency of any of its existing requirements of Division 13  
39     (commencing with Section 21000) of, or the requirements of Chapter 6 (commencing with  
40     Section 25500) of Division 15 of, the Public Resources Code to analyze, avoid, minimize, or  
41     mitigate impacts to species and habitat, or make the findings required by those statutes."

42     **The staff invites comment on whether that restatement would cause any problems.**

## **§ 63080. Incorporation of mitigation actions into Desert Renewable Energy Conservation Plan**

63080. The mitigation actions implemented pursuant to this article shall be incorporated into the Desert Renewable Energy Conservation Plan upon the finalization of the plan, to the extent the mitigation actions are consistent with the plan's conservation strategy.

**Comment.** Section 63080 continues former Fish and Game Code Section 2069(g) without substantive change.

### Article 3. Implementation

## **§ 63100. Funding**

63100. (a) The Renewable Energy Resources Development Fee Trust Fund is hereby established in the State Treasury.

(b) Upon direction by the department, the Controller shall create any accounts or subaccounts within the fund that the department determines are necessary or convenient to facilitate management of the fund.

(c) The department shall collect a fee from the owner or developer of an eligible project that elects to use mitigation actions developed and approved by the department pursuant to Article 2 (commencing with Section 63050), and all moneys received for purposes of mitigation actions pursuant to Article 2 (commencing with Section 63050) shall be deposited in the fund and shall be held in trust and be expended solely for the purposes of, and in conformity with, that article, applicable permit or certification requirements for eligible projects, and any contractual agreement between the Energy Commission or department and the owner or developer of an eligible project.

(d) The fund shall serve, and be managed, as an optional, voluntary method for developers or owners of eligible projects to deposit fees to complete mitigation actions meeting the conditions of Section 63055 and for the purpose of meeting the requirements of this part or the requirements of Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code by funding mitigation actions implemented by the department or third parties in a contractual relationship with the department. Notwithstanding Section 13340 of the Government Code, the money in the fund is hereby continuously appropriated to the department, without regard to fiscal years, for the purposes enumerated in this article and Article 2 (commencing with Section 63050). An expenditure shall not be made from the fund except as authorized by the department.

(e) A developer or owner of an eligible project that elects to use mitigation actions developed and authorized by the department pursuant to Article 2 (commencing with Section 63050) shall remit fees to the department for deposit into the fund for those mitigation actions in an amount that reflects the determination by the Energy Commission, with respect to a solar thermal or geothermal powerplant subject to its jurisdiction, or the department, with respect

1 to a renewable energy powerplant not subject to the Energy Commission's  
2 jurisdiction, of the costs attributable to the mitigation actions that meet the  
3 standards of this part. The amount of fees to be paid by a developer or owner of an  
4 eligible project to meet the standards of this part shall be calculated on a per acre  
5 basis, using total cost accounting, and shall include, as applicable, land acquisition  
6 or conservation easement costs, monitoring costs, restoration costs, transaction  
7 costs, the amount of a perpetual endowment account for land management or  
8 easement stewardship costs by the department or other management entity, and  
9 administrative costs and funds sufficient to repay any expenditure of state funds  
10 made pursuant to subdivision (f). To ensure the funds deposited pursuant to this  
11 article are sufficient to meet the standards of this part, the project developer or  
12 owner, in addition to payment of those funds, shall provide security, in a form and  
13 amount, not to exceed 5 percent of the amount of the funds, excluding any portion  
14 of the funds to be used for a perpetual endowment, to be determined by the Energy  
15 Commission, with respect to a solar thermal or geothermal powerplant subject to  
16 its jurisdiction, or to be determined by the department, with respect to a renewable  
17 energy powerplant not subject to the Energy Commission's jurisdiction.

18 (f) The sum of ten million dollars (\$10,000,000) previously transferred, as a  
19 loan, from the Renewable Resource Trust Fund to the fund shall be repaid from  
20 the fund to the Renewable Resource Trust Fund no later than December 31, 2013.  
21 The department shall use these funds, pursuant to paragraph (1) of subdivision (a)  
22 of Section 63055, to purchase mitigation lands or conservation easements, and to  
23 cover related restoration, monitoring, and transaction costs incurred in advance of  
24 the receipt of fees pursuant to paragraph (5) and to cover the department's  
25 administrative costs for the program.

26 (g) The department may contract with, or award grants to, third parties to  
27 implement mitigation actions in conformity with Article 2 (commencing with  
28 Section 63050) and this article.

29 **Comment.** Section 63100 continues former Fish and Game Code Section 2099(b) without  
30 substantive change.

31 **§ 63105. Monitoring use of funds**

32 63105. (a) The department shall monitor the implementation of the mitigation  
33 actions and the progress of the construction of the eligible projects.

34 (b) The department shall report all deposits, and the source of those deposits, on  
35 its Internet Web site. The department shall also report all expenditures from the  
36 fund on its Internet Web site and identify the mitigation activities or programs that  
37 each expenditure funded and its relationship to the permitted project.

38 (c) The Energy Commission, with respect to a solar thermal or geothermal  
39 powerplant subject to its jurisdiction, and the department, with respect to a  
40 renewable energy powerplant not subject to the Energy Commission's jurisdiction,  
41 shall ensure that moneys paid pursuant to this article are used only for purposes of  
42 satisfying the standards of subdivision (b) of Section 62700.

1       (d) Where moneys are used to fund mitigation actions, including the acquisition  
2       of lands or conservation easements, or the restoration of lands, that use shall be in  
3       addition to, and not duplicative of, mitigation obtained through any other means.

4       **Comment.** Section 63105 continues former Fish and Game Code Section 2099(c) without  
5       substantive change.

6       **§ 63110. Limitation on use of interim mitigation strategy**

7       63110. (a) The department and the Energy Commission shall not allow any use  
8       of the interim mitigation strategy subsequent to a determination by the department  
9       that the time and extent of mitigation actions are not being implemented in rough  
10      proportion to the impacts of those projects.

11      (b) The department shall reinstitute the use of the interim mitigation strategy  
12      when the department determines the rough proportionality between mitigation  
13      actions and impacts of eligible projects has been reestablished by the completion  
14      of additional mitigation actions.

15      **Comment.** Section 63110 continues former Fish and Game Code Section 2099(d) without  
16      substantive change.

17       **§ 63115. Permit application fee**

18       63115. (a) The department shall collect a permit application fee from the owner  
19       or developer of an eligible project to support its permitting of eligible projects  
20       pursuant to this part. The owner or developer of a proposed eligible project shall  
21       pay a one-time permit application fee of seventy-five thousand dollars (\$75,000)  
22       to the department.

23       (b) The department shall collect the permit application fee, at the time the owner  
24       or developer submits its permit application or, for eligible projects for which an  
25       application has already been submitted, within 30 days of March 22, 2010. The  
26       department shall utilize the permit application fee to pay for all or a portion of the  
27       department's cost of processing incidental take permit applications pursuant to  
28       subdivision (a) of Section 62700 and Section 62705. If the permit application fee  
29       is insufficient to complete permitting work due to the complexity of a project or  
30       timeline delays, the department may collect an additional fee from the owner or  
31       developer to pay for its actual costs, not to exceed an additional seventy-five  
32       thousand dollars (\$75,000).

33       (c) For an eligible project seeking site certification, pursuant to Chapter 6  
34       (commencing with Section 25500) of Division 15 of the Public Resources Code,  
35       by the Energy Commission, the owner or developer shall pay the permit  
36       application fee directly to the department. The permit application fee paid to the  
37       department shall fund the department's participation in the Energy Commission's  
38       site certification process as the state's trustee for natural resources. The permit  
39       application fee shall be in addition to any application fees collected directly by the  
40       Energy Commission. The permit application fee shall be due and payable within  
41       30 days of March 22, 2010.

(d) Permit application fees paid pursuant to this part shall be deposited in the Fish and Game Preservation Fund and shall be eligible for expenditure by the department pursuant to subdivision (a) of Section 62700 and Section 62705.

(e) The sum of one million six hundred fifty thousand dollars (\$1,650,000) is hereby appropriated to the department from the Fish and Game Preservation Fund for the purposes of this section. These funds shall be available for expenditure through June 30, 2011.

(f) If an owner or developer withdraws a project within 30 days after paying the permit application fee, the department shall refund any unused portion of the fee to the owner or developer.

**Comment.** Together with Section 63010, Section 63115 continues former Fish and Game Code Section 2099.5 without substantive change.

**☒ Staff Notes.** (1) Existing Section 2099.5 twice refers to “the operative date of this section.” In proposed Section 63115, that phrase has been replaced with the apparent effective date of the section (as reported on the Legislative Counsel’s website), March 22, 2010. **The staff invites comment on whether that is a proper substitution or, alternatively, whether the provisions that include that reference are obsolete and can be deleted.**

(2) Existing Section 2099.5(c) refers to "Chapter 6 (commencing with Section 25500) of Division 1 of the Public Resources Code." That appears to be an error. Section 25500 is part of Division 15 of the Public Resources Code, not Division 1. Proposed Section 63115 corrects the error.

**☒ Staff Note.** Existing Section 2099.20 appears to be obsolete. It provides an application procedure to implement a provision that was repealed by its own terms on January 1, 2016, former Section 2099.10. For that reason, Section 2099.20 is not continued in this draft. **The staff invites comment on whether that would cause any problems.**

## CHAPTER 5. SURFACE MINING

## **§ 63200. Application of chapter**

63200. This chapter applies to an ongoing surface mining operation that meets all of the following criteria:

(a) It has been issued a permit pursuant to Section 2770 of the Public Resources Code by the lead agency, as defined in Section 2728 of the Public Resources Code.

(b) It is in compliance with the permit with regard to matters relating to plants.

(c) It is in compliance with any memorandum of understanding with the department for any of the purposes specified in Section 62700.

**Comment.** Section 63200 restates the introductory clause of former Fish and Game Code Section 2081.5 without substantive change.

1      **§ 63205. Limitation on criminal liability**

2      63205. The surface mining operator is not liable for criminal prosecution  
3      pursuant to this code for any take of a threatened or endangered plant species that  
4      is incidental to the surface mining operation.

5      **Comment.** Section 63205 continues former Fish and Game Code Section 2081.5(a) without  
6      substantive change.

7      **§ 63210. Newly listed or discovered plant species**

8      63210. (a) If a plant species that exists on the private property of the surface  
9      mining operator is added to the list of threatened species or endangered species  
10     pursuant to this part after the date that the operator was issued the permit, or if a  
11     plant species on the list of threatened species or endangered species adopted  
12     pursuant to this part is newly discovered on the private property of the operator  
13     after that date, the department shall notify the operator by mail within 14 days of  
14     the addition to the list or knowledge of the new discovery by the department.

15     (b) Within 30 days from the date of the notification, the department shall meet  
16     with the operator to discuss an interim and permanent plan for the protection of the  
17     newly added or newly discovered plant species.

18     (c) Within 60 days of the initial meeting with the operator, the department shall  
19     issue reasonable and feasible interim management measures required to protect the  
20     newly added or newly discovered plant species that take into account the  
21     economic impact on the surface mining operation.

22     (d) The department shall work with the operator to develop and finalize a  
23     reasonable memorandum of understanding for one of the purposes specified in  
24     Section 62700 for the protection of the newly added or newly discovered plant  
25     species as expeditiously as possible.

26     (e) Both the interim management measures and the final memorandum of  
27     understanding shall, to the extent feasible, avoid interference with ongoing surface  
28     mining operations.

29     (f) The department shall send a copy of the final memorandum of understanding  
30     to the lead agency that issued the permit to the operator for the lead agency's  
31     information.

32     (g) The surface mining operator shall pay a fee to the department in the amount  
33     the department determines is necessary to pay the department's actual costs  
34     incurred in preparing interim management measures and developing and finalizing  
35     a memorandum of understanding for the protection of the newly added or newly  
36     discovered plant species. The fees shall be deposited in the Endangered and Rare  
37     Fish, Wildlife, and Plant Species Conservation and Enhancement Account in the  
38     Fish and Game Preservation Fund and, notwithstanding Section 13340 of the  
39     Government Code, are continuously appropriated to the department for purposes  
40     of implementing this chapter.

41      **Comment.** Section 63210 continues former Fish and Game Code Section 2081.5(b)-(c)  
42      without substantive change.

1                   **CHAPTER 6. SPECIFIC EXCEPTIONS**

2                   **Article 1. Quantification Settlement Agreement**

3                   **§ 63300. Take from specified effects of implementation of agreement**

4         63300. Notwithstanding **Sections 3511, 4700, 5050, and 5515**, and contingent  
5         upon the fulfillment of the conditions listed in Section 63305, the department may  
6         authorize, under this part or Title 1 (commencing with Section 64500) of Part 2,  
7         the take of species resulting from impacts attributable to the implementation of the  
8         Quantification Settlement Agreement, as defined in subdivision (a) of Section 1 of  
9         Chapter 617 of the Statutes of 2002, on all of the following:

- 10         (a) The salinity, elevation, shoreline habitat, or water quality of the Salton Sea.  
11         (b) The quantity and quality of water flowing in the All American Canal, the  
12         Coachella Canal, the Imperial Valley and Coachella Valley drains, the New and  
13         Alamo Rivers, the Coachella Valley Stormwater Channel, and the habitat  
14         sustained by those flows.  
15         (c) Agricultural lands in the Imperial Valley.  
16         (d) The quantity and quality of water flowing in the Colorado River, the habitat  
17         sustained by those flows, and the collection of that water for delivery to authorized  
18         users.

19         **Comment.** Section 63300 restates former Fish and Game Code Section 2081.7(a) without  
20         substantive change.

21                   **§ 63305. Application of Section 63300**

22         63305. Section 63300 only applies if all of the following conditions are fulfilled:

23         (a) The Quantification Settlement Agreement is executed by the appropriate  
24         parties on or before October 12, 2003.

25         (b) The department has determined that the appropriate agreements have been  
26         executed to address environmental impacts at the Salton Sea that include  
27         enforceable commitments requiring all of the following:

28                 (1) Imperial Irrigation District to transfer 800,000 acre-feet of conserved water,  
29         by conservation methods selected by the Imperial Irrigation District, to the  
30         Department of Water Resources on a mutually agreed-upon schedule in exchange  
31         for payment of one hundred seventy-five dollars (\$175) per acre-foot. The price  
32         shall be adjusted for inflation on an annual basis.

33                 (2) Imperial Irrigation District to transfer up to 800,000 additional acre-feet of  
34         conserved water, by conservation methods selected by the Imperial Irrigation  
35         District, to the Department of Water Resources during the first 15 years of the  
36         Quantification Settlement Agreement on the schedule established for the  
37         mitigation water that was previously to be transferred to the San Diego Water  
38         Authority, or on a mutually agreed-upon schedule, at no cost for the water in  
39         addition to the payment for the water from the mitigation fund described in

1 paragraph (1) of subdivision (b) of Section 3 of Chapter 613 of the Statutes of  
2 2003.

3 (3) As a condition to acquisition of the water described in paragraph (1), the  
4 Department of Water Resources shall be responsible for any environmental  
5 impacts, including Salton Sea salinity, related to use or transfer of that water. As a  
6 condition to acquisition of the water described in paragraph (2), the Department of  
7 Water Resources shall be responsible for environmental impacts related to Salton  
8 Sea salinity that are related to the use or transfer of that water.

9 (4) The Metropolitan Water District of Southern California (MWD) to purchase  
10 up to 1.6 million acre-feet of the water provided in accordance with paragraphs (1)  
11 and (2) from the Department of Water Resources at a price of not less than two  
12 hundred fifty dollars (\$250) per acre-foot on a mutually agreed-upon schedule.  
13 The price shall be adjusted for inflation on an annual basis. The Department of  
14 Water Resources shall deposit all proceeds from the sale of water pursuant to this  
15 paragraph, after deducting costs and reasonable administrative expenses, into the  
16 Salton Sea Restoration Fund established in **Section 2932**.

17 (5) The Metropolitan Water District of Southern California to pay not less than  
18 twenty dollars (\$20) per acre-foot for all special surplus water received by MWD  
19 as a result of reinstatement of access to that water under the Interim Surplus  
20 Guidelines by the United States Department of Interior subtracting any water  
21 delivered to Arizona as a result of a shortage. The money shall be paid into the  
22 Salton Sea Restoration Fund. The price shall be adjusted for inflation on an annual  
23 basis. Metropolitan Water District of Southern California shall receive a credit  
24 against future mitigation obligations under the Lower Colorado River Multi-  
25 Species Conservation Plan for any funds provided under this paragraph to the  
26 extent that those funds are spent on projects that contribute to the conservation or  
27 mitigation for species identified in the Lower Colorado River Multi-Species  
28 Conservation Plan and that are consistent with the preferred alternative for Salton  
29 Sea restoration.

30 (6) Coachella Valley Water District, Imperial Irrigation District, and San Diego  
31 County Water Authority to pay a total of thirty million dollars (\$30,000,000) to  
32 the Salton Sea Restoration Fund as provided in paragraph (2) of subdivision (b) of  
33 Section 3 of Chapter 613 of the Statutes of 2003.

34 (c) The requirements of subdivision (a) and (b) of Section 62700 are satisfied as  
35 to the species for which take is authorized.

36 (d) The take authorization provides for the development and implementation, in  
37 cooperation with federal and state agencies, of an adaptive management process  
38 for monitoring the effectiveness of, and adjusting as necessary, the measures to  
39 minimize and fully mitigate the impacts of the authorized take. The adjusted  
40 measures are subject to Section 62015.

41 (e) The take authorization provides for the development and implementation in  
42 cooperation with state and federal agencies of an adaptive management process  
43 that substantially contributes to the long-term conservation of the species for

1 which take is authorized. Preparation of the adaptive management program and  
2 implementation of the program is the responsibility of the department. The  
3 department's obligation to prepare and implement the adaptive management  
4 program is conditioned upon the availability of funds pursuant to the Water  
5 Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002, if it is  
6 approved by the voters at the statewide general election to be held November 5,  
7 2002 (Proposition 50), or other funds that may be appropriated by the Legislature  
8 or approved by the voters for that purpose. The failure to appropriate funds does  
9 not relieve the applicant of the obligations of subdivisions (c) and (d). However,  
10 the applicant shall not be required to fund any program pursuant to this  
11 subdivision.

12 (f) The requirements of subdivision (c) may be satisfied if the take is authorized  
13 under this title.

14 **Comment.** Section 63305 restates former Fish and Game Code Section 2081.7(b)-(d) without  
15 substantive change.

16 **☒ Staff Note.** Existing Section 2081.7(d)(4) (proposed Section 63305(f)) refers to "Chapter 10  
17 (commencing with Section 2080)." The reference to "Chapter 10" appears to be erroneous.  
18 Section 2080 is the first section of Article 3 of Chapter 1.5 (which would be continued as Title 3  
19 of Part 1). Proposed Section 63305(f) corrects the error. **The staff invites comment on whether  
20 the proposed correction would cause any problem.**

21 **§ 63310. Restoration study**

22 63310. (a) The Secretary of the Resources Agency, in consultation with the  
23 department, the Department of Water Resources, the Salton Sea Authority,  
24 appropriate air quality districts, and the Salton Sea Advisory Committee, shall  
25 undertake a restoration study to determine a preferred alternative for the  
26 restoration of the Salton Sea ecosystem and the protection of wildlife dependent  
27 on that ecosystem.

28 (b) The Secretary of the Resources Agency shall extend an invitation to the  
29 United States Geological Survey Salton Sea Science Office to also participate in  
30 the restoration study, and the office may participate if it accepts the invitation.

31 (c) The restoration study shall be conducted pursuant to a process with deadlines  
32 for release of the report and programmatic environmental documents established  
33 by the secretary, in consultation with the department, the Department of Water  
34 Resources, the Salton Sea Authority, and the Salton Sea Advisory Committee, and  
35 the United States Geological Survey Salton Sea Science Office, if it is a  
36 participant. The secretary shall use all available authority to enter into a  
37 memorandum of understanding (MOU) with the Secretary of the Interior, as  
38 provided in Section 101(b)(1)(B)(i) of the Salton Sea Reclamation Act of 1998  
39 (P.L. 105-372) for the purpose of obtaining federal participation in the restoration  
40 of the Salton Sea.

41 (d) The restoration study shall establish all of the following:

1       (1) An evaluation of alternatives for the restoration of the Salton Sea that  
2 includes consideration of strategies for salinity control, habitation creation and  
3 restoration, and different shoreline elevations and surface area configurations. The  
4 alternatives shall consider the range of possible inflow conditions. The evaluation  
5 established pursuant to this paragraph shall also include suggested criteria for  
6 selecting and evaluating alternatives consistent with **Chapter 13 (commencing  
7 with Section 2930)**, including, but not limited to, at least one most cost-effective,  
8 technically feasible, alternative.

9       (2) An evaluation of the magnitude and practicability of costs of construction,  
10 operation, and maintenance of each alternative evaluated.

11      (3) A recommended plan for the use or transfer of water provided by paragraph  
12 (2) of subdivision (b) of Section 63305. No water may be transferred pursuant to  
13 that subdivision unless the secretary finds that transfer is consistent with the  
14 preferred alternative for Salton Sea restoration.

15      (4) The selection of a preferred alternative consistent with **Section 2931**,  
16 including a proposed funding plan to implement the preferred alternative. The  
17 proposed funding plan shall include a determination of the moneys that are, or  
18 may be, available to construct and operate the preferred project, including, but not  
19 limited to, all of the following moneys:

20       (A) Moneys in the Salton Sea Restoration Fund established by **Section 2932**.

21       (B) State water and environmental bond moneys.

22       (C) Federal authorizations and appropriations.

23       (D) Moneys available through a Salton Sea Infrastructure Financing District  
24 established pursuant to Section 53395.9 of the Government Code and local  
25 assessments by the Salton Sea Authority or its member agencies.

26       (E) Moneys derived from user or other fees.

27       (e) The study identifying the preferred alternative shall be submitted to the  
28 Legislature on or before December 31, 2006.

29       **Comment.** Section 63310 continues former Fish and Game Code Section 2081.7(e)(1)-(3)  
30 without substantive change.

31      ☒ **Staff Note.** The staff invites public comment on whether proposed Section 63310(e) can be  
32 omitted as obsolete.

33      **§ 63315. Advisory committee**

34      63315. The Secretary of the Resources Agency shall establish an advisory  
35 committee for purposes of Section 63310 as follows:

36       (a) The advisory committee shall be selected to provide balanced representation  
37 of the following interests:

38        (1) Agriculture.

39        (2) Local governments.

40        (3) Conservation groups.

41        (4) Tribal governments.

- 1       (5) Recreational users.
- 2       (6) Water agencies.
- 3       (7) Air pollution control districts.
- 4       (8) Geothermal energy development.
- 5       (b) Appropriate federal agency representatives may be asked to serve in an ex  
6       officio capacity.
- 7       (c) The Resources Agency shall consult with the advisory committee throughout  
8       all stages of the alternative selection process.
- 9       (d) The advisory committee shall meet no fewer than six times annually.
- 10      (e) The secretary shall appoint a vice chair of the advisory committee from the  
11       committee membership. The vice chair shall work with the secretary to develop  
12       advisory committee agendas and to schedule meetings of the committee. The  
13       secretary and vice chair shall appoint an agenda subcommittee to assist in the  
14       preparation of advisory committee agendas.
- 15      (f) The advisory committee shall submit to the Resources Agency  
16       recommendations to assist the agency in preparation of its restoration plan. The  
17       Resources Agency shall develop a schedule for the completion of these  
18       recommendations to ensure that these recommendations will be considered by the  
19       agency in a timely and meaningful manner as the restoration plan is developed.  
20       These recommendations may include, but are not limited to:
  - 21       (1) The specific goals and objectives of the restoration plan.
  - 22       (2) The range of alternative restoration actions that must be developed and  
23       analyzed.
  - 24       (3) The no action alternative.
  - 25       (4) The criteria for determining economic and technical feasibility of the  
26       alternatives.
  - 27       (5) The range of options for funding the restoration plan.
  - 28       (6) The selection of a preferred alternative for a restoration plan.
- 29      (g) The Resources Agency shall periodically provide an update to the advisory  
30       committee of the current work plan and schedule for the development of the  
31       restoration plan.

32      **Comment.** Section 63315 continues former Fish and Game Code Section 2081.7(e)(4) without  
33       substantive change.

34      **§ 63320. No exemption from other laws**

35      63320. This article shall not be construed to exempt from any other provision of  
36       law the Quantification Settlement Agreement and the Agreement for Transfer of  
37       Conserved Water by and between the Imperial Irrigation District and the San  
38       Diego County Water Authority, dated April 29, 1998.

39      **Comment.** Section 63320 continues former Fish and Game Code Section 2081.7(f) without  
40       substantive change.

1      **§ 63325. Related assessment by Resources Agency**

2      63325. (a) The Resources Agency shall undertake the necessary activities to  
3      assess the protection of recreational opportunities, including, but not limited to,  
4      hunting, fishing, boating, and birdwatching, and the creation of opportunities for  
5      improved local economic conditions, surrounding the Salton Sea.

6      (b) The Resources Agency shall not undertake any of those activities if the  
7      agency determines they would constitute a project purpose for environmental  
8      documentation that is prepared pursuant to Sections 63300 to 63320, inclusive.

9      **Comment.** Section 63325 continues former Fish and Game Code Section 2081.8 without  
10     substantive change.

11     Article 2. Chinook Salmon

12     **§ 63350. Findings and declarations**

13     63350. The Legislature finds and declares the following:

14     (a) The historic settlement approved by Congress in the San Joaquin River  
15     Restoration Settlement Act (Part I of Subtitle A of Title X of Public Law 111-11) directs the federal government to reintroduce spring run Chinook salmon to the  
16     San Joaquin River. In approving the settlement and the new statutory provisions  
17     governing the reintroduction of California central valley spring run Chinook  
18     salmon, Congress found that the implementation of the settlement, to resolve 18  
19     years of contentious litigation regarding restoration of the San Joaquin River and  
20     the reintroduction of the salmon, was a unique and unprecedented circumstance.  
21     The settlement also provides that nothing in the settlement diminishes the statutory  
22     or regulatory protections under the federal Endangered Species Act of 1973 (16  
23     U.S.C. Sec. 1531 et seq.) nor does it establish a precedent with respect to any other  
24     application of the federal act.

25     (b) Central valley spring run Chinook salmon have been listed since 1999 as a  
26     threatened species under this part and were still listed as of January 1, 2011.

27     (c) Restoring spring run Chinook salmon to the San Joaquin River is intended to  
28     further the conservation and recovery of the species.

29     (d) Consistent with the unique and historic circumstances that led to the  
30     settlement, nothing in this article is intended to create any precedent as to future  
31     application of this part, nor does this article otherwise modify other existing  
32     statutes or legal obligations.

33     **Comment.** Section 63350 continues former Fish and Game Code Section 2080.2 without  
34     substantive change.

35     **§ 63355. Enhancement of survival permit**

36     63355. (a) Notwithstanding any other provision of this part, if any person  
37     obtains from the Secretary of Commerce an enhancement of survival permit  
38     pursuant to subparagraph (A) of paragraph (1) of subdivision (a) of Section 1539  
39     of Title 16 of the United States Code that authorizes the taking of spring run

1 Chinook salmon (*Oncorhynchus tshawytscha*) in order to establish or maintain an  
2 experimental population in the San Joaquin River pursuant to subsection (j) of that  
3 section and the San Joaquin River Restoration Settlement Act (Part I of Subtitle A  
4 of Title X of Public Law 111-111), no further authorization or approval is necessary  
5 under this part for that person to take that species as identified in, and in  
6 accordance with, the enhancement of survival permit, if all of the following  
7 requirements are met:

8 (1) That person shall notify the director in writing that the person has received  
9 an enhancement of survival permit and include in the notification a copy of the  
10 permit.

11 (2) Upon receipt of the notice specified in paragraph (1), the director shall  
12 immediately have the notice published in the General Public Interest Section of the  
13 California Regulatory Notice Register.

14 (3) Within 30 days after the director has received the notice specified in  
15 paragraph (1), the director shall determine whether the enhancement of survival  
16 permit will further the conservation of the species. As used in this paragraph,  
17 “conservation” has the same meaning as defined in Section 62110.

18 (4) The director shall immediately have the determination pursuant to paragraph  
19 (3) published in the General Public Interest Section of the California Regulatory  
20 Notice Register.

21 (b) The timing and extent of a take authorization under this section shall be  
22 limited to the terms in the federal enhancement of survival permit and shall expire  
23 upon the expiration of the federal permit.

24 (c) This section shall remain in effect only until the effective date of an  
25 amendment to Section 1539 of Title 16 of the United States Code that alters the  
26 requirements for issuing an enhancement of survival permit, as applicable, and as  
27 of that date is repealed, unless a later enacted statute, that is chaptered before the  
28 date this section is repealed, deletes or extends that date.

29 **Comment.** Section 63355 continues former Fish and Game Code Section 2080.3 without  
30 substantive change.

31 **☒ Staff Note.** Existing Section 2080.3(a)(2) refers to “paragraph (1) of subdivision (c).” That  
32 reference is erroneous, as subdivision (c) is not divided into paragraphs. In context, it appears that  
33 the reference should have been to Section 2080.3(a)(1). That change has been made in proposed  
34 Section 63355. **The staff invites comment on whether the change would cause any problems.**

35 **§ 63360. Experimental population**

36 63360. (a) If a population of spring run Chinook salmon in the San Joaquin  
37 River is designated as an experimental population under subsection (j) of Section  
38 1539 of Title 16 of the United States Code, no further authorization or approval is  
39 necessary under this part for any person to incidentally take members of that  
40 experimental population, if all of the following requirements are met:

41 (1) The Secretary of Commerce has published regulations in the Federal  
42 Register specifying management restrictions, protective measures, prohibitions,

and exceptions to the prohibitions for the designated experimental population of spring run Chinook salmon in the San Joaquin River.

(2) The director has determined, in writing, that the management restrictions, protective measures, prohibitions and exceptions to prohibitions contained in the regulations specified in paragraph (1) meet the requirements in subdivision (b).

(3) The action or activity that results in incidental take of the designated experimental population is authorized by the regulations published in the Federal Register.

(b) The director shall issue the determination described in paragraph (2) of subdivision (a), if the director finds that the federal regulations described in paragraph (1) of subdivision (a) meet all of the following criteria:

(1) The federal regulations will further the conservation of the spring run Chinook salmon. As used in this paragraph, "conservation" has the same meaning as defined in Section 62110.

(2) The federal regulations contain all reasonably feasible measures to avoid and minimize the impacts of any taking allowed by the regulation.

(3) The federal regulations will not jeopardize the continued existence or recovery of spring run Chinook salmon, and will not jeopardize the restoration of spring run Chinook salmon in the San Joaquin River.

(c) If the director determines that the federal regulations described in paragraph (1) of subdivision (a) are not consistent with this part, or if the action or activity that results in incidental take is not authorized in those federal regulations, then the incidental take of members of the designated experimental population may only be authorized pursuant to this part.

(d) The director shall publish the determination, pursuant to paragraph (2) of subdivision (a), and subdivision (b), in the General Public Interest Section of the California Regulatory Notice Register.

**Comment.** Section 63360 continues former Fish and Game Code Section 2080.4 without substantive change.

### Article 3. Rough Sculpin

## **§ 63400. Spring Creek Bridge**

63400. (a) The department may authorize, under this part, the take of the rough sculpin (*Cottus asperimus*) resulting from impacts attributable to replacing the Spring Creek Bridge in the County of Shasta, if all of the following conditions are satisfied:

(1) The requirements of subdivisions (a) and (b) of Section 62700 are satisfied for the take of the rough sculpin.

(2) The department ensures that all further measures necessary to satisfy the conservation standard of subdivision (d) of Section 64515 are incorporated into the project.

(3) The take authorization provides for the development and implementation, in cooperation with federal and state agencies, of a monitoring program and an adaptive management process until the department determines that any impacts resulting from the replacement of the Spring Creek Bridge have been fully mitigated.

(b) This section shall not be construed to exempt the project described in subdivision (a) from any other law.

**Comment.** Section 63400 continues former Fish and Game Code Section 2081.4 without substantive change.

## Article 4. Threespine Stickleback

## **§ 63450. Bouquet Creek**

63450. (a) The department may authorize, under this part, the take of the unarmored threespine stickleback (*Gasterosteus aculeatus williamsoni*) resulting from impacts attributable to the habitat restoration project to restore, maintain, and improve riparian habitat on public lands in the geographic area defined in paragraph (1) and projects to restore the flow capacity to Bouquet Creek in Bouquet Canyon on public lands, undertaken by the Los Angeles County Department of Public Works, the Los Angeles Department of Water and Power, and the United States Department of Agriculture, Forest Service, if all of the following conditions are satisfied:

(1) The take authorization is limited to the portion of Bouquet Creek located from a position normal to mile marker 8.3 on Bouquet Canyon Road to a position normal to mile marker 16.3 on Bouquet Canyon Road, inclusive.

(2) The department has determined that the appropriate agreements have been executed to address environmental impacts at the Bouquet Canyon area, including, but not limited to, Bouquet Creek.

(3) The requirements of subdivisions (a) and (b) of Section 62700 are satisfied for the take of the unarmored threespine stickleback.

(4) The department ensures that all further measures necessary to satisfy the conservation standard of subdivision (d) of Section 64515 are incorporated into the projects.

(5) A biologist will be on duty whenever an activity is conducted that may affect the unarmored threespine stickleback.

(6) The take authorization provides for the development and implementation, in cooperation with federal and state agencies, of a monitoring program and an adaptive management process that satisfy the conservation standard of subdivision (d) of Section 64515 for monitoring the effectiveness of, and adjusting, as necessary, the measures to minimize and fully mitigate the impacts of the authorized take.

(7) The take authorization provides for the development and implementation, in cooperation with state and federal agencies, of an adaptive management process

1 that substantially contributes to the long-term conservation of the unarmored  
2 threespine stickleback.

3 (b) This section shall not be construed to exempt the projects described in  
4 subdivision (a) from any other law.

5 (c) This section shall not be construed to affect the contractual obligations of the  
6 Los Angeles Department of Water and Power to provide water from Bouquet  
7 Reservoir.

8 **Comment.** Section 63450 continues former Fish and Game Code Section 2081.6 without  
9 substantive change.

10 **§ 63455. Metropolitan Water District of Southern California water supply facility**

11 63455. (a) The department may authorize, under this part, the incidental take of  
12 unarmored threespine stickleback (*Gasterosteus aculeatus williamsoni*) attributable  
13 to the periodic dewatering, inspection, maintenance, modification, or repair,  
14 including emergency repair, of the Metropolitan Water District of Southern  
15 California's Foothill Feeder water supply facility from Castaic Dam to the Joseph  
16 Jensen Treatment Plant in the County of Los Angeles, contingent upon the  
17 fulfillment of the following conditions:

18 (1) The department determines that the requirements of subdivisions (a) and (b)  
19 of Section 62700 are satisfied for the take of the unarmored threespine stickleback.

20 (2) The department ensures that all further measures necessary to satisfy the  
21 conservation standard of subdivision (d) of Section 64515 are incorporated into  
22 the project.

23 (3) The take authorization provides for the development and implementation, in  
24 cooperation with the department, of an adaptive management plan for monitoring  
25 the effectiveness of, and adjusting as necessary, the measures to minimize and  
26 fully mitigate the impacts of the authorized take and to satisfy the conservation  
27 standard of subdivision (d) of Section 64515.

28 (4) A biologist who has substantial relevant experience evaluating impacts to  
29 inland fisheries is on duty whenever an activity is conducted that may affect the  
30 unarmored threespine stickleback.

31 (5) The Metropolitan Water District of Southern California consults with the  
32 department to consider feasible measures to avoid and minimize incidental take of  
33 unarmored threespine stickleback. For purposes of this paragraph, “feasible” has  
34 the same meaning as defined in Section 15364 of Title 14 of the California Code  
35 of Regulations.

36 (b) The take authorization shall cover any incidental take of unarmored  
37 threespine stickleback attributable to the periodic dewatering, inspection,  
38 maintenance, modification, or repair, including emergency repair, of the Foothill  
39 Feeder that may occur in the following locations:

40 (1) Within the Santa Clara River, from the Bouquet Canyon Road Bridge to a  
41 point located 4,000 feet downstream of where Commerce Center Drive, as of  
42 January 1, 2016, dead-ends adjacent to the Santa Clara River.

1       (2) From the confluence with the Santa Clara River upstream to the following  
2 locations:

3       (A) In Charlie Canyon to a point 1,000 feet upstream of the Foothill Feeder  
4 facility dewatering structure.

5       (B) In San Francisquito Creek to the Copper Hill Drive bridge.

6       (C) In Placerita Creek to the Hacienda Lane crossing.

7       (D) In Bouquet Creek to the Newhall Ranch Road Bridge.

8       (c) The take authorization shall also cover any incidental take of unarmored  
9 threespine stickleback that may occur in the course of implementing mitigation or  
10 conservation actions required in the permit issued pursuant to subdivision (a) as  
11 may be modified through an adaptive management plan adopted pursuant to  
12 paragraph (3) of subdivision (a).

13      (d) The permit issued pursuant to subdivision (a) shall include conditions that  
14 cover biological and scientific considerations including, but not limited to, criteria  
15 for the handling of stranded fish and their relocation into suitable habitat, the  
16 dewatering of the Foothill Feeder, and the reasonable and feasible mimicking of  
17 streamflows. The permit conditions shall be in compliance with the project  
18 description, mitigation measures, and release plan set forth in the certified  
19 environmental impact report known as the “Foothill Feeder Repair and Future  
20 Inspections Project Environmental Impact Report, January 2005, State  
21 Clearinghouse Number 2005071082.” The permit conditions are subject to  
22 amendment when required by the adaptive management plan or when modified by  
23 a subsequent final environmental document pursuant to the California  
24 Environmental Quality Act (Division 13 (commencing with Section 21000) of the  
25 Public Resources Code).

26      (e) This section shall not be construed to exempt from any other law the periodic  
27 dewatering, inspection, maintenance, modification, or repair of the Foothill  
28 Feeder.

29      (f) If the Metropolitan Water District of Southern California receives a permit  
30 under this section, the permit shall require the district to report to the department  
31 within six months after every dewatering of the Foothill Feeder. The report shall  
32 address compliance with the permit conditions and the effectiveness of the  
33 adaptive management plan in contributing to the conservation of the unarmored  
34 threespine stickleback. The Metropolitan Water District of Southern California  
35 shall ensure that each report is made available to the public.

36      (g) As used in this section, “modification” does not include alterations to expand  
37 the maximum physical capacity of the Foothill Feeder to deliver water.

38      **Comment.** Section 63455 continues former Fish and Game Code Section 2081.10 without  
39 substantive change.

## Article 5. Limestone Salamander

## **§ 63500. Ferguson Slide Permanent Restoration Project**

63500. (a) Notwithstanding **Section 5050**, the department may authorize, under this part, the incidental take of limestone salamander (*Hydromantes brunus*) resulting from impacts attributable to the Department of Transportation's implementation of the Ferguson Slide Permanent Restoration Project on State Route 140 from 8 miles east of Briceburg to 7.6 miles west of El Portal in Mariposa County, contingent upon the fulfillment of the following conditions:

(1) The Department of Transportation begins construction of the Ferguson Slide Permanent Restoration Project on or before January 1, 2016.

(2) The department has determined that the Department of Transportation will adopt appropriate avoidance and mitigation measures to protect the limestone salamander through enforceable commitments that, at a minimum, include the following:

(A) A construction work window that prevents initial ground-disturbing construction activities from occurring on the southern slope during the salamander's active season of December to March, inclusive.

(B) Environmentally sensitive area fencing in the form of five-foot orange plastic mesh, as well as salamander protection exclusionary fencing in the form of 24-inch sheet metal, will be erected if construction-related activities will occur adjacent to limestone salamander habitat during their active season.

(C) A biological monitor will be onsite during active building to inspect the worksite and all exclusionary fencing.

(D) All ground-disturbing activities within 100 feet will cease if a limestone salamander is detected in an active construction site until the animal can be safely removed from the area according to an agreed-upon salvage plan.

(3) The requirements of subdivisions (a) and (b) of Section 62700 are satisfied for the take of the limestone salamander.

(4) The department ensures that all further measures necessary to satisfy the conservation standard of subdivision (d) of Section 64515 are incorporated into the project.

(5) The take authorization provides for the development and implementation, in cooperation with the department, of an adaptive management process for monitoring the effectiveness of, and adjusting as necessary, the measures to minimize and fully mitigate the impacts of the authorized take. The adjusted measures are subject to Section 62015.

(6) The failure to appropriate funds does not relieve the applicant of the obligations of paragraphs (1) and (2).

(7) Any observations of the species in the worksite and any accidental injury or mortality from vehicle strikes or other means will be reported to the department immediately and the onsite biological monitor will notify the resident engineer who will halt the work immediately.

(b) This section shall not be construed to exempt the Ferguson Slide Permanent Restoration Project on State Route 140 from 8 miles east of Briceburg to 7.6 miles west of El Portal in Mariposa County from any other law.

**Comment.** Section 63500 continues former Fish and Game Code Section 2081.9 without substantive change.

## CHAPTER 7. PERMIT APPLICATION FEE

## **§ 63600. Definitions**

63600. For the purposes of this chapter, the following terms have the following meanings:

(a) "Permit" means any authorization issued by the department pursuant to this title to take a species listed by this part as candidate, threatened, or endangered.

(b) "Permittee" includes any individual, firm, association, organization, partnership, business, trust, corporation, limited liability company, district, city, county, city and county, town, federal agency, and the state who applies for or who has received a permit pursuant to this title.

(c) "Project" has the same meaning as defined in Section 21065 of the Public Resources Code.

(d) "Project cost" means the total direct and indirect project expenses that include, but are not limited to, labor, equipment, permanent materials and supplies, subcontracts, permits and licenses, overhead, and miscellaneous costs.

(e) "Voluntary habitat restoration project" means a project that meets both of the following requirements:

(1) The project's primary purpose is voluntary habitat restoration and the project may have other environmental benefits, and the project is not required as mitigation due to a regulatory action.

(2) The project is not part of a regulatory settlement, a regulatory enforcement action, or a court order.

**Comment.** Section 63600 continues former Fish and Game Code Section 2081.2(a) without substantive change.

## **§ 63605. Collection and use of fee**

63605. (a) The department shall collect a permit application fee for processing a permit application submitted pursuant to this title at the time the permit application is submitted to the department.

(b) Notwithstanding Section 64100, upon appropriation to the department from the Endangered Species Permitting Account, the department shall use the permit application fee to pay for all or a portion of the department's cost of processing permit applications, permit development, and compliance monitoring pursuant to this title.

(c) This section does not apply to any of the following:

1       (1) Activities or costs associated with the review of projects, inspection and  
2       oversight of projects, and permits necessary to conduct timber operations, as  
3       defined in Section 4527 of the Public Resources Code, in accordance with Article  
4       9.5 (commencing with Section 4629) of Chapter 8 of Part 2 of Division 4 of the  
5       Public Resources Code.

6       (2) Permits or memoranda of understanding authorized by Section 62650.

7       (3) Permits for voluntary habitat restoration projects.

8       **Comment.** Section 63605 continues former Fish and Game Code Section 2081.2(b) without  
9       substantive change.

10      **§ 63610. Timing**

11      63610. (a) For an application submitted to the department pursuant to this title  
12     on or after September 13, 2016, the department shall collect the permit application  
13     fee at the time the permit application is submitted. The department shall not deem  
14     the application complete until it has collected the permit application fee. A permit  
15     application submitted or deemed complete prior to the effective date of this article  
16     shall not be subject to fees established pursuant to this article.

17      (b) If a permit or amendment application is withdrawn within 30 days after  
18     paying the permit or amendment application fee, the department shall refund any  
19     unused portion of the fee to the permittee.

20      (c) If a permit or amendment application is withdrawn after 30 days of paying  
21     the permit or amendment application fee, the department shall not refund any  
22     portion of the fee to the permittee.

23      **Comment.** Section 63610 continues former Fish and Game Code Section 2081.2(e) without  
24     substantive change.

25      **☒ Staff Note.** Existing Section 2081.2(e)(1) refers to “the effective date of this section.”  
26     According to the Legislative Counsel’s website, the section became effective on September 13,  
27     2016. Proposed Section 63610 replaces the reference to the effective date of the section with that  
28     date. **The staff invites comment on whether that change would cause any problems.**

29      **§ 63615. Fee amounts**

30      63615. The department shall assess the permit application fee as follows, subject  
31     to Sections 63620, 63630, and 63640:

32      (a) For a project, regardless of estimated project cost, that is subject only to  
33     Section 62705, 63355, or 63360, the department shall assess either of the  
34     following amounts:

35       (1) Seven thousand five hundred dollars (\$7,500).

36       (2) Six thousand dollars (\$6,000), if the project uses a department-approved  
37     conservation or mitigation bank to fulfill mitigation obligations pursuant to this  
38     title.

39      (b) For a project where the estimated project cost is less than one hundred  
40     thousand dollars (\$100,000), the department shall assess either of the following  
41     amounts:

1       (1) Seven thousand five hundred dollars (\$7,500).

2       (2) Six thousand dollars (\$6,000), if the project uses a department-approved  
3 conservation or mitigation bank to fulfill mitigation obligations pursuant to this  
4 title.

5       (c) For a project where the estimated project cost is one hundred thousand  
6 dollars (\$100,000) or more but less than five hundred thousand dollars (\$500,000),  
7 the department shall assess either of the following amounts:

8       (1) Fifteen thousand dollars (\$15,000).

9       (2) Twelve thousand dollars (\$12,000), if the project uses a department-  
10 approved conservation or mitigation bank to fulfill mitigation obligations pursuant  
11 to this title.

12      (d) For a project where the estimated project cost is five hundred thousand  
13 dollars (\$500,000) or more, the department shall assess either of the following  
14 amounts:

15       (1) Thirty thousand dollars (\$30,000).

16       (2) Twenty-four thousand dollars (\$24,000), if the project uses a department-  
17 approved conservation or mitigation bank to fulfill mitigation obligations pursuant  
18 to this title.

19       (e) The department shall collect a fee of seven thousand five hundred dollars  
20 (\$7,500) for processing permit amendments that the department has determined  
21 are minor as defined in regulation or fifteen thousand dollars (\$15,000) for  
22 processing permit amendments that the department has determined are major as  
23 defined in regulation.

24      **Comment.** Section 63615 continues former Fish and Game Code Section 2081.2(c) without  
25 substantive change.

26      **§ 63620. Adjustment of fee amount**

27      63620. The department shall adjust the fees in this article pursuant to **Section**  
28 **713.**

29      **Comment.** Section 63620 continues former Fish and Game Code Section 2081.2(f)(1) without  
30 substantive change.

31      **§ 63625. Additional fee to cover costs**

32      63625. (a) If the permit or amendment application fee paid pursuant to Section  
33 63615 is determined by the department to be insufficient to complete permitting  
34 work due to the complexity of a project or the potential effects of a project, the  
35 department shall collect an additional fee of up to ten thousand dollars (\$10,000)  
36 from the permittee to pay for its estimated costs. Upon its determination, the  
37 department shall notify the permittee of the reasons why an additional fee is  
38 necessary and the estimated amount of the additional fee.

39      (b) The additional fee collected pursuant to subdivision (a) shall not exceed an  
40 amount that, when added to the fee paid pursuant to Section 63615, equals thirty-

1 five thousand dollars (\$35,000). The department shall collect the additional fee  
2 before a final decision on the application by the department.

3 **Comment.** Section 63625 continues former Fish and Game Code Section 2081.2(d) without  
4 substantive change.

5 **§ 63630. Periodic review of fee amount**

6 63630. The department, at least every five years, shall analyze application fees  
7 pursuant to **Section 713** to ensure the appropriate fee amounts are charged.

8 **Comment.** Section 63630 continues former Fish and Game Code Section 2081.2(f)(3) without  
9 substantive change.

10 **§ 63635. Endangered Species Permitting Account**

11 63635. Fees paid to the department pursuant to this article shall be deposited in  
12 the Endangered Species Permitting Account, which is hereby established in the  
13 Fish and Game Preservation Fund. Notwithstanding Section 64100, funds in the  
14 account shall be available to the department, upon appropriation by the  
15 Legislature, for the purposes of administering and implementing this part, except  
16 that fee moneys collected pursuant to this article shall only be used for the  
17 purposes of this title.

18 **Comment.** Section 63635 continues former Fish and Game Code Section 2081.2(g) without  
19 substantive change.

20 **§ 63640. Article XIII B of the California Constitution**

21 63640. The Legislature finds that all revenues generated under this article and  
22 used for the purposes for which they were imposed are not subject to Article XIII  
23 B of the California Constitution.

24 **Comment.** Section 63640 continues former Fish and Game Code Section 2081.2(f)(2) without  
25 substantive change.

26 **TITLE 4. AGRICULTURE**

27 **CHAPTER 1. GENERAL PROVISIONS**

28 **§ 63700. Accidental take in the course of lawful agricultural activities**

29 63700. (a) Accidental take of candidate, threatened, or endangered species  
30 resulting from an act that occurs on a farm or a ranch in the course of otherwise  
31 lawful routine and ongoing agricultural activities is not prohibited by this part.

32 (b) For purposes of this section, “accidental” means unintended or unforeseen.

33 (c) This section shall remain in effect only until January 1, 2020, and as of that  
34 date is repealed, unless a later enacted statute, that is enacted before January 1,  
35 2020, deletes or extends that date.

36 **Comment.** Section 63700 continues former Fish and Game Code Section 2087 without  
37 substantive change.

## **§ 63705. Routine and ongoing agricultural activities**

63705. Routine and ongoing agricultural activities shall be defined by the department by regulation and shall not include the conversion of agricultural land to a nonagricultural use.

**Comment.** Section 63705 continues former Fish and Game Code Section 2089 without substantive change.

## **§ 63710. Application to take of fish species**

63710. This title does not authorize the take of fish species. "Fish species" as used in this section means a member of the class Osteichthyes.

**Comment.** Section 63710 continues the first part of former Fish and Game Code Section 2088 without substantive change.

## **§ 63715. Application to timber harvesting**

63715. This title does not apply to timber harvesting governed by the State Board of Forestry.

**Comment.** Section 63715 continues the second part of former Fish and Game Code Section 2088 without substantive change.

## **§ 63720. Nonregulatory guidelines**

63720. The department may adopt nonregulatory guidelines to clarify how the provisions of this part may be used in connection with voluntary local programs for routine and ongoing agricultural activities adopted pursuant to this title.

**Comment.** Section 63720 continues the part of former Fish and Game Code Section 2089.22(b) that applies to ongoing agricultural activities, without substantive change.

## CHAPTER 2. VOLUNTARY PROGRAM

## **§ 63750. Authorization of voluntary programs**

63750. (a) The department, in cooperation with the Department of Food and Agriculture, agricultural commissioners, extension agents, farmers, ranchers, and other agricultural experts, shall adopt regulations that authorize locally designed voluntary programs for routine and ongoing agricultural activities on farms or ranches that encourage habitat for candidate, threatened, and endangered species, and wildlife generally.

(b) Agricultural commissioners, extension agents, farmers, ranchers, or other agricultural experts, in cooperation with conservation groups, may propose those programs to the department.

(c) The department shall propose regulations for those programs not later than July 1, 1998.

**Comment.** Section 63750 continues former Fish and Game Code Section 2086(a) without substantive change.

1 **☒ Staff Note.** The staff invites public comment on whether proposed Section 63750(c) can be  
2 omitted as obsolete.

3 **§ 63755. Program requirements**

4 63755. Programs authorized under Section 63750 shall do all of the following:  
5 (a) Include management practices that will, to the maximum extent practicable,  
6 avoid and minimize take of candidate, endangered, and threatened species, while  
7 encouraging the enhancement of habitat.

8 (b) Be supported by the best available scientific information for both agricultural  
9 and conservation practices.

10 (c) Be consistent with the policies and goals of this part.

11 (d) Be designed to provide sufficient flexibility to maximize participation and to  
12 gain the maximum wildlife benefits without compromising the economics of  
13 agricultural operations.

14 (e) Include terms and conditions to allow farmers or ranchers to cease  
15 participation in a program without penalty. The terms and conditions shall include  
16 reasonable measures to minimize take during withdrawal from the program.

17 **Comment.** Section 63755 continues former Fish and Game Code Section 2086(b) without  
18 substantive change.

19 **§ 63760. Take occurring while management practices followed**

20 63760. Any taking of candidate, threatened, or endangered species incidental to  
21 routine and ongoing agricultural activities that occurs while the management  
22 practices specified by subdivision (a) of Section 63755 are followed, is not  
23 prohibited by this part.

24 **Comment.** Section 63760 continues former Fish and Game Code Section 2086(c) without  
25 substantive change.

26 **§ 63765. Renewal of programs**

27 63765. The department shall automatically renew the authorization for these  
28 voluntary programs every five years, unless the Legislature amends or repeals this  
29 chapter in which case the program shall be revised to conform to this chapter.

30 **Comment.** Section 63765 continues former Fish and Game Code Section 2086(d)(1) without  
31 substantive change.

32 **§ 63770. Report on program effects**

33 63770. (a) Commencing in 2000, and every five years thereafter, the department  
34 shall post a report regarding the effect of the programs on its Internet Web site.  
35 The department shall consult with the Department of Food and Agriculture in  
36 evaluating the programs and preparing the report.

37 (b) The report shall address factors such as the temporary and permanent  
38 acreage benefiting from the programs, include an estimate of the amount of land  
39 upon which routine and ongoing agricultural activities are conducted, provide

1 examples of farmer and rancher cooperation, and include recommendations to  
2 improve the voluntary participation by farmers and ranchers.

3     **Comment.** Section 63770 continues former Fish and Game Code Section 2086(d)(2) without  
4 substantive change.

5     **§ 63775. Nonrenewal or modification of program**

6     63775. If the authorization for these programs is not renewed or is modified  
7 under Section 63765, persons participating in the program shall be allowed to  
8 cease participating in the program in accordance with the terms and conditions  
9 specified in subdivision (e) of Section 63755, without penalty.

10    **Comment.** Section 63775 continues former Fish and Game Code Section 2086(e) without  
11 substantive change.

12    **§ 63780. Educational outreach by nonprofit entity**

13    63780. (a) The department may approve an application submitted by an  
14 agricultural-based nonprofit organization or other entity registered as a California  
15 nonprofit organization to initiate and undertake public education and outreach  
16 activities that promote the achievement of the objectives of this part.

17    (b) An application submitted pursuant to this section shall include the following:

18      (1) The name and contact information of the participating organization.

19      (2) A brief description of the planned outreach activities.

20      (3) An end date for the outreach activities.

21    (c) The department may require a participating organization to submit, for  
22 approval by the department, educational materials and outreach materials that are  
23 disseminated to the public in furtherance of this section.

24    (d) A participating organization shall file an annual report with the department  
25 before the end of each calendar year during the time period specified in the  
26 application. The report shall include, but is not limited to, the following:

27      (1) Complete information on the activities conducted by the participating  
28 organization in the prior year, including a description of all means of  
29 communicating to the public and agricultural community, including personal  
30 visits, electronic communications, organized meetings, or other means.

31      (2) A compilation of responses from the public and members of the agricultural  
32 community that will assist the participating organization and the department to  
33 modify or improve public education and outreach activities on an ongoing basis.

34      (3) An assessment of the existing knowledge within the agricultural community  
35 of programs and prohibitions under this part and a review of outreach activities  
36 that could be used to adapt and improve future outreach efforts.

37      (4) Information on a farm or ranch that has expressed interest in participating in  
38 a voluntary program pursuant to this chapter or the safe harbor agreement program  
39 contained in Title 5 (commencing with Section 63900). This provision does not  
40 require the annual report to include the identification to the department of an  
41 individual, farm, or ranch.

1       **Comment.** Section 63780 continues former Fish and Game Code Section 2086(f) without  
2       substantive change.

3                   **TITLE 5. CALIFORNIA STATE SAFE HARBOR**  
4                   **AGREEMENT PROGRAM ACT**

5                   **CHAPTER 1. GENERAL PROVISIONS**

6       **§ 63900. Short title**

7       63900. This title shall be known and may be cited as the California State Safe  
8       Harbor Agreement Program Act.

9       **Comment.** Section 63900 continues former Fish and Game Code Section 2089.2(a) without  
10      substantive change.

11      **§ 63905. Findings**

12      63905. The Legislature finds that a key to the goals set forth in this title of  
13      conserving, protecting, restoring, and enhancing endangered, threatened, and  
14      candidate species, is their habitat. A significant portion of the state's current and  
15      potential habitat for these species exists on property owned by private citizens,  
16      municipalities, tribes, and other nonfederal entities. Conservation efforts on these  
17      lands and waters are critical to help these declining species. Using a collaborative  
18      stewardship approach to these lands and waters will help ensure the success of  
19      these efforts.

20      **Comment.** Section 63905 continues former Fish and Game Code Section 2089.2(b) without  
21      substantive change.

22      **§ 63910. Definitions**

23      63910. As used in this title, the following definitions apply:

24      (a) "Agreement" means a state safe harbor agreement approved by the  
25      department pursuant to this title. "Agreement" includes an agreement with an  
26      individual landowner and a programmatic agreement.

27      (b) "Baseline conditions" means the existing estimated population size, the  
28      extent and quality of habitat, or both population size and the extent and quality of  
29      habitat, for the species on the land to be enrolled in the agreement that sustain  
30      seasonal or permanent use by the covered species. Baseline conditions shall be  
31      determined by the department, in consultation with the applicant, and shall be  
32      based on the best available science and objective scientific methodologies. For  
33      purposes of establishing baseline conditions, a qualified person that is not  
34      employed by the department may conduct habitat surveys, if that person has  
35      appropriate species expertise and has been approved by the department.

36      (c) "Department" means the Department of Fish and Wildlife, acting through its  
37      director or his or her designee.

1       (d) “Landowner” means any person or nonstate or federal entity or entities that  
2 lawfully hold any interest in land or water to which they are committing to  
3 implement the requirements of this title.

4       (e) “Management actions” means activities on the enrolled land or water that are  
5 reasonably expected by the department to provide a net benefit to the species or  
6 their habitat, or both.

7       (f) “Monitoring program” means a program established or approved by the  
8 department in accordance with subdivision (f) of Section 63950.

9       (g) “Net conservation benefit” means the cumulative benefits of the  
10 management activities identified in the agreement that provide for an increase in a  
11 species’ population or the enhancement, restoration, or maintenance of covered  
12 species’ suitable habitats within the enrolled property. Net conservation benefit  
13 shall take into account the length of the agreement, any offsetting adverse effects  
14 attributable to the incidental taking allowed by the agreement, and other mutually  
15 agreed upon factors. Net conservation benefits shall be sufficient to contribute  
16 either directly or indirectly to the recovery of the covered species. These benefits  
17 include, but are not limited to, reducing fragmentation and increasing the  
18 connectivity of habitats, maintaining or increasing populations, enhancing and  
19 restoring habitats, and buffering protected areas.

20      (h) “Programmatic agreement” means a state safe harbor agreement issued to a  
21 governmental or nongovernmental program administrator. The program  
22 administrator for a programmatic agreement shall work with landowners and the  
23 department to implement the agreement. The program administrator and the  
24 department shall be responsible for ensuring compliance with the terms of the  
25 agreement.

26      (i) “Qualified person” means a person with species expertise who has been  
27 approved by the department.

28      (j) “Return to baseline” means, at the termination of an agreement, activities  
29 undertaken by the landowner to return the species population or extent or quality  
30 of habitat to baseline, excluding catastrophic events such as floods, unplanned  
31 fires, or earthquakes, and other factors mutually agreed upon prior to permit  
32 issuance and that are beyond the control of the landowner.

33      **Comment.** Section 63910 continues former Fish and Game Code Section 2089.4 without  
34 substantive change.

35      **§ 63915. Purpose and effect**

36      63915. (a) The purpose of this title is to establish a program that will encourage  
37 landowners to manage their lands voluntarily to benefit endangered, threatened, or  
38 candidate species and not be subject to additional regulatory restrictions as a result  
39 of their conservation efforts.

40      (b) This title does not relieve landowners of any legal obligation with respect to  
41 endangered, threatened, or candidate species existing on their land. The program  
42 established by this title is designed to increase species populations, create new

1      habitats, and enhance existing habitats. Although this increase may be temporary  
2      or long-term, California state safe harbor agreements shall not reduce the existing  
3      populations of species present at the time the baseline is established by the  
4      department.

5      **Comment.** Section 63915 continues former Fish and Game Code Section 2089.2(c)-(d)  
6      without substantive change.

7      **§ 63920. Regulations**

8      63920. The department may promulgate regulations to implement this title.

9      **Comment.** Section 63920 continues former Fish and Game Code Section 2089.25 without  
10     substantive change.

11     **§ 63925. List of qualified persons and program administrators**

12     63925. The department, for informational purposes, shall maintain a list of  
13     qualified persons who have worked with the department on an approved  
14     agreement, and persons, entities, and organizations serving as program  
15     administrators for approved agreements.

16     **Comment.** Section 63925 continues former Fish and Game Code Section 2089.24 without  
17     substantive change.

18     **§ 63930. Federal safe harbor agreement**

19     63930. (a) If a federal safe harbor agreement has been approved pursuant to  
20     applicable provisions of federal law and the federal safe harbor agreement  
21     contains species that are endangered, threatened, or are candidate species pursuant  
22     to this part, no further authorization or approval is necessary under this title for  
23     any person authorized by that agreement to take the species identified in and in  
24     accordance with the federal Safe Harbor Agreement, if that person and the  
25     department follow all of the procedures specified in Section 62705, except that the  
26     determination of consistency shall be made by the department based only on the  
27     issuance criteria contained in this title.

28     **Comment.** Section 63930 continues former Fish and Game Code Section 2089.22(a) without  
29     substantive change.

30     **§ 63935. Sunset date**

31     63935. This title shall remain in effect only until January 1, 2020, and as of that  
32     date is repealed, unless a later enacted statute, that is enacted before January 1,  
33     2020, deletes or extends that date.

34     **Comment.** Section 63935 continues former Fish and Game Code Section 2089.26 without  
35     substantive change.

1                   CHAPTER 2. SAFE HARBOR AGREEMENT

2                   Article 1. Permissible take

3                   **§ 63950. Department authorization of otherwise prohibited take**

4         63950. In addition to the other provisions of this title, the department may  
5         authorize acts that are otherwise prohibited pursuant to Section 62600 through an  
6         agreement, including a programmatic agreement, if all the following conditions  
7         are met:

8         (a) The department receives a complete application containing all of the  
9         information described in Section 64000.

10         (b) The take is incidental to an otherwise lawful activity.

11         (c) The department finds that the implementation of the agreement is reasonably  
12         expected to provide a net conservation benefit to the species listed in the  
13         application. This finding shall be based, at a minimum, upon the determination  
14         that the agreement is of sufficient duration and has appropriate assurances to  
15         realize these benefits.

16         (d) The take authorized by the agreement will not jeopardize the continued  
17         existence of the species. This determination shall be made based on the provisions  
18         of subdivision (b) of Section 62700.

19         (e) The department finds that the landowner has agreed, to the maximum extent  
20         practicable, to avoid or minimize any incidental take authorized in the agreement,  
21         including returning to baseline.

22         (f) The department has established or approved a monitoring program, based  
23         upon objective scientific methodologies, to provide information for the department  
24         to evaluate the effectiveness and efficiency of the agreement program, including  
25         whether the net conservation benefits set forth in the agreement are being achieved  
26         and whether the participating landowner is implementing the provisions of the  
27         agreement.

28         (g) The department has determined that sufficient funding is ensured, for it or its  
29         contractors or agents, to determine baseline conditions on the property, and that  
30         there is sufficient funding for the landowner to carry out management actions and  
31         for monitoring for the duration of the agreement.

32         (h) Implementation of the agreement will not be in conflict with any existing  
33         department-approved conservation or recovery programs for the species covered  
34         by the agreement.

35         **Comment.** Section 63950 continues former Fish and Game Code Section 2089.6 without  
36         substantive change.

1      **§ 63955. Owens pupfish**

2      63955. The department may authorize the taking of the Owens pupfish in the  
3      Owens River watershed if the take is authorized under an agreement pursuant to  
4      this title.

5      **Comment.** Section 63955 continues former Fish and Game Code Section 2089.7 without  
6      substantive change.

7                                  Article 2. Agreement

8      **§ 64000. Information to be submitted by landowner**

9      64000. The landowner shall submit all of the following:

10     (a) A detailed map depicting the land proposed to be enrolled in the agreement.

11     (b) The common and scientific names of the species for which the landowner  
12    requests incidental take authorization.

13     (c) A detailed description of the landowner's current land and water use and  
14    management practices that affect the covered species, and the habitat of the  
15    covered species, for which the landowner requests incidental take authorization.

16     (d) A detailed description of the landowner's future land and water use and  
17    management practices that may affect the covered species, and the habitat of the  
18    covered species, for which the landowner requests incidental take authorization.  
19    This description shall be used only for informational and planning purposes.

20     (e) The proposed duration of the agreement that is sufficient to provide a net  
21    conservation benefit to the species covered in the permit and an explanation of the  
22    basis for this conclusion.

23     (f) A detailed description of the proposed management actions and the  
24    timeframe for implementing them.

25     (g) A description of the possible incidental take that may be caused by the  
26    management actions and of the anticipated species populations and habitat  
27    changes over the duration of the permit.

28     (h) A detailed description of the proposed monitoring program.

29     (i) Any other information that the department may reasonably require in order to  
30    evaluate the application.

31      **Comment.** Section 64000 continues former Fish and Game Code Section 2089.8 without  
32    substantive change.

33      **§ 64005. Treatment of proprietary information**

34      64005. (a) As used in this section, "proprietary information" means information  
35    that is all of the following:

36      (1) Related to an agricultural operation or land that is a part of an agricultural  
37    operation.

38      (2) A trade secret, or commercial or financial information, that is privileged or  
39    confidential, and is identified as such by the person providing the information to  
40    the department.

1       (3) Not required to be disclosed under any other provision of law or any  
2 regulation affecting the land or the agricultural operation on the land.

3       (b) Proprietary information received by the department pursuant to Section  
4 64000 is not public information, and the department shall not release or disclose  
5 the proprietary information to any person, including any federal, state, or local  
6 governmental agency, outside of the department.

7       (c) Notwithstanding subdivision (b), the department may release or disclose  
8 proprietary information received pursuant to Section 64000 to the following  
9 entities under the following circumstances:

10      (1) Any person or federal, state, or local governmental agency, to enforce this  
11 title.

12      (2) Any person or federal, state, or local governmental agency working in  
13 cooperation with the department to provide technical or financial assistance for the  
14 purposes of implementing the program established by this title.

15      (3) Any entity, to the extent that the owner, operator, or producer has consented  
16 to the release or disclosure.

17      (4) The general public, if the information has been transformed into a statistical  
18 or aggregate form without identifying any individual owner, operator, or producer,  
19 or the specific location from which the information was gathered.

20      **Comment.** Section 64005 continues former Fish and Game Code Section 2089.9 without  
21 substantive change.

22      **§ 64010. Department access to land or water proposed for enrollment**

23      64010. (a) Neither this section nor Section 64045 provide the public a right of  
24 entry onto the enrolled land or water. The landowner shall provide the department,  
25 its contractors, or agents with access to the land or water proposed to be enrolled  
26 in the agreement to develop the agreement, determine the baseline conditions,  
27 monitor the effectiveness of management actions, or safely remove or salvage  
28 species proposed to be taken.

29      (b) The department shall provide notice to the landowner at least seven days  
30 before accessing the land or water for the purposes of subdivision (a). The notice  
31 shall identify each person selected by the department, its contractors, or agents to  
32 access the land or water.

33      (c) Notwithstanding subdivision (a), during the seven-day notice period, a  
34 landowner may object, in writing, to a person selected to access the land or water.  
35 If a landowner objects, another person shall be selected by the department, its  
36 contractors, or agents, and notification shall be provided to the landowner pursuant  
37 to subdivision (b). However, if a landowner objects to a selection on two  
38 successive occasions, the landowner shall be deemed to consent to access to the  
39 land or water by a person selected by the department, its contractors, or agents.  
40 Failure by a landowner to object to the selection within the seven-day notice  
41 period shall be deemed consent to access the land or water by a person selected by  
42 the department, its contractors, or agents.

1       **Comment.** Section 64010 continues former Fish and Game Code Section 2089.20(a)-(c)  
2 without substantive change.

3       **§ 64015. Alteration or modification of enrolled property**

4       64015. If an agreement has been approved and the department finds that the  
5 agreement is being properly implemented, the department shall allow the  
6 landowner to alter or modify the enrolled property, even if that alteration or  
7 modification will result in the incidental take of a listed species, to the extent that  
8 the alteration or modification returns the species to baseline conditions.

9       **Comment.** Section 64015 continues former Fish and Game Code Section 2089.10 without  
10 substantive change.

11      **§ 64020. Advance notice of specified matters**

12      64020. Unless the department determines that it is inappropriate to do so based  
13 on the nature of the management actions being proposed, the species listed in the  
14 permit, or other factors, the agreement shall require that the landowner provide the  
15 department with at least 60 days' advance notice of any of the following:

- 16       (a) Any incidental take that is anticipated to occur under the agreement.
- 17       (b) The landowner's plan to return to baseline at the end of the agreement.
- 18       (c) Any plan to transfer or alienate the landowner's interest in the land or water.

19       **Comment.** Section 64020 continues former Fish and Game Code Section 2089.12(a) without  
20 substantive change.

21      **§ 64025. Department access to land after receiving notice**

22      64025. (a) If the department receives any notice described in Section 64020, the  
23 landowner shall provide the department, its contractors, or agents with access to  
24 the land or water for purposes of safely removing or salvaging the species.

25      (b) The department shall provide notice to the landowner at least seven days  
26 prior to accessing the land or water for the purposes of subdivision (a). The notice  
27 shall identify each person selected by the department, its contractors, or agents to  
28 access the land or water.

29      (c) Notwithstanding subdivision (a), during the seven-day notice period, a  
30 landowner may object, in writing, to a person selected to access the land or water.  
31 If a landowner objects, another person shall be selected by the department, its  
32 contractors, or agents, and notification shall be provided to the landowner pursuant  
33 to subdivision (b). However, if a landowner objects to a selection on two  
34 successive occasions, the landowner shall be deemed to consent to access to the  
35 land or water by a person selected by the department, its contractors, or agents.  
36 Failure by a landowner to object to the selection within the seven-day notice  
37 period shall be deemed consent to access the land or water by a person selected by  
38 the department, its contractors, or agents.

39      (d) If the landowner objects to a person selected to access the land or water  
40 pursuant to subdivision (c), the 60-day notice period described in Section 64020  
41 shall be tolled for the period between the landowner's objection to a person

1 selected for access to the land or water and the landowner's consent to a person  
2 selected for access to the land or water.

3     **Comment.** Section 64025 continues former Fish and Game Code Section 2089.12(b) without  
4 substantive change.

5     **§ 64030. Conveyance of enrolled land or water**

6     64030. If a landowner seeks to sell, transfer, or otherwise alienate the land or  
7 water enrolled in the agreement during the term of the agreement, the person or  
8 entity assuming that interest in the property shall (a) assume the existing  
9 landowner's duties under the agreement, (b) enter into a new agreement with the  
10 department, or (c) withdraw from an existing agreement under the terms provided  
11 in the agreement, as approved by the department.

12     **Comment.** Section 64030 continues former Fish and Game Code Section 2089.16 without  
13 substantive change.

14     **§ 64035. Agreement amendment**

15     64035. An agreement may be amended with the mutual consent of the  
16 landowner and the department.

17     **Comment.** Section 64035 continues former Fish and Game Code Section 2089.14 without  
18 substantive change.

19     **§ 64040. Suspension or revocation of agreement**

20     64040. The suspension and revocation of the agreement shall be governed by  
21 suspension and revocation regulations adopted by the department.

22     **Comment.** Section 64040 continues former Fish and Game Code Section 2089.18 without  
23 substantive change.

24     **§ 64045. Liability**

25     64045. (a) Nothing in this section or Section 64010 creates a duty of care or a  
26 ground of liability for injury to person or property.

27         (b) Notwithstanding any other law, the landowner is not required to do either of  
28 the following:

29             (1) Maintain enrolled land or water, or land or water proposed to be enrolled in  
30 an agreement, in a condition that is safe for access, entry, or use by the  
31 department, its contractors, or agents for purposes of providing access pursuant to  
32 subdivision (a) of Section 64010.

33             (2) Provide to the department, its contractors, or agents, any warning of a  
34 hazardous condition, use, structure, or activity on enrolled land or water, or land or  
35 water proposed to be enrolled in an agreement, for purposes of providing access  
36 pursuant to subdivision (a) of Section 64010.

37             (c) Notwithstanding any other law, the landowner shall not be liable for any  
38 injury, and does not owe a duty of care, to the department, its contractors, or  
39 agents resulting from any act or omission described in paragraph (1) or (2) of  
40 subdivision (b).

1       (d) The provision of access to land pursuant to subdivision (a) of Section 64010  
2 shall not be construed as any of the following:

3       (1) An assurance that the land or water is safe.

4       (2) A grant to the person accessing the land or water of a legal status for which  
5 the landowner would owe a duty of care.

6       (3) An assumption of responsibility or liability for any injury to a person or  
7 property caused by any act of the person to whom access to the land or water is  
8 provided.

9       (e) Notwithstanding subdivisions (b), (c), and (d), this section shall not be  
10 construed to limit a landowner's liability for an injury under either of the  
11 following circumstances:

12      (1) Willful or malicious failure to guard or warn against a dangerous condition,  
13 use, structure, or activity on the land or water.

14      (2) Express invitation to a person by the landowner to access the land or water,  
15 in a manner that is beyond the access required to be provided pursuant to  
16 subdivision (a) of Section 64010.

17      **Comment.** Section 64045 continues former Fish and Game Code Section 2089.20(d)-(e)  
18 without substantive change.

19      **§ 64050. Neighboring landowner**

20      64050. (a) A landowner that owns land that abuts a property enrolled in a state  
21 safe harbor agreement shall not be required, for purposes of an incidental take  
22 permit, to undertake the management activities set forth in the state safe harbor  
23 agreement, if all of the following conditions are met:

24      (1) The neighboring landowner allows the department to determine baseline  
25 conditions on the property.

26      (2) The neighboring landowner agrees to maintain the baseline conditions for  
27 the duration specified in the safe harbor agreement.

28      (3) The department determines that allowing the neighboring landowner to  
29 receive an incidental take permit for the abutting property does not undermine the  
30 net conservation benefit determination made by the department in the approval of  
31 the safe harbor agreement.

32      (4) The take authorized by the department will not jeopardize the continued  
33 existence of the species. This determination shall be made in accordance with  
34 subdivision (b) of Section 62700.

35      (b) Unless the department determines that it is inappropriate to do so based on  
36 the species listed in the permit, or any other factors, the neighboring landowner  
37 shall provide the department with at least 60 days' advance notice of any of the  
38 following:

39       (1) Any incidental take that is anticipated to occur under the permit.

40       (2) The neighboring landowner's plan to return to baseline conditions.

41       (3) Any plan to transfer or alienate the neighboring landowner's interest in the  
42 land or water.

(c) If the department receives any notice described in subdivision (b), the neighboring landowner shall provide the department, its contractors, or agents with access to the land or water for purposes of safely removing or salvaging the species.

(d) The department shall provide notice to the neighboring landowner at least seven days before accessing the land or water for the purposes of subdivision (c). The notice shall identify each person selected by the department, its contractors, or agents to access the land or water.

(e) Notwithstanding subdivision (d), during the seven-day notice period, the neighboring landowner may object, in writing, to a person selected to access the land or water. If the neighboring landowner objects, another person shall be selected by the department, its contractors, or agents, and notification shall be provided to the neighboring landowner pursuant to subdivision (d). However, if the neighboring landowner objects to a selection on two successive occasions, the neighboring landowner shall be deemed to consent to access to the land or water by a person selected by the department, its contractors, or agents. Failure by the neighboring landowner to object to the selection within the seven-day notice period shall be deemed consent to access the land or water by the person selected by the department, its contractors, or agents.

**Comment.** Section 64050 continues former Fish and Game Code Section 2089.23 without substantive change.

## TITLE 6. FUNDING

## **§ 64100. Endangered and Rare Fish, Wildlife, and Plant Species Conservation and Enhancement Account**

64100. The department shall pay the costs of administration of this part from the Endangered and Rare Fish, Wildlife, and Plant Species Conservation and Enhancement Account in the Fish and Game Preservation Fund.

**Comment.** Section 64100 continues former Fish and Game Code Section 2098 without substantive change.

## TITLE 7. ENFORCEMENT

## **§ 64150. Penalty for violation of part**

64150. Except as otherwise provided in Section 597 of the Penal Code, the punishment for a violation of any provision of this part is a fine of not more than five thousand dollars (\$5,000) or imprisonment in the county jail for not more than one year, or both the fine and imprisonment.

**Comment.** Section 64150 continues former Fish and Game Code Section 12008, as it relates to a violation of this part, without substantive change.

1      **§ 64155. Penalty for violation of specified provisions**

2      64155. (a) Notwithstanding **Section 12002** or 64150, the punishment for any  
3      violation of Section 62600 or 62605 is a fine of not less than twenty-five thousand  
4      dollars (\$25,000) or more than fifty thousand dollars (\$50,000) for each violation  
5      or imprisonment in the county jail for not more than one year, or by both that fine  
6      and imprisonment.

7      **Comment.** Section 64155 continues former Fish and Game Code Section 12008.1(a) without  
8      substantive change.

9      **§ 64160. Deposit of fines and forfeitures**

10     64160. Notwithstanding any other law, the moneys collected from any fine or  
11     forfeiture imposed or collected for violating this part shall be deposited as follows:

12     (a) One-half in the Endangered Species Permitting Account established pursuant  
13     to Section 63635.

14     (b) One-half in the county treasury of the county in which the violation  
15     occurred. The board of supervisors shall first use revenues pursuant to this section  
16     to reimburse the costs incurred by the district attorney or city attorney in  
17     investigating and prosecuting the violation. Any excess revenues may be expended  
18     in accordance with **Section 13103**.

19     **Comment.** Section 64160 continues former Fish and Game Code Section 12008.1(b) without  
20     substantive change.

21                   **PART 2. PLANNING AND MITIGATION**

22                   **TITLE 1. NATURAL COMMUNITY  
23                   CONSERVATION PLANNING ACT**

24                   **CHAPTER 1. GENERAL PROVISIONS**

25      **§ 64500. Short title**

26      64500. This title shall be known, and may be cited, as the Natural Community  
27      Conservation Planning Act.

28      **Comment.** Section 64500 continues former Fish and Game Code Section 2800 without  
29      substantive change.

30      **§ 64505. Findings and declarations**

31      64505. The Legislature finds and declares all of the following:

32      (a) The continuing population growth in California will result in increasing  
33      demands for dwindling natural resources and result in the continuing decline of the  
34      state's wildlife.

1       (b) There is a need for broad-based planning to provide for effective protection  
2 and conservation of the state's wildlife heritage while continuing to allow  
3 appropriate development and growth.

4       (c) Natural community conservation planning is an effective tool in protecting  
5 California's natural diversity while reducing conflicts between protection of the  
6 state's wildlife heritage and reasonable use of natural resources for economic  
7 development.

8       (d) Natural community conservation planning promotes coordination and  
9 cooperation among public agencies, landowners, and other private interests,  
10 provides a mechanism by which landowners and development proponents can  
11 effectively address cumulative impact concerns, promotes conservation of  
12 unfragmented habitat areas, promotes multispecies and multihabitat management  
13 and conservation, provides one option for identifying and ensuring appropriate  
14 mitigation that is roughly proportional to impacts on fish and wildlife, and  
15 promotes the conservation of broad-based natural communities and species  
16 diversity.

17       (e) Natural community conservation planning can provide for efficient use and  
18 protection of natural and economic resources while promoting greater sensitivity  
19 to important elements of the state's critical natural diversity.

20       (f) Natural community conservation planning is a voluntary and effective  
21 planning process that can facilitate early coordination to protect the interests of the  
22 state, the federal government, and local public agencies, landowners, and other  
23 private parties.

24       (g) Natural community conservation planning is a mechanism that can provide  
25 an early planning framework for proposed development projects within the  
26 planning area in order to avoid, minimize, and compensate for project impacts to  
27 wildlife.

28       (h) Natural community conservation planning is consistent with, and will  
29 support, the fish and wildlife management activities of the department in its role as  
30 the trustee for fish and wildlife within the state.

31       (i) The purpose of natural community conservation planning is to sustain and  
32 restore those species and their habitat identified by the department that are  
33 necessary to maintain the continued viability of those biological communities  
34 impacted by human changes to the landscape.

35       (j) Natural community conservation planning is a cooperative process that often  
36 involves local, state, and federal agencies and the public, including landowners  
37 within the plan area. The process should encourage the active participation and  
38 support of landowners and others in the conservation and stewardship of natural  
39 resources in the plan area during plan development using appropriate measures,  
40 including incentives.

41       **Comment.** Section 64505 continues former Fish and Game Code Section 2801 without  
42 substantive change.

1    **§ 64510. Further findings and declarations**

2    64510. The Legislature further finds and declares that it is the policy of the state  
3    to conserve, protect, restore, and enhance natural communities. It is the intent of  
4    the Legislature to acquire a fee or less than fee interest in lands consistent with  
5    approved natural community conservation plans and to provide assistance with the  
6    implementation of those plans.

7    **Comment.** Section 64510 continues former Fish and Game Code Section 2802 without  
8    substantive change.

9    **§ 64515. Definitions**

10    64515. The definitions in this section govern the construction of this title:

11    (a) “Adaptive management” means to use the results of new information  
12    gathered through the monitoring program of the plan and from other sources to  
13    adjust management strategies and practices to assist in providing for the  
14    conservation of covered species.

15    (b) “Candidate species” has the same meaning as defined in Section 62105.

16    (c) “Changed circumstances” are reasonably foreseeable circumstances that  
17    could affect a covered species or geographic area covered by the plan.

18    (d) “Conserve,” “conserving,” and “conservation” mean to use, and the use of,  
19    methods and procedures within the plan area that are necessary to bring any  
20    covered species to the point at which the measures provided pursuant to Part 1  
21    (commencing with Section 62000) are not necessary, and for covered species that  
22    are not listed pursuant to Part 1 (commencing with Section 62000), to maintain or  
23    enhance the condition of a species so that listing pursuant to Part 1 (commencing  
24    with Section 62000) will not become necessary.

25    (e) “Covered species” means those species, both listed pursuant to Part 1  
26    (commencing with Section 62000) and nonlisted, conserved and managed under  
27    an approved natural community conservation plan and that may be authorized for  
28    take. Notwithstanding **Section 3511, 4700, 5050, or 5515**, fully protected species  
29    may be covered species pursuant to this subdivision, and taking of fully protected  
30    species may be authorized pursuant to Section 64605 for any fully protected  
31    species conserved and managed as a covered species under an approved natural  
32    community conservation plan.

33    (f) “Department assurance” means the department’s commitment pursuant to  
34    Section 64610.

35    (g) “Monitoring program” means a program within an approved natural  
36    community conservation plan that provides periodic evaluations of monitoring  
37    results to assess the adequacy of the mitigation and conservation strategies or  
38    activities and to provide information to direct the adaptive management program.  
39    The monitoring program shall, to the extent practicable, also be used to meet the  
40    monitoring requirements of Section 21081.6 of the Public Resources Code. A  
41    monitoring program includes all of the following:

1       (1) Surveys to determine the status of biological resources addressed by the  
2 plan, including covered species.

3       (2) Periodic accountings and assessment of authorized take.

4       (3) Progress reports on all of the following matters:

5           (A) Establishment of habitat reserves or other measures that provide equivalent  
6 conservation of covered species and providing funding where applicable.

7           (B) Compliance with the plan and the implementation agreement by the wildlife  
8 agencies, local governments, and landowners who have responsibilities under the  
9 plan.

10          (C) Measurements to determine if mitigation and conservation measures are  
11 being implemented roughly proportional in time and extent to the impact on  
12 habitat or covered species authorized under the plan.

13          (D) Evaluation of the effectiveness of the plan in meeting the conservation  
14 objectives of the plan.

15          (E) Maps of land use changes in the plan area that may affect habitat values or  
16 covered species.

17          (4) A schedule for conducting monitoring activities.

18           (h) “Natural community conservation plan” or “plan” means the plan prepared  
19 pursuant to a planning agreement entered into in accordance with Section 64555.  
20 The plan shall identify and provide for those measures necessary to conserve and  
21 manage natural biological diversity within the plan area while allowing compatible  
22 and appropriate economic development, growth, and other human uses.

23           (i) “Person” has the same meaning as defined in **Section 711.2**.

24           (j) (1) “Plan participant,” prior to approval of a natural community conservation  
25 plan and execution of an implementation agreement, means a signatory to the  
26 planning agreement.

27           (2) Upon approval of a natural community conservation plan and execution of  
28 an implementation agreement, “plan participant” means the permittees and any  
29 local agency that is a signatory to the implementing agreement.

30           (k) “Unforeseen circumstances” means changes affecting one or more species,  
31 habitat, natural community, or the geographic area covered by a conservation plan  
32 that could not reasonably have been anticipated at the time of plan development,  
33 and that result in a substantial adverse change in the status of one or more covered  
34 species.

35           (l) “Wildlife” has the same meaning as defined in **Section 89.5**.

36           (m) “Wildlife agencies” means the department and one or both of the following:

37            (1) United States Fish and Wildlife Service.

38            (2) National Marine Fisheries Service.

39           **Comment.** Section 64515 continues former Fish and Game Code Section 2805 without  
40 substantive change.

## **§ 64520. Regulations**

64520. The department may adopt regulations for the development and implementation of natural community conservation plans consistent with this title.

**Comment.** Section 64520 continues former Fish and Game Code Section 2825 without substantive change.

## **§ 64525. Nonregulatory guidelines**

64525. The department may adopt nonregulatory guidelines to clarify how the provisions of Part 1 (commencing with Section 62000) may be used in connection with natural community conservation plans adopted pursuant to this title.

**Comment.** Section 64525 continues the part of former Fish and Game Code Section 2089.22(b) that applies to natural community conservation plans, without substantive change.

## **§ 64530. Department compensation**

64530. (a) The department may be compensated for the actual costs incurred in participating in the preparation and implementation of natural community conservation plans. These costs may include consultation with other parties to agreements authorized by Section 64555, providing and compiling wildlife and wildlife habitat data, reviewing and approving the final plan, monitoring implementation of the plan, and other activities necessary to the preparation and implementation of a plan.

(b) The department may be compensated for those expenses identified in subdivision (a) according to a schedule in the agreement authorized by Section 64555.

**Comment.** Section 64530 continues former Fish and Game Code Section 2829 without substantive change.

## CHAPTER 2. PLANNING

## **§ 64550. Authority to undertake planning**

64550. Any person, or any local, state, or federal agency, independently, or in cooperation with other persons, may undertake natural community conservation planning.

**Comment.** Section 64550 continues former Fish and Game Code Section 2809 without substantive change.

## **§ 64555. Cooperative agreement to conduct planning**

64555. The department may enter into an agreement with any person or public entity for the purpose of preparing a natural community conservation plan, in cooperation with a local agency that has land use permit authority over the activities proposed to be addressed in the plan, to provide comprehensive management and conservation of multiple wildlife species, including, but not

1 limited to, those species listed pursuant to Title 2 (commencing with Section  
2 62200) of Part 1.

3       **Comment.** Section 64555 continues the first sentence of former Fish and Game Code Section  
4 2810(a) without substantive change.

5       **§ 64560. Agreement requirements**

6       64560. A planning agreement entered into pursuant to Section 64555 shall meet  
7 all of the following conditions:

8       (a) The agreement shall be binding upon the department, other participating  
9 federal, state, and local agencies, and participating private landowners.

10     (b) The agreement shall define the geographic scope of the conservation  
11 planning area.

12     (c) The agreement shall identify a preliminary list of those natural communities,  
13 and the endangered, threatened, candidate, or other species known, or reasonably  
14 expected to be found, in those communities, that are intended to be the initial  
15 focus of the plan.

16     (d) The agreement shall identify preliminary conservation objectives for the  
17 planning area.

18     (e) The agreement shall establish a process for the inclusion of independent  
19 scientific input to assist the department and plan participants, and to do all of the  
20 following:

21       (1) Recommend scientifically sound conservation strategies for species and  
22 natural communities proposed to be covered by the plan.

23       (2) Recommend a set of reserve design principles that addresses the needs of  
24 species, landscapes, ecosystems, and ecological processes in the planning area  
25 proposed to be addressed by the plan.

26       (3) Recommend management principles and conservation goals that can be used  
27 in developing a framework for the monitoring and adaptive management  
28 component of the plan.

29       (4) Identify data gaps and uncertainties so that risk factors can be evaluated.

30       (f) The agreement shall require coordination with federal wildlife agencies with  
31 respect to the federal Endangered Species Act (16 U.S.C. Sec. 1531 et seq.).

32       (g) The agreement shall encourage concurrent planning for wetlands and waters  
33 of the United States.

34       (h) The agreement shall establish an interim process during plan development  
35 for project review wherein discretionary projects within the plan area subject to  
36 Division 13 (commencing with Section 21000) of the Public Resources Code that  
37 potentially conflict with the preliminary conservation objectives in the planning  
38 agreement are reviewed by the department prior to, or as soon as possible after the  
39 project application is deemed complete pursuant to Section 65943 of the  
40 Government Code and the department recommends mitigation measures or project  
41 alternatives that would help achieve the preliminary conservation objectives. As  
42 part of this process, information developed pursuant to subdivision (e) of Section

1       64560 shall be taken into consideration by the department and plan participants.  
2       Any take of candidate, threatened, or endangered species that occurs during this  
3       interim period shall be included in the analysis of take to be authorized under an  
4       approved plan. Nothing in this subdivision is intended to authorize take of  
5       candidate, protected, or endangered species.

6       (i) The agreement shall establish a process for public participation throughout  
7       the plan development and review pursuant to Section 64570.

8       (j) The agreement shall include a provision specifying the amount of  
9       compensation, if any, payable to the department pursuant to Section 64530.

10      **Comment.** Subdivisions (a) through (i) of Section 64560 continues former Fish and Game  
11      Code Section 2810(b) without substantive change.

12      Subdivision (j) continues the second sentence of former Fish and Game Code Section 2810(a)  
13      without substantive change.

14      **§ 64565. Implementation agreement**

15      64565. A natural community conservation plan approved pursuant to Section  
16      64580 shall include an implementation agreement that contains all of the  
17      following:

18       (a) Provisions defining species coverage, including any conditions of coverage.

19       (b) Provisions for establishing the long-term protection of any habitat reserve or  
20       other measures that provide equivalent conservation of covered species.

21       (c) Specific terms and conditions, which, if violated, would result in the  
22       suspension or revocation of the permit, in whole or in part. The department shall  
23       include a provision requiring notification to the plan participant of a specified  
24       period of time to cure any default prior to suspension or revocation of the permit  
25       in whole or in part. These terms and conditions shall address, but are not limited  
26       to, provisions specifying the actions the department shall take under all of the  
27       following circumstances:

28           (1) If the plan participant fails to provide adequate funding.

29           (2) If the plan participant fails to maintain the rough proportionality between  
30       impacts on habitat or covered species and conservation measures.

31           (3) If the plan participant adopts, amends, or approves any plan or project  
32       without the concurrence of the wildlife agencies that is inconsistent with the  
33       objectives and requirements of the approved plan.

34           (4) If the level of take exceeds that authorized by the permit.

35           (d) Provisions specifying procedures for amendment of the plan and the  
36       implementation agreement.

37           (e) Provisions ensuring implementation of the monitoring program and adaptive  
38       management program.

39           (f) Provisions for oversight of plan implementation for purposes of assessing  
40       mitigation performance, funding, and habitat protection measures.

41           (g) Provisions for periodic reporting to the wildlife agencies and the public for  
42       purposes of information and evaluation of plan progress.

1       (h) Mechanisms to ensure adequate funding to carry out the conservation actions  
2       identified in the plan.

3       (i) Provisions to ensure that implementation of mitigation and conservation  
4       measures on a plan basis is roughly proportional in time and extent to the impact  
5       on habitat or covered species authorized under the plan. These provisions shall  
6       identify the conservation measures, including assembly of reserves where  
7       appropriate and implementation of monitoring and management activities, that  
8       will be maintained or carried out in rough proportion to the impact on habitat or  
9       covered species and the measurements that will be used to determine if this is  
10      occurring.

11      **Comment.** Section 64565 continues former Fish and Game Code Section 2820(b) without  
12      substantive change.

13      **§ 64570. Public participation in plan development and review**

14      64570. The department shall establish, in cooperation with the parties to the  
15      planning agreement, a process for public participation throughout plan  
16      development and review to ensure that interested persons, including landowners,  
17      have an adequate opportunity to provide input to lead agencies, state and federal  
18      wildlife agencies, and others involved in preparing the plan. The public  
19      participation objectives of this section may be achieved through public working  
20      groups or advisory committees, established early in the process. This process shall  
21      include all of the following:

22       (a) A requirement that draft documents associated with a natural community  
23       conservation plan that are being considered for adoption by the plan lead agency  
24       shall be available for public review and comment for at least 60 days prior to the  
25       adoption of that draft document. Preliminary public review documents shall be  
26       made available by the plan lead agency at least 10 working days prior to any  
27       public hearing addressing these documents. The review period specified in this  
28       subdivision may run concurrently with the review period provided for any  
29       document required by the California Environmental Quality Act (Division 13  
30       (commencing with Section 21000) of the Public Resources Code) that is  
31       associated with the natural community conservation plan. This subdivision shall  
32       not be construed to limit the discretion of a public agency to revise any draft  
33       documents at a public hearing.

34       (b) A requirement to make available in a reasonable and timely manner all draft  
35       plans, memoranda of understanding, maps, conservation guidelines, species  
36       coverage lists, and other planning documents associated with a natural community  
37       conservation plan that are subject to public review.

38       (c) A requirement that all public hearings held during plan preparation or review  
39       for approval are complementary to, or integrated with, those hearings otherwise  
40       provided by law.

41       (d) An outreach program to provide access to information for persons interested  
42       in the plan, including landowners, with an emphasis on obtaining input from a

1 balanced variety of affected public and private interests, including state and local  
2 governments, county agricultural commissioners, agricultural organizations,  
3 landowners, conservation organizations, and the general public.

4       **Comment.** Section 64570 continues former Fish and Game Code Section 2815 without  
5 substantive change.

6       **§ 64575. Public review prior to approval**

7       64575. Prior to department approval of the planning agreement, the public shall  
8 have 21 calendar days to review and comment on the proposed planning  
9 agreement.

10     **Comment.** Section 64575 continues former Fish and Game Code Section 2810(d) without  
11 substantive change.

12     **§ 64580. Plan approval**

13     64580. The department shall approve a natural community conservation plan for  
14 implementation after making the following findings, based upon substantial  
15 evidence in the record:

16     (a) The plan has been developed consistent with the process identified in the  
17 planning agreement entered into pursuant to Section 64555.

18     (b) The plan integrates adaptive management strategies that are periodically  
19 evaluated and modified based on the information from the monitoring program  
20 and other sources, which will assist in providing for the conservation of covered  
21 species and ecosystems within the plan area.

22     (c) The plan provides for the protection of habitat, natural communities, and  
23 species diversity on a landscape or ecosystem level through the creation and long-  
24 term management of habitat reserves or other measures that provide equivalent  
25 conservation of covered species appropriate for land, aquatic, and marine habitats  
26 within the plan area.

27     (d) The development of reserve systems and conservation measures in the plan  
28 area provides, as needed for the conservation of species, all of the following:

29       (1) Conserving, restoring, and managing representative natural and seminatural  
30 landscapes to maintain the ecological integrity of large habitat blocks, ecosystem  
31 function, and biological diversity.

32       (2) Establishing one or more reserves or other measures that provide equivalent  
33 conservation of covered species within the plan area and linkages between them  
34 and adjacent habitat areas outside of the plan area.

35       (3) Protecting and maintaining habitat areas that are large enough to support  
36 sustainable populations of covered species.

37       (4) Incorporating a range of environmental gradients (such as slope, elevation,  
38 aspect, and coastal or inland characteristics) and high habitat diversity to provide  
39 for shifting species distributions due to changed circumstances.

(5) Sustaining the effective movement and interchange of organisms between habitat areas in a manner that maintains the ecological integrity of the habitat areas within the plan area.

(e) The plan identifies activities, and any restrictions on those activities, allowed within reserve areas that are compatible with the conservation of species, habitats, natural communities, and their associated ecological functions.

(f) The plan contains specific conservation measures that meet the biological needs of covered species and that are based upon the best available scientific information regarding the status of covered species and the impacts of permitted activities on those species.

(g) The plan contains a monitoring program.

(h) The plan contains an adaptive management program.

(i) The plan includes the estimated timeframe and process by which the reserves or other conservation measures are to be implemented, including obligations of landowners and plan signatories and consequences of the failure to acquire lands in a timely manner.

(j) The plan contains provisions that ensure adequate funding to carry out the conservation actions identified in the plan.

**Comment.** Section 64580 continues former Fish and Game Code Section 2820(a) without substantive change.

#### **§ 64585. Approval of agreement not a “project”**

64585. The approval of a planning agreement is not a project pursuant to Division 13 (commencing with Section 21000) of the Public Resources Code.

**Comment.** Section 64585 continues former Fish and Game Code Section 2810(c) without substantive change.

CHAPTER 3. IMPLEMENTATION

## **§ 64600. Department actions**

64600. Concurrent with the approval by the department of a final natural community conservation plan, the department shall do both of the following:

(a) Establish a list of species that are authorized for take pursuant to Section 64605 and the department shall make specific findings to support coverage pursuant to Sections 64565 and 64580. For purposes of determining whether a species should receive coverage under a plan, the department shall use, in addition to the standards required for the adoption of a plan, one or more of the following criteria:

(1) Coverage is warranted based upon regional or landscape level consideration, such as healthy population levels, widespread distribution throughout the plan area, and life history characteristics that respond to habitat-scale conservation and management actions.

1       (2) Coverage is warranted based on regional or landscape level considerations  
2 with site specific conservation and management requirements that are clearly  
3 identified in the plan for species that are generally well-distributed, but that have  
4 core habitats that must be conserved.

5       (3) Coverage is warranted based upon site specific considerations and the  
6 identification of specific conservation and management conditions for species  
7 within a narrowly defined habitat or limited geographic area within the plan area.

8       (b) Find that the mitigation measures specified in the plan and imposed by the  
9 plan participants are consistent with subdivision (d) of Section 64505.

10      **Comment.** Section 64600 continues former Fish and Game Code Section 2821 without  
11 substantive change.

12      **☒ Staff Note.** Existing Section 2821 requires the department to “make specific findings to  
13 support coverage pursuant to Section 2820.” Section 2820 is a long section that addresses many  
14 aspects of the approval and implementation of a natural community conservation plan. In  
15 proposed Section 64600(a), the reference is revised to refer to the provisions that seem most  
16 relevant to the purpose of the reference: proposed Sections 64565 and 64580. **The staff invites**  
17 **comment on whether that change would cause any problems.**

18      **§ 64605. Authorized take**

19      64605. At the time of plan approval, the department may authorize by permit the  
20 taking of any covered species, including species designated as fully protected  
21 species pursuant to **Section 3511, 4700, 5050, or 5515**, whose conservation and  
22 management is provided for in a natural community conservation plan approved  
23 by the department.

24      **Comment.** Section 64605 continues former Fish and Game Code Section 2835 without  
25 substantive change.

26      **§ 64610. Assurances**

27      64610. The department may provide assurances for plan participants  
28 commensurate with long-term conservation assurances and associated  
29 implementation measures pursuant to the approved plan.

30      (a) When providing assurances pursuant to this section, the department’s  
31 determination of the level of assurances and the time limits specified in the  
32 implementation agreement for assurances may be based on localized conditions  
33 and shall consider all of the following:

34       (1) The level of knowledge of the status of the covered species and natural  
35 communities.

36       (2) The adequacy of analysis of the impact of take on covered species.

37       (3) The use of the best available science to make assessments about the impacts  
38 of take, the reliability of mitigation strategies, and the appropriateness of  
39 monitoring techniques.

40       (4) The appropriateness of the size and duration of the plan with respect to  
41 quality and amount of data.

1       (5) The sufficiency of mechanisms for long-term funding of all components of  
2 the plan and contingencies.

3       (6) The degree of coordination and accessibility of centralized data for analysis  
4 and evaluation of the effectiveness of the plan.

5       (7) The degree to which a thorough range of foreseeable circumstances are  
6 considered and provided for under the adaptive management program.

7       (8) The size and duration of the plan.

8       (b) If there are unforeseen circumstances, additional land, water, or financial  
9 compensation or additional restrictions on the use of land, water, or other natural  
10 resources shall not be required without the consent of plan participants for a period  
11 of time specified in the implementation agreement, unless the department  
12 determines that the plan is not being implemented consistent with the substantive  
13 terms of the implementation agreement.

14      **Comment.** Section 64610 continues former Fish and Game Code Section 2820(f) without  
15 substantive change.

16      **§ 64615. No effect on application of CEQA**

17      64615. Nothing in this title exempts a project proposed in a natural community  
18 conservation planning area from Division 13 (commencing with Section 21000) of  
19 the Public Resources Code or otherwise alters or affects the applicability of that  
20 division.

21      **Comment.** Section 64615 continues former Fish and Game Code Section 2826 without  
22 substantive change.

23      **§ 64620. CEQA analysis**

24      64620. To the extent provided pursuant to Division 13 (commencing with  
25 Section 21000) of the Public Resources Code and any guidelines adopted pursuant  
26 thereto, if the impacts on one or more covered species and its habitat are analyzed  
27 and mitigated pursuant to a program environmental impact report for a plan  
28 adopted pursuant to this title, a plan participant that is a lead agency or a  
29 responsible agency under that division shall incorporate in the review of any  
30 subsequent project in the plan area the feasible mitigation measures and  
31 alternatives related to the biological impacts on covered species and their habitat  
32 developed in the program environmental impact report.

33      **Comment.** Section 64620 continues former Fish and Game Code Section 2820(e) without  
34 substantive change.

35      **§ 64625. Data and reports available for public review**

36      64625. Any data and reports associated with the monitoring program required by  
37 Sections 64565 and 64580 shall be available for public review. The entity  
38 managing the plan shall also conduct public workshops on an annual basis to  
39 provide information and evaluate progress toward attaining the conservation  
40 objectives of the plan.

1       **Comment.** Section 64625 continues former Fish and Game Code Section 2820(d) without  
2 substantive change.

3       **§ 64630. Use of conservation corps**

4       64630. To the extent practicable, implementation of natural community  
5 conservation plans shall use the services of either the California Conservation  
6 Corps or local community conservation corps.

7       **Comment.** Section 64630 continues former Fish and Game Code Section 2827 without  
8 substantive change.

9       **§ 64635. Injunctive relief**

10      64635. The department may seek injunctive relief against any plan participant,  
11 person, or entity to enforce this title.

12      **Comment.** Section 64635 continues former Fish and Game Code Section 2822 without  
13 substantive change.

14      **§ 64640. Suspension of take or revocation of permit**

15      64640. The department shall suspend or revoke any permit, in whole or in part,  
16 issued for the take of a species subject to Section 64605 if the continued take of  
17 the species would result in jeopardizing the continued existence of the species.

18      **Comment.** Section 64640 continues former Fish and Game Code Section 2823 without  
19 substantive change.

20      **§ 64645. Breach of proportionality between take and conservation**

21      64645. If a plan participant does not maintain the proportionality between take  
22 and conservation measures specified in the implementation agreement and does  
23 not either cure the default within 45 days or enter into an agreement with the  
24 department within 45 days to expeditiously cure the default, the department shall  
25 suspend or revoke the permit, in whole or in part.

26      **Comment.** Section 64645 continues former Fish and Game Code Section 2820(c) without  
27 substantive change.

28      **§ 64650. Local government authority to acquire land or water**

29      64650. Nothing in this title prohibits a local government from exercising any  
30 power or authority granted to it pursuant to state law to acquire land or water to  
31 implement a plan.

32      **Comment.** Section 64650 continues former Fish and Game Code Section 2828 without  
33 substantive change.

34      **§ 64655. Effect on take in specified circumstances**

35      64655. Nothing in this title prohibits the taking or the incidental take of any  
36 identified species if the taking is authorized by the department pursuant to any of  
37 the following:

1       (a) A natural community conservation plan or amended plan approved by the  
2 department prior to January 1, 2002. Any permits, plans, implementation  
3 agreements, and amendments to those permits, plans, or implementation  
4 agreements described in this section are deemed to be in full force and effect as of  
5 the date approved or entered into by the parties insofar as they authorize the take  
6 of identified species pursuant to an approved natural community conservation plan  
7 and shall be governed solely by former Chapter 10 (commencing with Section  
8 2800) of Division 3 of the Fish and Game Code as it read on December 31, 2001.

9       (b) Any natural community conservation plan, or subarea plan, approved, or  
10 amended on or after January 1, 2002, for which a planning or enrollment  
11 agreement meets any of the following criteria, which shall be solely governed in  
12 accordance with former Chapter 10 (commencing with Section 2800) of Division  
13 3 of the Fish and Game Code as it read on December 31, 2001:

14       (1) The natural community conservation plan was entered into between the  
15 department and plan participants prior to January 1, 2001, and is carried out  
16 pursuant to Rule 4(d) for the California Gnatcatcher (Federal Register Volume 58,  
17 December 10, 1993), including the southern subregion of Orange County.

18       (2) The natural community conservation plan was prepared pursuant to the  
19 planning agreement for the San Diego Multiple Species Conservation Plan.

20       (3) The natural community conservation plan was prepared pursuant to the  
21 planning agreement for the San Diego Multiple Habitat Conservation Plan.

22       (c) Any programmatic natural community conservation plan approved by the  
23 department on or before January 1, 2002.

24       (d) Any natural community conservation plan developed pursuant to a planning  
25 or enrollment agreement executed on or before January 1, 2001, and for which the  
26 department finds that the plan has been developed using a public participation and  
27 scientific analysis process substantially in conformance with the intent of  
28 subdivision (e) of Section 64560 and Section 64570.

29       (e) Any natural community conservation plan developed pursuant to a planning  
30 agreement executed on or before January 1, 2002, and which the department finds  
31 is in substantial compliance with Sections 64565, 64580, 64610, 64620, 64625,  
32 64645.

33       (f) (1) Any natural community conservation plan or subarea plan initiated on or  
34 before January 1, 2000, or amendments thereto, by Sweetwater Authority, Helix  
35 Water District, Padre Dam Municipal Water District, Santa Fe Irrigation District,  
36 or the San Diego County Water Authority, which the department determines is  
37 consistent with the approved San Diego Multiple Habitat Conservation Program or  
38 the San Diego Multiple Species Conservation Program, is exempt from Sections  
39 64555, 64560, 64575, and 64585, and subdivision (a) of Section 64580, except as  
40 provided in paragraph (2), if the department finds that the plan has been developed  
41 and is otherwise in conformance with this title.

42       (2) The public water agencies identified in this subdivision and the department  
43 shall include independent scientific input as described in paragraphs (1) to (4),

1 inclusive, of subdivision (e) of Section 64560 into the proposed plans in a manner  
2 that focuses on the covered species that are proposed for take authorization and  
3 that are not otherwise covered in the San Diego Multiple Species Conservation  
4 Program or the San Diego Multiple Habitat Conservation Program.

5 (3) The scientific input required by paragraph (2) shall be based on the best and  
6 most current scientific data generally available, and shall assure that  
7 documentation for coverage of all species is equal or greater than the San Diego  
8 Multiple Habitat Conservation Program.

9       **Comment.** Section 64655 continues former Fish and Game Code Section 2830 without  
10 substantive change.

11       **☒ Staff Notes.** (1) Existing Section 2830(e) refers to a “natural community conservation plan  
12 developed pursuant to a planning agreement executed on or before January 1, 2002, and which  
13 the department finds is in substantial compliance with Section 2820.” It is not certain which parts  
14 of Section 2820 are relevant to the purpose of that reference. Out of caution, proposed Section  
15 64655(e) refers to every provision of the proposed law that would continue part of existing  
16 Section 2820. **The staff invites comment on whether that approach is overbroad and, if so,**  
17 **which provisions can be dropped from the reference.**

18       (2) Existing Section 2830(f)(1) provides that certain entities are “exempt from Section 2810.” It is  
19 not certain which parts of Section 2810 are relevant to the purpose of that reference. Out of  
20 caution, proposed Section 64655(f)(1) refers to every provision of the proposed law that would  
21 continue part of existing Section 2810. **The staff invites comment on whether that approach is**  
22 **overbroad and, if so, which provisions can be dropped from the reference.**

23       **§ 64660. San Diego dedication of open space**

24       64660. (a) Notwithstanding any other provision of law, lands designated as of  
25 January 1, 2013, as open-space lands in a document entitled “Declaration of the  
26 Dedication of Land” approved by a resolution of the San Diego City Council in  
27 the same manner in which the city council processes approval of dedicated open  
28 space, reserving to the city council the authority to grant easements for utility  
29 purposes in, under, and across dedicated property, if those easements and facilities  
30 to be located thereon do not significantly interfere with the park and recreational  
31 use of the property, and filed with the Office of the City Clerk for the City of San  
32 Diego, and, if required, at the Office of the County of San Diego  
33 Assessor/Recorder/County Clerk, are dedicated land under the City Charter of the  
34 City of San Diego.

35       (b) Upon filing of that document in accordance with subdivision (a), the Office  
36 of the City Clerk for the City of San Diego, and, if applicable, the Office of the  
37 County of San Diego Assessor/Recorder/County Clerk shall make the document  
38 available for inspection by the public upon request.

39       **Comment.** Section 64660 continues former Fish and Game Code Section 2831 without  
40 substantive change.

1      **☒ Staff Note.** Existing Section 2831 does not have any obvious connection to Natural  
2      Community Conservation Planning. The staff invites comment on whether this section would  
3      be better located elsewhere (and if so, where).

4                    **TITLE 2. ADVANCE MITIGATION AND**  
5                    **REGIONAL CONSERVATION INVESTMENT**  
6                    **STRATEGIES**

7                    **CHAPTER 1. GENERAL PROVISIONS**

8                    **Article 1. Legislative Findings and Intent**

9                    **§ 64700. Findings and declarations**

10        64700. (a) The Legislature finds and declares that it would be beneficial to  
11        identify species and habitat conservation initiatives at a regional scale, including  
12        actions to address the impacts of climate change and other wildlife stressors, in  
13        order to guide voluntary investments in conservation, and compensatory  
14        mitigation for impacts to ecological resources, including impacts to threatened and  
15        endangered species, other sensitive species, natural communities, ecological  
16        processes, and wildlife corridors.

17        (b) The purpose of this title is to promote the voluntary conservation of natural  
18        resources, including biodiversity and ecological processes, and to enhance  
19        resiliency to climate change and other threats. In order to further this goal, it is the  
20        policy of the state to encourage voluntary mechanisms to conserve biological and  
21        other ecological resources and to identify conservation actions, including actions  
22        to promote resiliency to the impacts of climate change and other stressors to  
23        species and habitat.

24        (c) It is further the policy of the state to encourage voluntary mechanisms to  
25        identify and implement advance mitigation actions that do all of the following:

26                  (1) Can be used to compensate for project impacts, including, but not limited to,  
27                  infrastructure and renewable energy projects, more efficiently.

28                  (2) Are effective ecologically.

29                  (3) Will help to conserve regionally important biological and other ecological  
30                  resources.

31        (d) In enacting this title, it is the intent of the Legislature to promote science-  
32        based conservation, including actions to promote resiliency to the impacts of  
33        climate change and other stressors. It is further the intent of the Legislature to  
34        create nonregulatory mechanisms to guide investments in conservation,  
35        infrastructure, and compensatory mitigation for impacts to natural resources,  
36        including impacts to threatened and endangered species, other sensitive species,  
37        natural communities, ecological processes, and connectivity.

(e) In enacting this title, it is not the intent of the Legislature to regulate the use of land, establish land use designations, or to affect, limit, or restrict the land use authority of any public agency.

(f) Further, in enacting this title, it is not the intent of the Legislature that an approved regional conservation investment strategy would be binding on independent public agency action within the strategy's geographic scope.

**Comment.** Section 64700 continues former Fish and Game Code Section 1850 without substantive change.

## **§ 64705. Legislative intent**

64705. It is the intent of this title to establish requirements that provide sufficient flexibility to develop each regional conservation investment strategy based on the best available information regarding the strategy area.

**Comment.** Section 64705 continues former Fish and Game Code Section 1854(b) without substantive change.

## Article 2. Definitions

## **§ 64710. Application**

64710. The definitions in this article govern this title.

**Comment.** Section 64710 restates the introductory clause of former Fish and Game Code Section 1851 without substantive change.

## **§ 64715. Administrative draft natural community conservation plan**

64715. "Administrative draft natural community conservation plan" means a substantially complete draft of a natural community conservation plan that is released after January 1, 2016, to the general public, plan participants, and the department.

**Comment.** Section 64715 continues former Fish and Game Code Section 1851(a) without substantive change.

## **§ 64720. Areas of conservation emphasis**

64720. "Areas of Conservation Emphasis" means the biodiversity analysis completed by the department in 2010, or the latest update of that analysis.

**Comment.** Section 64720 continues former Fish and Game Code Section 1851(b) without substantive change.

## **§ 64725. Compensatory mitigation**

64725. “Compensatory mitigation” means actions taken to fulfill, in whole or in part, mitigation requirements under state or federal law or a court mandate.

**Comment.** Section 64725 continues former Fish and Game Code Section 1851(c) without substantive change.

1   **§ 64730. Conservation action**

2   64730. “Conservation action” means an action to preserve or to restore  
3   ecological resources, including habitat, natural communities, ecological processes,  
4   and wildlife corridors, to protect those resources permanently, and to provide for  
5   their perpetual management, so as to help to achieve one or more biological goals  
6   and objectives for one or more focal species. Conservation actions may include,  
7   but are not limited to, actions to offset impacts to focal species.

8   **Comment.** Section 64730 continues former Fish and Game Code Section 1851(d) without  
9   substantive change.

10   **§ 64735. Conservation easement**

11   64735. “Conservation easement” means a perpetual conservation easement that  
12   complies with Chapter 4 (commencing with Section 815) of Title 2 of Part 2 of  
13   Division 2 of the Civil Code.

14   **Comment.** Section 64735 continues former Fish and Game Code Section 1851(e) without  
15   substantive change.

16   **§ 64740. Focal species**

17   64740. “Focal species” means sensitive species within a regional conservation  
18   investment strategy area that are analyzed in the strategy and will benefit from  
19   conservation actions and habitat enhancement actions set forth in the strategy.

20   **Comment.** Section 64740 continues former Fish and Game Code Section 1851(f) without  
21   substantive change.

22   **§ 64745. Habitat enhancement action**

23   64745. “Habitat enhancement action” means an action to improve the quality of  
24   wildlife habitat, or to address risks or stressors to wildlife, that has long-term  
25   durability but does not involve land acquisition or the permanent protection of  
26   habitat, such as improving in-stream flows to benefit fish species, enhancing  
27   habitat connectivity, or invasive species control or eradication.

28   **Comment.** Section 64745 continues former Fish and Game Code Section 1851(g) without  
29   substantive change.

30   **§ 64750. Performance-based milestones**

31   64750. “Performance-based milestones” means specifically identified steps in  
32   the implementation of a conservation action or habitat enhancement action, such  
33   as site protection, initiating implementation, completing implementation, or  
34   achieving performance standards.

35   **Comment.** Section 64750 continues former Fish and Game Code Section 1851(h) without  
36   substantive change.

1   **§ 64755. Performance standards**

2   64755. “Performance standards” means observable or measurable physical or  
3   biological attributes that are used to determine if a conservation action or habitat  
4   enhancement action has met its objectives.

5   **Comment.** Section 64755 continues former Fish and Game Code Section 1851(i) without  
6   substantive change.

7   **§ 64760. Permanently protect**

8   64760. “Permanently protect” means doing both of the following acts:

9   (a) Recording a conservation easement, in a form approved in advance in  
10 writing by the department, or establishing perpetual protection of land in a manner  
11 consistent with draft or approved natural community conservation plans within the  
12 area of the applicable regional conservation investment strategy and approved in  
13 advance in writing by the department, that prevents development, prohibits  
14 inconsistent uses, and ensures that habitat for focal species is maintained.

15   (b) Providing secure, perpetual funding for management of the land, monitoring,  
16 and legal enforcement.

17   **Comment.** Section 64760 continues former Fish and Game Code Section 1851(j) without  
18 substantive change.

19   **§ 64765. Regional conservation assessment**

20   64765. “Regional conservation assessment” means information and analyses  
21 that document the important species, ecosystems, ecosystem processes, protected  
22 areas, and linkages within an ecoregion to provide the appropriate context for  
23 nonbinding, voluntary conservation strategies and actions. Those assessments  
24 include information for the identification of areas with greatest probability for  
25 long-term ecosystem conservation success incorporating cobenefits of ecosystem  
26 services, such as carbon, water, and agricultural lands. A regional conservation  
27 assessment may be used to provide context at an ecoregional or subecoregional  
28 scale to assist with the development of a regional conservation investment  
29 strategy.

30   **Comment.** Section 64765 continues the first two sentences of former Fish and Game Code  
31 Section 1851(k) without substantive change.

32   **§ 64770. Regional conservation investment strategy**

33   64770. “Regional conservation investment strategy” means information and  
34 analyses prepared pursuant to this title to inform nonbinding and voluntary  
35 conservation actions and habitat enhancement actions that would advance the  
36 conservation of focal species, habitat, and other natural resources and to provide  
37 nonbinding voluntary guidance for the identification of wildlife and habitat  
38 conservation priorities, investments in ecological resource conservation, or  
39 identification of locations for compensatory mitigation for impacts to species and  
40 natural resources.

**Comment.** Section 64770 continues the first sentence of former Fish and Game Code Section 1851(l) without substantive change.

## **§ 64775. Regional level**

64775. “Regional level” means the geographic scale of relevant ecologically defined units such as ecoregions.

**Comment.** Section 64775 continues former Fish and Game Code Section 1851(m) without substantive change.

## § 64780. Sensitive species

64780. "Sensitive species" means any special status species identified by a state or federal agency.

**Comment.** Section 64780 continues former Fish and Game Code Section 1851(n) without substantive change.

### Article 3. Implementation and Scope

## **§ 64800. Guidelines**

64800. The department may adopt guidelines and criteria to aid in the implementation of this title. Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code does not apply to the development, adoption, or amendment of guidelines or criteria pursuant to this section. These guidelines and criteria shall be posted on the department's Internet Web site.

**Comment.** Section 64800 continues former Fish and Game Code Section 1858 without substantive change.

## § 64805. Fees

64805. The department shall collect fees or other compensation from a person or entity that proposes to enter into a mitigation credit agreement, and from a public agency that proposes a regional conservation investment strategy or a regional conservation assessment, to pay for all or a portion of the department's costs relating to the mitigation credit agreement, proposed strategy, or proposed assessment.

**Comment.** Section 64805 continues former Fish and Game Code Section 1857 without substantive change.

## **§ 64810. Limitations**

64810. (a) The department shall approve no more than eight regional conservation investment strategies before January 1, 2020.

(b) The department shall not approve a regional conservation investment strategy or regional conservation assessment pursuant to this title on or after January 1, 2020, and shall not enter into a mitigation credit agreement pursuant to this title on or after January 1, 2020.

1       **Comment.** Section 64810 continues former Fish and Game Code Section 1861 without  
2 substantive change.

3       **§ 64815. Report to Legislature**

4       64815. (a) The department shall submit a report to the Legislature on or before  
5 January 1, 2020, regarding the implementation of this title.

6       (b) The report required to be submitted pursuant to subdivision (a) shall be  
7 submitted in compliance with Section 9795 of the Government Code.

8       **Comment.** Section 64815 continues former Fish and Game Code Section 1859 without  
9 substantive change.

10      **§ 64820. Effect on specified statutes**

11      64820. Nothing in this title supersedes, limits, or otherwise modifies the  
12 Sacramento-San Joaquin Delta Reform Act of 2009 (Division 35 (commencing  
13 with Section 85000) of the Water Code) or Division 22.3 (commencing with  
14 Section 32300) of the Public Resources Code.

15      **Comment.** Section 64820 continues former Fish and Game Code Section 1860 without  
16 substantive change.

17                    CHAPTER 2. REGIONAL CONSERVATION ASSESSMENT

18      **§ 64850. Voluntary**

19      64850. A regional conservation assessment is nonbinding, voluntary, and does  
20 not create, modify, or impose regulatory requirements or standards, regulate the  
21 use of land, establish land use designations, or affect the land use authority of, or  
22 the exercise of discretion by, any public agency. The preparation and use of a  
23 regional conservation assessment is voluntary.

24      **Comment.** Section 64850 continues the third and fourth sentences of former Fish and Game  
25 Code Section 1851(k) without substantive change.

26      **§ 64855. Proposal and approval**

27      64855. (a) A regional conservation assessment may be proposed by the  
28 department or any other public agency.

29      (b) A regional conservation assessment may be proposed by the department or  
30 any other public agency.

31      (c) The department may approve a regional conservation assessment only for the  
32 purposes of a regional conservation investment strategy pursuant to this title.

33      (d) A regional conservation assessment is not required for department approval  
34 of a regional conservation investment strategy.

35      **Comment.** Section 64855 continues former Fish and Game Code Section 1853(a) without  
36 substantive change.

1   **§ 64860. Requirements**

2   64860. A regional conservation assessment shall do all of the following:

3   (a) Identify and summarize relevant regional pressures and stressors, including  
4   climate change vulnerability, conservation areas and habitat connectivity values,  
5   included in all of the following:

6   (1) Conservation plans, such as the State Wildlife Action Plan and approved  
7   natural community conservation plans.

8   (2) Analyses designed to identify areas of high biological diversity, such as the  
9   Areas of Conservation Emphasis.

10   (3) Analyses designed to identify areas for habitat connectivity.

11   (b) Identify the best available scientific information and analyses, including  
12   geospatial information regarding the distribution of species and natural  
13   communities.

14   (c) Use spatial analysis to identify ecological relationships between existing  
15   protected areas and conservation areas.

16   (d) Use standard or prevalent vegetation classifications and standard ecoregional  
17   classifications for terrestrial and aquatic data to enable and promote consistency  
18   among regional conservation assessments throughout California.

19   (e) Compile input and summary data in a consistent format that could be  
20   uploaded for interactive use in an Internet Web portal and that would allow  
21   stakeholders to generate queries of regional conservation values within the  
22   strategy area.

23   (f) Be consistent with administrative draft natural community conservation  
24   plans, approved natural community conservation plans, and regional habitat  
25   conservation plans, and approved recovery plans within the ecoregion or  
26   subecoregion included in the assessment.

27   (g) Consider existing major water, transportation, and transmission  
28   infrastructure facilities in the assessment area and account for reasonably  
29   foreseeable development of major infrastructure facilities, including, but not  
30   limited to, renewable energy and housing.

31   (h) Include provisions ensuring that the strategy will be in compliance with all  
32   applicable state and local requirements and does not preempt the authority of local  
33   agencies to implement infrastructure and urban development in local general  
34   plans.

35   (i) Include provisions ensuring that the assessment is consistent with and  
36   complements any approved natural community conservation plan or regional  
37   federal habitat conservation plan that overlaps with the assessment area.

38   (j) Include an explanation of whether, and to what extent, the assessment is  
39   consistent with any previously approved assessment or amended assessment, state  
40   or federal recovery plan, or other state or federal approved conservation strategy  
41   that overlaps with the assessment area.

42   **Comment.** Section 64860 continues former Fish and Game Code Section 1853(c) without  
43   substantive change.

1                   **CHAPTER 3. REGIONAL CONSERVATION INVESTMENT**  
2                   **STRATEGY**

3                   **Article 1. Regional Conservation Investment Strategy Generally**

4                   **§ 64900. Purpose**

5                   64900. The purpose of a regional conservation investment strategy shall be to  
6 inform science-based nonbinding and voluntary conservation actions and habitat  
7 enhancement actions that would advance the conservation of focal species,  
8 including the ecological processes, natural communities, and habitat connectivity  
9 upon which those focal species depend, and to provide nonbinding voluntary  
10 guidance for one or more of the following:

11                  (a) Identification of wildlife and habitat conservation priorities, including  
12 actions to address the impacts of climate change and other wildlife stressors.

13                  (b) Investments in resource conservation.

14                  (c) Infrastructure.

15                  (d) Identification of areas for compensatory mitigation for impacts to species  
16 and natural resources.

17                  **Comment.** Section 64900 continues former Fish and Game Code Section 1852(b) without  
18 substantive change.

19                  **§ 64905. Voluntary**

20                  64905. Regional conservation investment strategies are intended to provide  
21 scientific information for the consideration of public agencies, are voluntary, and  
22 do not create, modify, or impose regulatory requirements or standards, regulate the  
23 use of land, establish land use designations, or affect the land use authority of or  
24 exercise of discretion by, any public agency. The preparation and use of regional  
25 conservation investment strategies for this guidance is voluntary.

26                  **Comment.** Section 64905 continues the second sentence of former Fish and Game Code  
27 Section 1851(l) without substantive change.

28                  **§ 64910. Content**

29                  64910. A regional conservation investment strategy shall include all of the  
30 following:

31                  (a) An explanation of the conservation purpose of and need for the strategy.

32                  (b) The geographic area of the strategy and rationale for the selection of the  
33 area, together with a description of the surrounding ecoregions and any adjacent  
34 protected habitat areas or linkages that provide relevant context for the  
35 development of the strategy.

36                  (c) The focal species included in, and their current known or estimated status  
37 within, the strategy.

1       (d) Important resource conservation elements within the strategy area, including,  
2       but not limited to, important ecological resources and processes, natural  
3       communities, habitat, habitat connectivity, and existing protected areas, and an  
4       explanation of the criteria, data, and methods used to identify those important  
5       conservation elements.

6       (e) A summary of historic, current, and projected future stressors and pressures  
7       in the strategy area, including climate change vulnerability, on the focal species,  
8       habitat, and other natural resources, as identified in the best available scientific  
9       information, including, but not limited to, the State Wildlife Action Plan.

10      (f) Consideration of major water, transportation and transmission infrastructure  
11     facilities, urban development areas, and city, county, and city and county general  
12     plan designations that accounts for reasonably foreseeable development of major  
13     infrastructure facilities, including, but not limited to, renewable energy and  
14     housing in the strategy area.

15      (g) Provisions ensuring that the strategy will be in compliance with all  
16     applicable state and local requirements and does not preempt the authority of local  
17     agencies to implement infrastructure and urban development in local general  
18     plans.

19      (h) Conservation goals and measurable objectives for the focal species and  
20     important conservation elements identified in the strategy that address or respond  
21     to the identified stressors and pressures on focal species.

22      (i) Conservation actions, including a description of the general amounts and  
23     types of habitat that, if preserved or restored and permanently protected, could  
24     achieve the conservation goals and objectives, and a description of how the  
25     conservation actions and habitat enhancement actions were prioritized and  
26     selected in relation to the conservation goals and objectives.

27      (j) Provisions ensuring that the strategy is consistent with and complements any  
28     administrative draft natural community conservation plan, approved natural  
29     community conservation plan, or federal habitat conservation plan that overlaps  
30     with the strategy area.

31      (k) An explanation of whether and to what extent the strategy is consistent with  
32     any previously approved strategy or amended strategy, state or federal recovery  
33     plan, or other state or federal approved conservation strategy that overlaps with the  
34     strategy area.

35      (l) A summary of mitigation banks and conservation banks approved by the  
36     department or the United States Fish and Wildlife Service that are located within  
37     the strategy area or whose service area overlaps with the strategy area.

38      (m) A description of how the strategy's conservation goals and objectives  
39     provide for adaptation opportunities against the effects of climate change for the  
40     strategy's focal species.

41      (n) Incorporation and reliance on, and citation of, the best available scientific  
42     information regarding the strategy area and the surrounding ecoregion, including a  
43     brief description of gaps in relevant scientific information, and use of standard or

1 prevalent vegetation classifications and standard ecoregional classifications for  
2 terrestrial and aquatic data to enable and promote consistency among regional  
3 conservation investment strategies throughout California.

4       **Comment.** Section 64910 continues former Fish and Game Code Section 1852(c) without  
5 substantive change.

6       **§ 64915. Considerations**

7       64915. In addition to considering the potential to advance the conservation of  
8 focal species, regional conservation investment strategies shall consider all of the  
9 following:

- 10       (a) The conservation benefits of preserving working lands for agricultural uses.
- 11       (b) Reasonably foreseeable development of infrastructure facilities.
- 12       (c) Reasonably foreseeable projects in the strategy area, including, but not  
13 limited to, housing.
- 14       (d) Reasonably foreseeable development for the production of renewable  
15 energy.
- 16       (e) Draft natural community conservation plans within the area of the applicable  
17 regional conservation investment strategy.

18       **Comment.** Section 64915 continues former Fish and Game Code Section 1852(e) without  
19 substantive change.

20       **§ 64920. Incorporation of regional conservation assessment**

21       64920. If a regional conservation assessment that encompasses the area of a  
22 proposed regional conservation investment strategy has already been approved by  
23 the department, the strategy shall explain how and to what extent it has  
24 incorporated the assessment information and analysis.

25       **Comment.** Section 64920 continues former Fish and Game Code Section 1853(b) without  
26 substantive change.

27       **§ 64925. Format**

28       64925. A regional conservation investment strategy shall compile input and  
29 summary priority data in a consistent format that could be uploaded for interactive  
30 use in an Internet Web portal and that would allow stakeholders to generate  
31 queries of regional conservation values within the strategy area.

32       **Comment.** Section 64925 continues former Fish and Game Code Section 1852(d) without  
33 substantive change.

34       **§ 64930. Consistent metrics.**

35       64930. The department shall require the use of consistent metrics that  
36 incorporate both the area and quality of habitat and other natural resources in  
37 relation to a regional conservation investment strategy's conservation objectives to  
38 measure the net change resulting from the implementation of conservation actions  
39 and habitat enhancement actions.

**Comment.** Section 64930 continues former Fish and Game Code Section 1854(e) without substantive change.

## **§ 64935. Proposal and approval**

64935. (a) A regional conservation investment strategy may be proposed by the department or any other public agency, and shall be developed in consultation with local agencies that have land use authority within the geographic area of the regional conservation investment strategy.

(b) The department may approve a regional conservation investment strategy pursuant to this title.

(c) The department may only approve a regional conservation investment strategy if one or more state agencies request approval of the regional conservation investment strategy through a letter sent to the director indicating that the proposed regional conservation investment strategy would contribute to meeting both of the following state goals:

- (1) Conservation.
  - (2) Public infrastructure or forest management.

**Comment.** Section 64935 continues former Fish and Game Code Section 1852(a) without substantive change.

## Article 2. Procedure

## **§ 64960. Notice of intent**

64960. (a) A public agency shall publish notice of its intent to create a regional conservation investment strategy.

(b) This notice shall be filed with the Governor's Office of Planning and Research and the county clerk of each county in which the regional conservation investment strategy is found in part or in whole.

(c) If preparation of a regional conservation investment strategy was initiated before January 1, 2017, this notice shall not be required.

**Comment.** Section 64960 continues former Fish and Game Code Section 1854(c)(1) without substantive change.

## **§ 64965. Department review and acceptance of draft**

64965. (a) After a draft regional conservation investment strategy or an amendment to a strategy is submitted to the department for approval, the department shall have 30 days within which to deem the draft regional conservation investment strategy or an amended strategy complete or to explain in writing to the public agency submitting the strategy or amended strategy what is needed to complete the strategy or amended strategy.

(b) Within 30 days of deeming a draft regional conservation investment strategy or amended strategy complete, the department shall make the draft strategy or amended strategy available to the public on its Internet Web site for review and

1 comment for a period of at least 30 days and shall notify any public agency,  
2 organization, or individual who has filed a written request to the department for  
3 notices regarding draft regional conservation strategies.

4       **Comment.** Section 64965 continues former Fish and Game Code Section 1854(c)(2) without  
5 substantive change.

6       **§ 64970. Public meeting and comment**

7       64970. (a) A public agency proposing a strategy or amended strategy shall hold  
8 a public meeting to allow interested persons and entities to receive information  
9 about the draft regional conservation investment strategy or amended strategy  
10 early in the process of preparing it and to have an adequate opportunity to provide  
11 written and oral comments. The public meeting shall be held at a location within  
12 or near the strategy area.

13       (b) In a draft regional conservation investment strategy or amended strategy  
14 submitted to the department for approval, the public agency shall include  
15 responses to written public comments submitted during the public comment  
16 period.

17       (c) If preparation of a regional conservation investment strategy was initiated  
18 before January 1, 2017, and a public meeting regarding the strategy or amended  
19 strategy that is consistent with the requirements of this article was held before  
20 January 1, 2017, an additional public meeting shall not be required.

21       (d) If preparation of a regional conservation investment strategy was initiated  
22 before January 1, 2017, and a public meeting regarding the strategy was not held  
23 before January 1, 2017, the public meeting required under this article may be held  
24 after January 1, 2017, if it is held at least 30 days before the strategy is submitted  
25 to the department for approval.

26       **Comment.** Section 64970 continues former Fish and Game Code Section 1854(c)(3) without  
27 substantive change.

28       **§ 64975. Notice of meeting**

29       64975. At least 30 days before holding a public meeting to distribute  
30 information about the development of a draft regional conservation investment  
31 strategy or amended strategy, a public agency proposing a strategy shall provide  
32 notice of a regional conservation investment strategy or amended strategy public  
33 meeting as follows:

34       (a) On the public agency's Internet Web site and any relevant LISTSERV.  
35       (b) To each city, county, and city and county within or adjacent to the regional  
36 conservation investment strategy area.

37       (c) To the implementing entity for each natural community conservation plan or  
38 federal regional habitat conservation plan that overlaps with the strategy area.

39       (d) To each public agency, organization, or individual who has filed a written  
40 request for the notice, including any agency, organization, or individual who has

1 filed a written request to the department for notices of all regional conservation  
2 investment strategy public meetings.

3       **Comment.** Section 64975 continues former Fish and Game Code Section 1854(c)(4) without  
4 substantive change.

5       **§ 64980. Notice of final draft**

6       64980. At least 60 days before submitting a final regional conservation  
7 investment strategy or amended strategy to the department for approval, the public  
8 agency proposing the investment strategy or amended strategy shall notify the  
9 board of supervisors and the city councils in each county within the geographical  
10 scope of the strategy and provide the board of supervisors and the city councils  
11 with an opportunity to submit written comments for a period of at least 30 days.

12      **Comment.** Section 64980 continues former Fish and Game Code Section 1854(c)(5) without  
13 substantive change.

14      **§ 64985. Department review of final draft**

15      64985. After a final regional conservation investment strategy or amended  
16 strategy is submitted to the department for approval, the department shall have 30  
17 days within which to approve the final regional conservation investment strategy  
18 or amended strategy or to explain in writing to the public agency submitting the  
19 strategy or amended strategy what is needed to approve the strategy or amended  
20 strategy.

21      **Comment.** Section 64985 continues former Fish and Game Code Section 1854(c)(6) without  
22 substantive change.

23      **§ 64990. Limitation on department rejection**

24      64990. The department shall not reject biologically appropriate and adequate  
25 compensatory mitigation proposed by a project proponent on the basis that the  
26 compensatory mitigation is not a conservation action or habitat enhancement  
27 identified in a regional conservation investment strategy.

28      **Comment.** Section 64990 continues former Fish and Game Code Section 1855(e) without  
29 substantive change.

30      **§ 64995. Internet publication**

31      64995. The department shall make all approved regional conservation  
32 investment strategies, including all updates to scientific information and analyses  
33 used in a regional conservation investment strategy and any amendments to the  
34 strategy available on its Internet Web site.

35      **Comment.** Section 64995 continues former Fish and Game Code Section 1854(d) without  
36 substantive change.

37      **§ 65000. Duration**

38      65000. (a) The department may prepare or approve a regional conservation  
39 investment strategy, or approve an amended strategy, for an initial period of up to

10 years after finding that the strategy meets the requirements of Article 1 (commencing with Section 64900).

(b) The department may extend the duration of an approved or amended regional conservation investment strategy for additional periods of up to 10 years after updating the strategy for new scientific information and finding that the strategy continues to meet the requirements of Article 1 (commencing with Section 64900).

(c) For purposes of this article, an amended strategy means a complete regional conservation investment strategy prepared by a public agency to amend substantially and to replace an approved strategy submitted by the public agency.

**Comment.** Section 65000 continues former Fish and Game Code Section 1854(a) without substantive change.

### Article 3. Effect

## **§ 65050. Effect on public agencies**

65050. (a) Regional conservation investment strategies shall not affect the authority or discretion of any public agency and shall not be binding upon public agencies other than parties to a mitigation credit agreement.

(b) Nothing in this title increases or decreases the authority or jurisdiction of the department regarding any land use, species, habitat, area, resource, plan, process, or corridor.

(c) Regional conservation investment strategies are intended to provide scientific information for the consideration of public agencies.

(d) Nothing in this title or any other provision of law requires any public agency, other than a public agency that is party to a mitigation credit agreement, to adopt, implement, or otherwise adhere to a regional conservation investment strategy or a regional conservation assessment.

**Comment.** Section 65050 continues former Fish and Game Code Section 1855(a) without substantive change.

## **§ 65055. Effect on other processes**

65055. The approval or existence of a regional conservation investment strategy, mitigation credit agreement, or credit pursuant to this title does not do any of the following:

(a) Modify in any way the standards for issuance of incidental take permits or consistency determinations pursuant to Section 62700 or 62705, issuance of take authorizations pursuant to Section 64605, the issuance of lake or streambed alteration agreements pursuant to **Section 1602**, or any other provision of this code or regulations adopted pursuant to this code.

(b) Modify in any way the standards under the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), or in any way limit a lead agency's or responsible agency's discretion, in connection with any determination of whether a proposed project may or may not

1 result in significant environmental effects or in any way establish a presumption in  
2 connection with any determination of whether a proposed project may or may not  
3 result in significant environmental effects or whether a proposed project's impacts  
4 would be mitigated.

5 (c) Prohibit or authorize any project or project impacts.  
6 (d) Create a presumption or guarantee that any proposed project will be  
7 approved or permitted, or that any proposed impact will be authorized, by any  
8 state or local agency.

9 (e) Create a presumption that any proposed project will be disapproved or  
10 prohibited, or that any proposed impact will be prohibited, by any state or local  
11 agency.

12 (f) Alter or affect, or create additional requirements for, the general plan of the  
13 city, county, or city and county, in which it is located.

14 (g) Constitute any of the following, for the purposes of the California  
15 Environmental Quality Act (Division 13 (commencing with Section 21000) of the  
16 Public Resources Code):

17 (1) A plan, policy, or regulation adopted for the purpose of avoiding or  
18 mitigating an environmental effect.

19 (2) A local policy or ordinance protecting biological resources.

20 (3) An adopted local, regional, or state habitat conservation plan.

21 **Comment.** Section 65055 continues former Fish and Game Code Section 1855(b) without  
22 substantive change.

23 **§ 65060. Effect on project proponent**

24 65060. (a) Nothing in this title shall require a project proponent seeking to  
25 provide compensatory mitigation pursuant to **Section 1602**, 62700, 62705, or  
26 64605, or the California Environmental Quality Act (Division 13 (commencing  
27 with Section 21000) of the Public Resources Code) to take any of the following  
28 actions:

29 (1) Undertake conservation actions or habitat enhancement actions identified in  
30 a regional conservation investment strategy.

31 (2) Implement, contribute to, fund, or otherwise comply with the actions  
32 described in a regional conservation investment strategy.

33 (3) Enter into a mitigation credit agreement.

34 (4) Use or purchase mitigation credits established pursuant to this title to satisfy  
35 the compensatory mitigation requirements.

36 (b) Nothing in this chapter shall prevent a project proponent from proposing  
37 mitigation consistent with one or more strategies approved pursuant to this title.

38 **Comment.** Section 65060 continues former Fish and Game Code Section 1855(c) without  
39 substantive change.

40 **☒ Staff Note.** Existing Section 1855(c) (proposed Section 65060(b)) provides that “nothing in  
41 this section shall prevent a project proponent from proposing mitigation consistent with one or  
42 more strategies approved pursuant to this chapter.” It is not clear which provisions of “this

1 section” (i.e., Section 1855) are intended to be covered by that disclaimer. In proposed Section  
2 65060, the disclaimer is revised to refer to “this chapter” (which would continue Section 1855(a)-  
3 (c)). **The staff invites comment on whether the scope of that reference should be broadened  
4 or narrowed.**

5                   **CHAPTER 4. MITIGATION CREDITS**

6                   **§ 65100. Creation**

7         65100. (a) A conservation action or habitat enhancement action that measurably  
8         advances the conservation objectives of an approved regional conservation  
9         investment strategy may be used to create mitigation credits that can be used to  
10       compensate for impacts to focal species and other species, habitat, and other  
11       natural resources, as provided in this chapter.

12         (b) The requirements of this chapter apply only to the creation of mitigation  
13       credits under mitigation credit agreements pursuant to this chapter and do not  
14       establish requirements for other forms of compensatory mitigation.

15         **Comment.** Section 65100 continues former Fish and Game Code Section 1856(a) without  
16       substantive change.

17                   **§ 65105. Requirements**

18         65105. For a conservation action or habitat enhancement action identified in a  
19       regional conservation investment strategy to be used to create mitigation credits  
20       pursuant to this chapter, the regional conservation investment strategy shall  
21       include, in addition to the requirements of Article 1 (commencing with Section  
22       64900) of Chapter 3, all of the following:

23         (a) An adaptive management and monitoring strategy for conserved habitat and  
24       other conserved natural resources.

25         (b) A process for updating the scientific information used in the strategy, and for  
26       tracking the progress of, and evaluating the effectiveness of, conservation actions  
27       and habitat enhancement actions identified in the strategy, in offsetting identified  
28       threats to focal species and in achieving the strategy’s biological goals and  
29       objectives, at least once every 10 years, until all mitigation credits are used.

30         (c) Identification of a public or private entity that will be responsible for the  
31       updates and evaluation required pursuant to subdivision (b).

32         **Comment.** Section 65105 continues former Fish and Game Code Section 1856(b) without  
33       substantive change.

34                   **§ 65110. Use of mitigation credits**

35         65110. A mitigation credit created in accordance with this chapter may be used  
36       to fulfill, in whole or in part, compensatory mitigation requirements established  
37       under any state or federal environmental law, as determined by the applicable  
38       local, state, or federal regulatory agency, including, but not limited to, the  
39       following:

1       (a) To compensate for take or other adverse impacts of activities authorized  
2 pursuant to Part 1 (commencing with Section 62000) within the regional  
3 conservation investment strategy area.

4       (b) To reduce adverse impacts to fish or wildlife resources, or both, from  
5 activities authorized pursuant to **Chapter 6 (commencing with Section 1600)**  
6 within the regional conservation investment strategy area to less than substantial.

7       (c) To mitigate significant effects on the environment within the regional  
8 conservation investment strategy area pursuant to the California Environmental  
9 Quality Act (Division 13 (commencing with Section 21000) of the Public  
10 Resources Code) and Guidelines for Implementation of the California  
11 Environmental Quality Act (Chapter 3 (commencing with Section 15000) of  
12 Division 6 of Title 14 of the California Code of Regulations).

13     **Comment.** Section 65110 continues former Fish and Game Code Section 1856(c) without  
14 substantive change.

15     **§ 65115. Long-term durability of enhancement action**

16     65115. (a) The department shall ensure the long-term durability of a habitat  
17 enhancement action.

18     (b) If a habitat enhancement action is used to create one or more mitigation  
19 credits pursuant to this chapter, the habitat enhancement action shall remain in  
20 effect at least until the site of the environmental impact is returned to preimpact  
21 ecological conditions.

22     **Comment.** Section 65115 continues former Fish and Game Code Section 1856(d) without  
23 substantive change.

24     **§ 65120. Mitigation credit agreement**

25     65120. (a) To create mitigation credits pursuant to this chapter, a person or  
26 entity, including a state or local agency, shall enter into a mitigation credit  
27 agreement with the department.

28     (b) The mitigation credit agreement shall identify the type and number of  
29 mitigation credits proposed to be created and the terms and conditions under  
30 which the mitigation credits may be used.

31     (c) Mitigation credits shall not be created on a site that has already been  
32 permanently protected and has been used, or is currently in use, to fulfill  
33 compensatory mitigation requirements for one or more projects.

34     (d) The person or entity may create and use, sell, or otherwise transfer the  
35 mitigation credits upon department approval that the credits have been created in  
36 accordance with the agreement.

37     **Comment.** Section 65120 continues former Fish and Game Code Section 1856(e) without  
38 substantive change.

1   **§ 65125. Creation process**

2   65125. (a) To enter into a mitigation credit agreement with the department, a  
3   person or entity shall submit a draft mitigation credit agreement to the department  
4   for its review, revision, and approval or disapproval.

5   (b) Within five days of deeming a draft agreement complete, the department  
6   shall publish notice of the availability of the draft agreement by filing its notice  
7   with the Governor's Office of Planning and Research and the city and county  
8   clerks of each county in which the agreement is applicable in part or in whole and  
9   shall make the draft agreement available to the public on its Internet Web site, and  
10   to any public agency, organization, or individual who has filed a written request to  
11   the department for notices regarding agreements, for review and comment for a  
12   period of at least 45 days.

13   (c) Following the notice period required by subdivision (b), the department shall  
14   respond to written comments submitted during the public comment period and  
15   may approve the agreement, approve it with revisions, or disapprove it.

16   (d) The department may enter into a mitigation credit agreement if it determines  
17   that the mitigation credit agreement does all of the following:

18   (1) Provides contact information for, and establishes the qualifications of, the  
19   person or entity entering into the agreement, the entity that will manage the site of  
20   the conservation action or habitat enhancement action, and any contractors or  
21   consultants.

22   (2) Fully describes the proposed conservation actions or habitat enhancement  
23   actions and explains how, and to what extent, they will measurably advance  
24   conservation objectives of the regional conservation investment strategy that have  
25   not yet been achieved.

26   (3) Identifies the location of the conservation actions or habitat enhancement  
27   actions, including a location map, address, and size of the site where the proposed  
28   conservation action or habitat enhancement action will be implemented.

29   (4) Provides color aerial and ground-level photographs that reflect current  
30   conditions on the site and surrounding properties.

31   (5) Explains how the mitigation credits will be created, including, but not  
32   limited to, information regarding proposed ownership arrangements, long-term  
33   management strategy, and any phases of implementation.

34   (6) Identifies mitigation banks and conservation banks approved by the  
35   department as a mitigation alternative and explains how available mitigation  
36   credits at those banks will be purchased or used in combination with the mitigation  
37   credits created under the mitigation credit agreement or, if those available  
38   mitigation credits will not be purchased or used, why they will not be purchased or  
39   used.

40   (7) Includes a natural resources evaluation that documents biotic and abiotic  
41   baseline conditions, including past, current, and adjacent land uses, vegetation  
42   types, species information, topography, hydrology, and soil types.

1       (8) Identifies public lands and permanently protected lands in the vicinity of the  
2 conservation actions or habitat enhancement actions.

3       (9) Fully describes the proposed type and quantity of mitigation credits and the  
4 supporting rationale. Mitigation credits created pursuant to this chapter shall  
5 directly correlate to the focal species and other species, habitat, and other natural  
6 resources protected by the conservation actions or habitat enhancement actions.

7       (10) Identifies metrics or indicators by which the proposed conservation action  
8 or habitat enhancement action's contribution to achieving the strategy's  
9 conservation goals and objectives can feasibly be measured with existing  
10 technology. The net ecological gain from the implementation of conservation  
11 actions and habitat enhancement actions that include habitat restoration shall be  
12 reported using consistent metrics that measure the increment of gain in the area  
13 and quality of habitat or other natural resource values compared to baseline  
14 conditions described in the regional conservation investment strategy, and  
15 measures the increment of gain in relation to the regional conservation investment  
16 strategy's conservation objectives.

17      (11) Describes the proposed landownership of the site or sites of the  
18 conservation actions or habitat enhancement actions.

19      (12) Includes a template conservation easement, or other instrument providing  
20 for perpetual protection of land in a manner consistent with approved natural  
21 community conservation plans within the area of the applicable regional  
22 conservation investment strategy, for the sites of any conservation action and an  
23 explanation of how the long-term durability of the sites of any habitat  
24 enhancement actions will be ensured.

25      (13) Ensures that the implementation of the conservation action or habitat  
26 enhancement action will be adequately funded and that long-term protection and  
27 management of the site will be funded in accordance with Chapter 4.6  
28 (commencing with Section 65965) of Division 1 of Title 7 of the Government  
29 Code or, if a state agency proposed to enter into a mitigation credit agreement,  
30 other comparable funding mechanism approved by the department in accordance  
31 with an adopted statewide policy regarding funding for long-term management  
32 and operations of mitigation sites.

33      (14) Includes a template monitoring and long-term adaptive management plan.

34      (15) Explains the terms and conditions under which the proposed mitigation  
35 credits may be sold or otherwise transferred and how the proposed mitigation  
36 credits will be accounted for, including the specific methods proposed for  
37 reporting and maintaining a record of credit creation, release, and use, sale, or  
38 transfer.

39      (16) Includes enforcement provisions.

40      (17) Ensures that, for each site on which the conservation actions or habitat  
41 enhancement actions will be implemented, information consistent with, pursuant  
42 to this title, the information required for a mitigation bank in subdivision (c) of  
43 Section 65455 and subdivisions (b) to (h), inclusive, of Section 65505 shall be

1 prepared and submitted to the department for review for adequacy and approval  
2 prior to implementation.

3 (18) Includes a proposed credit ledger and credit release schedule that meets the  
4 requirements of Section 65135.

5 **Comment.** Section 65125 continues former Fish and Game Code Section 1856(f) without  
6 substantive change.

7 **§ 65130. Project that quantifiably exceeds compensatory mitigation requirements**

8 65130. (a) Mitigation credit agreements may be used to establish the terms and  
9 conditions under which mitigation credits can be created by projects that improve  
10 wildlife habitat, or that address stressors to wildlife, to an extent that quantifiably  
11 exceeds compensatory mitigation requirements established by the department for  
12 those projects pursuant to **Chapter 6 (commencing with Section 1600)** or Part 1  
13 (commencing with Section 62000).

14 (b) Those projects may include, but are not limited to:

15 (1) The construction of setback levees that result in the creation of more  
16 floodplain or riparian habitat than is required to compensate for construction  
17 impacts.

18 (2) The construction of transportation facility improvements that remove  
19 barriers to fish or wildlife movement and thereby improve the quality of habitat or  
20 address stressors to wildlife to a greater extent than is required to compensate for  
21 construction impacts.

22 (c) For those projects, the project proponent may submit a draft mitigation credit  
23 agreement that proposes the terms and conditions under which mitigation credits  
24 may be created and used by or in conjunction with those projects to the department  
25 for its review, revision, and approval. The submission may occur concurrently  
26 with, or after, an application submitted pursuant to Part 1 (commencing with  
27 Section 62000) or a notice submitted pursuant to **Chapter 6 (commencing with**  
28 **Section 1600)** or may occur after the application or notice is submitted. Where a  
29 draft mitigation agreement is submitted concurrently with the application or  
30 notice, the department shall review the draft mitigation credit agreement  
31 concurrently with its review of the application or notice and shall, to the maximum  
32 extent practicable, complete its review of both the notice or application and the  
33 draft agreement concurrently.

34 (d) Mitigation credit agreements submitted to the department pursuant to this  
35 section may comply with the requirements of Section 65135 with a credit release  
36 schedule related to construction of the project that will improve wildlife habitat, or  
37 will address stressors to wildlife, to an extent that exceeds compensatory  
38 mitigation requirements quantifiably. For those projects, construction of the  
39 project may be a performance-based milestone required by subdivision (b) of  
40 Section 65135.

41 **Comment.** Section 65130 continues former Fish and Game Code Section 1856(h) without  
42 substantive change.

1   **§ 65135. Release of mitigation credits**

2   65135. (a) The release of mitigation credits for use, sale, or transfer under a  
3   mitigation credit agreement shall require the department's approval in accordance  
4   with this section.

5   (b) The release of mitigation credits shall be tied to performance-based  
6   milestones and achievement of ecological performance standards. The credit  
7   release schedule for each mitigation credit agreement shall reserve a substantial  
8   share of the total credits for release after those ecological performance standards  
9   are fully achieved.

10   (c) Performance-based milestones shall include, but are not be limited to, the  
11   following:

12   (1) Recording a conservation easement consistent with approved natural  
13   community conservation plans within the area of the applicable regional  
14   conservation investment strategy on the site of a conservation action, or putting  
15   into place measures that ensure the long-term durability of a habitat enhancement  
16   action in accordance with Section 65115.

17   (2) Completing construction of a habitat restoration action.

18   (3) Achieving temporal ecological performance standards for habitat restoration,  
19   such as standards established for one year, three years, or five years following the  
20   initiation of habitat restoration.

21   (4) Fully achieving ecological performance standards.

22   (5) The terms of the credit release schedule shall be specified in the mitigation  
23   credit agreement. When conservation actions and habitat enhancement actions are  
24   implemented and meet the performance-based milestones specified in the credit  
25   release schedule, credits shall be created in accordance with the credit release  
26   schedule. If a conservation action or habitat enhancement action does not meet  
27   performance-based milestones, the department may suspend the release of credits,  
28   reduce the number of credits, or otherwise modify the credit release schedule  
29   accordingly.

30   (d) In order for mitigation credits to be released, the person or entity that has  
31   entered into a mitigation credit agreement shall demonstrate to the department that  
32   the appropriate performance-based milestones for credit release have been met.  
33   The department shall determine whether the milestones have been met and the  
34   credits may be released.

35   **Comment.** Section 65135 continues former Fish and Game Code Section 1856(g) without  
36   substantive change.

37   **§ 65140. Effect on conservation bank or mitigation bank**

38   65140. Nothing in this title is intended to limit or impose additional conditions  
39   on the creation or sale of mitigation credits by a conservation bank or mitigation  
40   bank approved by the department pursuant to Title 3 (commencing with Section  
41   65300).

1       **Comment.** Section 65140 continues former Fish and Game Code Section 1856(i) without  
2 substantive change.

3       **§ 65145. Application to natural community conservation plan**

4       65145. (a) The creation of mitigation credits pursuant to this chapter from a  
5 conservation action or habitat enhancement action implemented within the plan  
6 area of an approved natural community conservation plan shall not duplicate or  
7 replace mitigation requirements set forth in the natural community conservation  
8 plan and shall require the advance written approval of the plan's implementing  
9 entity.

10     (b) Mitigation credits created pursuant to this chapter may be used for covered  
11 activities under an approved natural community conservation plan only in  
12 accordance with the requirements of the plan.

13     (c) Individuals and entities eligible for coverage as a participating special entity  
14 under an approved natural community conservation plan may use mitigation  
15 credits created pursuant to this chapter only if the plan's implementing entity  
16 declines to extend coverage to the covered activity proposed by the eligible  
17 individual or entity.

18     **Comment.** Section 65145 continues former Fish and Game Code Section 1856(j) without  
19 substantive change.

20     **§ 65150. Application to Delta water conveyance facilities**

21     65150. Mitigation credits provided by this title shall not be utilized to fund or  
22 offset the costs of the design, construction, or mitigation of new Delta water  
23 conveyance facilities.

24     **Comment.** Section 65150 continues former Fish and Game Code Section 1855(d) without  
25 substantive change.

26     **§ 65155. Internet publication**

27     65155. The department shall make project mitigation credit and release  
28 information, including the demonstration submitted pursuant to subdivision (d) of  
29 Section 65135, publicly available on the department's Internet Web site.

30     **Comment.** Section 65155 continues former Fish and Game Code Section 1856(k) without  
31 substantive change.

1                   **TITLE 3. CONSERVATION BANK AND**  
2                   **MITIGATION BANK APPLICATIONS AND FEES**

3                   **CHAPTER 1. GENERAL PROVISIONS**

4                   Article 1. Findings and Declarations

5                   **§ 65300. Findings and declarations**

6         65300. The Legislature finds and declares as follows:

7         (a) Mitigation banks and conservation banks provide for the conservation of  
8         important habitats and habitat linkages, take advantage of economies of scale that  
9         are often not available to individualized mitigation projects, and simplify the state  
10       regulatory compliance process while achieving conservation goals.

11       (b) The department authorizes the establishment of private and public  
12       conservation and mitigation banks that can provide viable consolidated mitigation  
13       for adverse impacts caused by projects. Banks sell habitat or species credits to  
14       project proponents having mitigation responsibilities that require compensation for  
15       impacts to wetlands, threatened or endangered species, and other sensitive  
16       resources. The state policy on conservation banks was established in 1995 by the  
17       Natural Resources Agency and the California Environmental Protection Agency.

18       (c) In 2011, the department and other state and federal agencies, including the  
19       United States Fish and Wildlife Service, the National Marine Fisheries Service,  
20       the United States Army Corps of Engineers, and the United States Environmental  
21       Protection Agency, renewed a memorandum of understanding for the purpose of  
22       jointly establishing a framework for developing and using combined or  
23       coordinated approaches to mitigation and conservation banking in the state. The  
24       memorandum of understanding includes provisions for the development and  
25       continuous improvement of standardized banking program documents and  
26       guidance. Existing standardized documents identified in the memorandum of  
27       understanding include bank enabling instruments, conservation easements, long-  
28       term management plans, and bank proposal review checklists, among others.

29       (d) The department has properly excluded from being eligible as mitigation and  
30       conservation banks those lands that are not suitable to become banks, for reasons  
31       that include that the lands do not support significant biological resources or are not  
32       biologically viable, are subject to potentially inconsistent uses, encumbrances, or  
33       requirements, or would not meet requirements of permits or authorizations that  
34       require mitigation.

35       (e) Greater transparency is desired to ensure that mitigation requirements of  
36       regulatory programs, permits, and authorizations are fully met when employing  
37       conservation and mitigation banks, and that the monitoring of banks to ensure  
38       long-term conservation of species and habitats is scientifically valid.

(f) The private and public mitigation and conservation banks and the private and public entities to which bank credits are sold should fully fund the administrative and regulatory costs of the department in providing banking program services, administration and oversight.

(g) The department has found that the establishment and use of conservation and mitigation banks may result in added ecological benefits and reduced administrative costs over the more traditional forms of smaller, single-purpose mitigation projects.

(h) It is the intent of the Legislature that banking and all other forms of mitigation for wildlife species comply with regulatory requirements, are based on the best available scientific information, can be implemented successfully, and have adequate funding to achieve mitigation measures and be monitored for compliance and effectiveness. The Legislature recognizes that mitigation and conservation banking is important to the state because banks provide regulatory efficiencies, environmental benefits, and economic advantages. Properly developed and monitored banks have demonstrated their value and efficacy and are important tools in mitigating impacts to resources and in conserving a wide range of habitat lands.

**Comment.** Section 65300 continues former Fish and Game Code Section 1797 without substantive change.

## Article 2. Definitions

## **§ 65305. Application**

65305. The definitions in this article govern this title.

**Comment.** Section 65305 restates the introductory clause of former Fish and Game Code Section 1797.5 without substantive change.

## § 65310. Bank

65310. “Bank” means a conservation bank, mitigation bank, or conservation and mitigation bank.

**Comment.** Section 65310 continues former Fish and Game Code Section 1797.5(a) without substantive change.

## **§ 65315. Bank enabling instrument**

65315. "Bank enabling instrument" means a written agreement with the department regarding the establishment, use, operation, and maintenance of the bank.

**Comment.** Section 65315 continues former Fish and Game Code Section 1797.5(b) without substantive change.

1   **§ 65320. Bank sponsor**

2   65320. “Bank sponsor” means the person or entity responsible for establishing  
3   and operating a bank.

4   **Comment.** Section 65320 continues former Fish and Game Code Section 1797.5(c) without  
5   substantive change.

6   **§ 65325. Conservation bank**

7   65325. “Conservation bank” means a publicly or privately owned and operated  
8   site that is to be conserved and managed in accordance with a written agreement  
9   with the department that includes provisions for the issuance of credits, on which  
10   important habitat, including habitat for threatened, endangered, or other special  
11   status species, exists, has been, or will be created to do any of the following:

12   (a) Compensate for take or other adverse impacts of activities authorized  
13   pursuant to Part 1 (commencing with Section 62000).

14   (b) Reduce adverse impacts to fish or wildlife resources from activities,  
15   authorized pursuant to **Chapter 6 (commencing with Section 1600) of Division**  
16   **2,** to less than substantial.

17   (3) Mitigate significant effects on the environment pursuant to the California  
18   Environmental Quality Act (Division 13 (commencing with Section 21000) of the  
19   Public Resources Code) and Guidelines for Implementation of the California  
20   Environmental Quality Act (Chapter 3 (commencing with Section 15000) of  
21   Division 6 of Title 14 of the California Code of Regulations).

22   (d) Establish mitigation in advance of any impacts or effects.

23   (e) To the extent feasible and practicable, protect habitat connectivity for fish  
24   and wildlife resources for purposes of this article.

25   **Comment.** Section 65325 continues former Fish and Game Code Section 1797.5(d) without  
26   substantive change.

27   **§ 65330. Conservation easement**

28   65330. “Conservation easement” means a perpetual conservation easement, as  
29   defined by Section 815.1 of the Civil Code, covering the real property that  
30   comprises the bank site.

31   **Comment.** Section 65330 continues former Fish and Game Code Section 1797.5(e) without  
32   substantive change.

33   **§ 65335. Mitigation bank**

34   65335. “Mitigation bank” means either of the following:

35   (a) A bank site or mitigation bank site as defined by Section 65855.

36   (b) Any publicly or privately owned and operated site, other than those defined  
37   by Section 65855, on which wetlands exist, have been, or will be created, and that  
38   is to be conserved and managed in accordance with a written agreement with the  
39   department for any of the purposes described in subdivisions (a) to (d), inclusive,  
40   of Section 65325.

**Comment.** Section 65335 continues former Fish and Game Code Section 1797.5(f) without substantive change.

## **§ 65340. Person**

65340. "Person" has the meaning set forth in **subdivision (b) of Section 711.2**.

**Comment.** Section 65340 continues former Fish and Game Code Section 1797.5(g) without substantive change.

## § 65345. Prospectus

65345. "Prospectus" means a written summary of the proposed bank containing a sufficient level of detail to support informed department review and comment.

**Comment.** Section 65345 continues former Fish and Game Code Section 1797.5(h) without substantive change.

### Article 3. Scope

## **§ 65400. Submissions prior to January 1, 2013**

65400. A bank prospectus, agreement, or amendment package submitted to the department, but not approved as of January 1, 2013, shall be reviewed for completeness or acceptability in accordance with the timelines provided by this title and only after the department has collected all appropriate fees pursuant to this title.

**Comment.** Section 65400 continues former Fish and Game Code Section 1798.7 without substantive change.

## CHAPTER 2. APPLICATION PROCEDURE

## Article 1. Prospectus

## **§ 65450. Optional draft prospectus**

65450. (a) Any person interested in establishing any bank with the department may elect to submit an optional draft prospectus for review by the department.

(b) Any draft prospectus shall be accompanied by a draft prospectus review fee of one thousand five hundred dollars (\$1,500) to fund the reasonable cost of the department's review services.

(c) The draft prospectus review, while optional, is intended to identify potential issues early so that the potential bank sponsor may attempt to address those issues prior to initiating the formal review process.

(d) The draft prospectus is a brief proposal submitted when scoping the concept of a bank, contemplating pursuing a bank idea, or for those new to the banking process.

(e) No later than 30 calendar days after the department receives a draft prospectus and review fee, the department shall make an initial evaluation of the

1 proposed concept and notify the person who submitted the draft prospectus of  
2 potential issues identified by the department.

3     **Comment.** Section 65450 continues former Fish and Game Code Section 1798(a) without  
4 substantive change.

5     **§ 65455. Submission**

6     65455. (a) Any person seeking to establish a bank with the department shall  
7 submit a bank prospectus to the department together with a prospectus review fee  
8 of ten thousand dollars (\$10,000) to fund the reasonable cost of the department's  
9 review services.

10    (b) If a draft prospectus and the review fee have been submitted pursuant to  
11 Section 65450, then the review fee for the bank prospectus shall be eight thousand  
12 five hundred dollars (\$8,500) so as not to exceed a total fee of ten thousand dollars  
13 (\$10,000).

14    (c) The bank prospectus shall contain at least all of the following information:

15      (1) The proposed bank name.

16      (2) Contact information, including, but not limited to, the bank sponsor, property  
17 owner, and any consultants.

18      (3) A general location map, address, and the size of the proposed bank in acres.

19      (4) A 7.5-minute United States Geological Survey map showing proposed  
20 boundaries of the bank.

21      (5) Color aerial photographs that reflect current conditions on the site of the  
22 proposed bank and surrounding properties.

23      (6) Description of how the bank will be established and operated, including, but  
24 not limited to, proposed ownership arrangements, long-term management strategy,  
25 and any phases.

26      (7) Qualifications of bank sponsor.

27      (8) Preliminary natural resources surveys that document biotic and abiotic  
28 baseline conditions, including past, current, and adjacent land uses, vegetation  
29 types, species information, topography, hydrology, and soil types.

30      (9) Map of proposed bank service areas.

31      (10) Map depicting other conserved lands in the vicinity of the proposed bank.

32      (11) Description of bank objectives that includes how the proposed bank would  
33 contribute to connectivity and ecosystem function.

34      (12) A current preliminary report covering the site of the proposed bank that  
35 identifies the owner of the fee simple title and shows all liens, easements, and  
36 other encumbrances and depicts all relevant property lines, easements, dedications,  
37 and other features.

38      (13) A declaration of whether or not the proposed bank site has been or is being  
39 used as mitigation, is designated or dedicated for park or open space use, or  
40 designated for purposes that may be inconsistent with habitat preservation.

41      (14) Details of any public funding received for acquisition or restoration of, or  
42 other purposes related to, the proposed bank site.

1       **Comment.** Section 65455 continues former Fish and Game Code Section 1798(b) without  
2 substantive change.

3       **§ 65460. Review**

4       65460. (a) No later than 30 calendar days after the department receives a bank  
5 prospectus and the prospectus review fee, the department shall determine whether  
6 or not the prospectus is complete and provide written notice of its determination to  
7 the person who submitted the prospectus.

8       (b) If a prospectus is not complete, it may be made complete and resubmitted.

9       (c) If the department determines that the prospectus is complete, then within 90  
10 calendar days of that determination, the department shall determine whether or not  
11 the prospectus is acceptable and notify the person who submitted the prospectus of  
12 the determination.

13       (d) The department may request clarifying information during the prospectus  
14 review process.

15       **Comment.** Section 65460 continues former Fish and Game Code Section 1798(c)-(d) without  
16 substantive change.

17       **§ 65465. Decision**

18       65465. (a) If the department determines that a bank prospectus is acceptable  
19 then a bank agreement package may be submitted in accordance with Article 2  
20 (commencing with Section 65500).

21       (b) If the department determines that a bank prospectus is not acceptable the  
22 department shall state the reasons for the determination. The prospectus may be  
23 resubmitted in accordance with Section 65450 if further consideration is desired.  
24 Any resubmittal must be accompanied by payment of a new prospectus review  
25 fee.

26       **Comment.** Section 65465 continues former Fish and Game Code Section 1798(e) without  
27 substantive change.

28       ☒ **Staff Note.** Existing Section 1798(e)(2) (proposed Section 65465(b)) provides that, on  
29 disapproval of a bank prospectus, the applicant can resubmit for further consideration “in  
30 accordance with subdivision (a).” That reference seems odd. Section 1798(a) establishes an  
31 *optional* procedure for submission of a *draft* prospectus, for advisory review. By contrast, Section  
32 1798(b) provides the procedure for submission of a *final* bank prospectus, for determinative  
33 review. It is not clear why Section 1798(e)(2) would require submission of a draft prospectus,  
34 rather than a revised version of a final prospectus. **The staff invites comment on whether the**  
35 **reference to Section 1798(a) is erroneous.**

36       **§ 65470. Guidelines**

37       65470. The department may adopt and amend guidelines and criteria for the  
38 purposes of this article pursuant to Section 65680.

39       **Comment.** Section 65470 continues former Fish and Game Code Section 1798(f) without  
40 substantive change.

## Article 2. Bank Agreement Package

## **§ 65500. Submission**

65500. (a) If the department determines that a bank prospectus is acceptable pursuant to Article 1 (commencing with Section 65450), the person seeking to establish the bank may submit a bank agreement package to the department.

(b) Pursuant to Section 65685, the department may adopt and amend guidelines and criteria for the bank agreement package, including, but not limited to, recommended standard forms for bank enabling instruments or long-term management plan and conservation easements.

**Comment.** Section 65500 continues former Fish and Game Code Section 1798.5(a)(1) without substantive change.

**☒ Staff Note.** Existing Section 1798.5(a)(1) (proposed Section 65500(b)) provides that the department may adopt guidelines and criteria for a bank package agreement “pursuant to subdivision (b) of Section 1799.1.” That reference appears to be incorrect. Section 1799.1(b) has no obvious connection to the purpose of the cross-reference. It specifies a rule for the deposit of certain fees. However, Section 1799.1(c) does address the adoption of guidelines and criteria. In proposed Section 65500(b), the cross-reference has been changed to refer to the provision that continues Section 1799.1(c) (proposed Section 65685). **The staff invites comment on whether that change would cause any problems.**

## **§ 65505. Content**

65505. The bank agreement package shall be consistent with the prospectus and contain at least all of the following information:

- (a) The draft bank enabling instrument and all exhibits.
  - (b) Drafts of the interim management plan, long-term management plan, bank closure plan, and, if applicable, a development or construction plan for the bank.
  - (c) A draft conservation easement, or if potential state ownership is contemplated by the department, a draft grant deed.
  - (d) A map and written description of the proposed bank service area.
  - (e) A proposed credit ledger and credit release schedule for the bank.
  - (f) A property analysis record or other comparable economic analysis of the funding necessary to support bank maintenance activities, such as monitoring and reporting, in perpetuity.
  - (g) Estimates of financial assurances and proposed forms of security. Proposed forms of security may be either cash or a letter of credit.
  - (h) A phase I environmental site assessment of the site of the proposed bank dated not more than six months prior to the date the bank agreement package is submitted to the department. This assessment shall be performed in accordance with the American Society of Testing and Materials Standard E1527-05 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process" or any successive ASTM standard active at the time of the assessment.

1       **Comment.** Section 65505 continues former Fish and Game Code Section 1798.5(a)(2) without  
2 substantive change.

3       **§ 65510. Fee**

4       65510. The department shall collect a fee of twenty-five thousand dollars  
5 (\$25,000) per bank agreement package to fund the cost of the department's review  
6 services. The fee shall be collected at the time the bank agreement package is  
7 submitted to the department.

8       **Comment.** Section 65510 continues former Fish and Game Code Section 1798.5(b) without  
9 substantive change.

10      **§ 65515. Review**

11      65515. (a) Within 30 calendar days following the department's receipt of a bank  
12 agreement package and fee pursuant to Section 65500, the department shall  
13 determine whether or not the package is complete and give written notice of the  
14 determination to the person who submitted the package.

15      (b) If the department determines that the bank agreement package is not  
16 complete, it may be made complete and resubmitted.

17      (c) If the department determines that the bank agreement package is complete,  
18 within 90 calendar days of that determination, the department shall determine  
19 whether or not it is acceptable and notify the person who submitted the package of  
20 the determination. If the department determines that the bank agreement package  
21 is not acceptable, the department shall state the reasons.

22      (d) The department may request clarifying information during the bank  
23 agreement review process.

24       **Comment.** Section 65515 continues former Fish and Game Code Section 1798.5(c)-(d)  
25 without substantive change.

26      **§ 65520. Request for supplemental information**

27      65520. (a) If the department needs supplemental information during its review  
28 of the bank agreement package in order to fully evaluate the proposed bank, the  
29 regional manager or departmental equivalent, or a higher level department  
30 employee, shall provide the person seeking to establish the bank a written request  
31 for the needed information.

32      (b) Upon the department's receipt of the requested information, a new 90-day  
33 period shall begin during which the department shall determine acceptability  
34 pursuant to subdivision (c) of Section 65515.

35      (c) If the department does not receive the requested information within 60  
36 calendar days of the department's request, the bank agreement package will be  
37 deemed unacceptable.

38       **Comment.** Section 65520 continues former Fish and Game Code Section 1798.5(e) without  
39 substantive change.

## **§ 65525. Changes proposed by applicant during review**

65525. (a) If the person seeking to establish the bank proposes changes to the bank agreement package that have not been solicited by the department during its 90-day review period, including, but not limited to, parties, number or type of credits, bank size, number or type of species, credit release schedule, service area, design change, or other changes as identified by the department as necessitating additional review time, the department, acting through the regional manager or department equivalent, or a higher level department employee, shall assess a one-time fee of ten thousand dollars (\$10,000) to cover the reasonable cost of the department's services in reviewing the changes.

(b) A new 90-day review period shall begin upon the department's receipt of the proposed changes and the associated review fee, during which it will determine acceptability pursuant to subdivision (c) of Section 65515.

**Comment.** Section 65525 continues former Fish and Game Code Section 1798.5(f) without substantive change.

## **§ 65530. Extension of time for review**

65530. If the department determines that 90 days is insufficient time to complete its review of the bank agreement package for reasons including, but not limited to, the size, location, or complexity of the bank, that the package includes a development or construction plan, complexity of the bank agreement package, or substantial variations from recommended standard forms, the department may extend the 90-day period for reviewing the bank agreement package by an additional 60 calendar days.

**Comment.** Section 65530 continues former Fish and Game Code Section 1798.5(g) without substantive change.

## **§ 65535. Resubmission after negative determination**

65535. (a) If the department determines that a bank agreement package is not acceptable, the package may be resubmitted in accordance with Section 65500 if further consideration is desired.

(b) Any resubmittal shall be accompanied by payment of a new bank agreement package review fee.

**Comment.** Section 65535 continues former Fish and Game Code Section 1798.5(h) without substantive change.

### Article 3. Bank Amendment

## **§ 65550. Submission**

65550. (a) Any person seeking to amend any bank shall submit to the department a complete bank amendment package containing each of the original bank agreement package documents, including any prior amendments, as well as

1 any documents proposed to be amended or that would be affected by the proposed  
2 amendment.

3 (b) The department may adopt and amend guidelines and criteria for the bank  
4 amendment package pursuant to Section 65685.

5 **Comment.** Section 65550 continues former Fish and Game Code Section 1798.6(a) without  
6 substantive change.

7 **☒ Staff Note.** Existing Section 1798.6(a) (proposed Section 65550(b)) provides that the  
8 department may adopt guidelines and criteria for a bank amendment package “pursuant to  
9 subdivision (b) of Section 1799.1.” That reference appears to be incorrect. Section 1799.1(b) has  
10 no obvious connection to the purpose of the cross-reference. It specifies a rule for the deposit of  
11 certain fees. However, Section 1799.1(c) does address the adoption of guidelines and criteria. In  
12 proposed Section 65550(b), the cross-reference has been changed to refer to the provision that  
13 continues Section 1799.1(c) (proposed Section 65685). **The staff invites comment on whether  
14 that change would cause any problems.**

15 **§ 65555. Review**

16 65555. (a) Within 30 calendar days following its receipt of a draft bank  
17 amendment package and any fee required by Sections 65560 and 65565, the  
18 department shall determine whether or not the package is complete and give  
19 written notice of that determination to the person who submitted the package.

20 (b) If the department determines that the bank amendment package is complete,  
21 then within 90 calendar days of that determination, the department shall determine  
22 whether or not the package is acceptable and notify the person who submitted the  
23 package of that determination.

24 (c) If the bank amendment package is determined not to be acceptable, the  
25 determination shall state the reasons.

26 (d) The department may request clarifying information during the bank  
27 amendment review process.

28 **Comment.** Section 65555 continues the first four sentences of former Fish and Game Code  
29 Section 1798.6(b) without substantive change.

30 **§ 65560. Fee amount**

31 65560. (a) The department shall collect a fee of either seven thousand five  
32 hundred dollars (\$7,500) or twenty-five thousand dollars (\$25,000) per bank  
33 amendment package to fund the reasonable cost of the department’s review  
34 services.

35 (b) The fee of seven thousand five hundred dollars (\$7,500) is intended to cover  
36 the reasonable cost of the department’s services in reviewing simple amendments,  
37 such as a change in bank name, ownership change, address change, or proposed  
38 decrease in the number of credits proposed.

39 (c) The fee of twenty-five thousand dollars (\$25,000) is intended to cover the  
40 reasonable cost of the department’s services in reviewing all other amendments,  
41 including, but not limited to, requests for increase change in service area, or  
42 increase in the number of credits.

1       (d) A regional manager or department equivalent, or a higher level department  
2 representative employee, shall determine which of the two fees is appropriate and  
3 shall provide notification of that determination to the person who submitted the  
4 request for bank amendment package pursuant to subdivisions (b) through (d),  
5 inclusive, of Section 65565.

6       **Comment.** Section 65560 continues former Fish and Game Code Section 1798.6(c)(1) without  
7 substantive change.

8       **§ 65565. Payment of fee**

9       65565. (a) An initial fee of seven thousand five hundred dollars (\$7,500) shall  
10 be submitted to the department with the bank amendment package.

11       (b) Within 30 calendar days following the department's receipt of a bank  
12 amendment package and the initial fee, pursuant to subdivision (a), the department  
13 shall determine whether or not the package is complete and give written notice of  
14 the determination to the person who submitted it and, if applicable, notice pursuant  
15 to Section 65560 that the person shall remit an additional fee of seventeen  
16 thousand five hundred dollars (\$17,500).

17       (c) If noticed by the department, the additional fee of seventeen thousand five  
18 hundred dollars (\$17,500) shall be submitted to the department within 30 days of  
19 the notice.

20       (d) If the additional fee is not received by this date, the review timelines in this  
21 article shall be suspended until the fee is received by the department.

22       **Comment.** Section 65565 continues former Fish and Game Code Section 1798.6(c)(2)-(3)  
23 without substantive change.

24       **§ 65570. Decision**

25       65570. (a) If the department determines that the bank amendment package is not  
26 complete, the package may be made complete and resubmitted.

27       (b) If the department determines that the bank amendment package is complete,  
28 then within 90 calendar days of that determination and the receipt of the additional  
29 fee pursuant to subdivisions (b) through (d), inclusive, of Section 65565, if  
30 applicable, the department shall determine whether or not the bank amendment  
31 package is acceptable and notify the person who submitted the package of the  
32 determination.

33       (c) If the department determines that the bank amendment package is not  
34 acceptable the determination shall state the reasons.

35       (d) The department may request clarifying information during the bank  
36 amendment review process.

37       **Comment.** Section 65570 continues former Fish and Game Code Section 1798.6(c)(4) & (d)  
38 without substantive change.

1   **§ 65575. Request for supplemental information**

2   65575. (a) If the department needs supplemental information during its review  
3   of the bank amendment package in order to fully evaluate the proposed  
4   amendment, the regional manager or department equivalent, or a higher level  
5   department employee, shall provide the person seeking to amend the bank, in  
6   writing, a written request for the needed information.

7   (b) Upon the department's receipt of the requested information, a new 90-day  
8   period shall begin during which the department will determine acceptability  
9   pursuant to subdivisions (a) and (b) of Section 65570.

10   (c) If the department does not receive the requested information within 60  
11   calendar days of the department's request, the bank amendment package shall be  
12   deemed unacceptable.

13   **Comment.** Section 65575 continues former Fish and Game Code Section 1798.6(e) without  
14   substantive change.

15   **§ 65580. Changes proposed by applicant during review**

16   65580. (a) If the person seeking to amend the bank proposes changes to the bank  
17   amendment package that have not been solicited by the department during its the  
18   department's 90-day review period, including, but not limited to, parties, number  
19   or type of credits, bank size, number or type of species, credit release schedule,  
20   service area, design change, or other changes as identified by the department to  
21   require additional review time, the department, acting through the regional  
22   manager or department equivalent, or a higher level department employee, shall  
23   assess a one-time fee of ten thousand dollars (\$10,000) to cover the reasonable  
24   cost of the department's services in reviewing the changes.

25   (b) A new 90-day review period shall begin upon receipt of the proposed  
26   changes and the fee, during which the department shall determine acceptability  
27   pursuant to subdivisions (a) and (b) of Section 65570.

28   **Comment.** Section 65580 continues former Fish and Game Code Section 1798.6(f) without  
29   substantive change.

30   **§ 65585. Extension of time**

31   65585. The department may extend the 90-day period for reviewing the bank  
32   amendment package by an additional 60 days if the department determines that 90  
33   days is insufficient time to complete its review of a bank amendment package for  
34   reasons that may include, but are not limited to, the size, location, or complexity of  
35   the bank or bank amendment documents, that the package includes a development  
36   plan, or that there are substantial variations from recommended standard forms.

37   **Comment.** Section 65585 continues the fifth sentence of former Fish and Game Code Section  
38   1798.6(b) without substantive change.

39   **☒ Staff Note:** Existing Section 1798.6(b) (proposed Section 65585) seems to substantially  
40   duplicate Section 1798.6(g) (proposed Section 65590). The staff invites comment on whether one  
41   of those provisions can be deleted as redundant.

## **§ 65590. Extension of time**

65590. If the department determines that 90 days is insufficient time to complete its review of the bank amendment package for reasons, including, but not limited to, the size, location, or complexity of the bank or bank amendment package, that the package includes a development or construction plan, or substantial variations from recommended standard forms, the department may extend the 90-day period for reviewing the bank amendment package by an additional 60 calendar days.

**Comment.** Section 65590 continues former Fish and Game Code Section 1798.6(g) without substantive change.

## **§ 65600. Resubmission after negative determination**

65600. (a) If the department determines that a bank amendment package is not acceptable, then the package may be resubmitted in accordance with Section 65550 if further consideration is desired.

(b) Any resubmittal shall be accompanied by payment of all applicable bank amendment package review fees.

**Comment.** Section 65600 continues former Fish and Game Code Section 1798.6(h) without substantive change.

CHAPTER 3. IMPLEMENTATION

## **§ 65650. General approval requirement**

65650. Until the department has approved a bank, in writing, and, if applicable, a conservation easement has been recorded on the site, no bank shall be operative, vested, or final, nor bank credits issued. No amendment to an approved bank shall be effective without the written approval of the department.

**Comment.** Section 65650 continues former Fish and Game Code Section 1799(a) without substantive change.

## § 65655. Compliance review

65655. Following approval of a final bank agreement package and establishment of a bank, the department shall conduct compliance review activities as provided in the approved bank enabling instrument.

**Comment.** Section 65655 continues former Fish and Game Code Section 1799(b) without substantive change.

## § 65660. Database

65660. (a) The department shall establish and maintain a database that allows bank sponsors to accurately update and add information about mitigation and conservation banks.

(b) This data shall be available on the department's Internet Web site or accessible by a link from the department's Internet Web site.

1       (c) The available information shall include, but is not limited to, the total  
2       number of each type of bank credit, the types of credits sold or obligated, the  
3       number of credits sold or obligated, the number of credits applied, the balance of  
4       each type of credit remaining, the status of the species and habitat at the bank,  
5       links to the bank's long-term management plans, and links to the complete annual  
6       monitoring reports required by departmental policy.

7       (d) Information contained in the database created pursuant to former Title 2  
8       (commencing with Section 64700) on January 1, 2011, shall be incorporated into  
9       the database established pursuant to subdivision (a).

10      **Comment.** Section 65660 continues former Fish and Game Code Section 1799(c) without  
11       substantive change.

12      **§ 65665. Annual report**

13      65665. (a) By January 1, 2014, and annually thereafter, the department shall  
14       provide a report to the Legislature.

15      (b) The report shall include the following information based on data from the  
16       previous calendar year:

17       (1) Number of new bank applications, prospectuses, bank agreement packages,  
18       and amendments received.

19       (2) Number of bank applications approved, rejected because not complete,  
20       rejected because not acceptable, and withdrawn.

21       (3) Name of new or existing bank, geographic location, number of acres,  
22       number of credits approved for each habitat type or species, and number of credits  
23       sold.

24       (4) An accounting of fees collected pursuant to this title.

25       (5) A statement of whether or not the timelines for bank review in this title were  
26       met.

27       (6) Other information determined by the department to be relevant in assessing  
28       the effectiveness of the department's mitigation and conservation banking  
29       program.

30      **Comment.** Section 65665 continues former Fish and Game Code Section 1799(d) without  
31       substantive change.

32      **§ 65670. Implementation and compliance fees**

33      65670. (a) The department shall collect fees to pay for all or a portion of the  
34       department's bank implementation and compliance costs.

35       (b) The department shall collect a total payment of sixty thousand (\$60,000) per  
36       bank, apportioned by an amount that equals the ratio of the number of credits  
37       released to the total number of credits in the bank, and shall be identified in the  
38       bank enabling instrument.

39       (c) Payments shall be due following each credit release no later than the due date  
40       for the submission of the bank's annual report. The payments shall be submitted

1 following each credit release and no later than the time of the submission of the  
2 bank's annual report.

3 (d) The department may require the bank to cease selling credits and may stop  
4 credit releases until these fees are paid in full.

5 (e) The department shall assess a penalty of 10 percent of the amount of fees due  
6 if there is a failure to remit the amount payable when due.

7 **Comment.** Section 65670 continues former Fish and Game Code Section 1799(e) without  
8 substantive change.

9 **§ 65675. Fee adjustment**

10 65675. The department shall annually adjust the fees in this title pursuant to  
11 **Section 713.**

12 **Comment.** Section 65675 continues former Fish and Game Code Section 1799.1(a) without  
13 substantive change.

14 **§ 65680. Deposit of fees**

15 65680. Moneys received pursuant to this title shall be deposited in a separate  
16 dedicated account within the Fish and Game Preservation Fund and expended for  
17 the purposes of this title.

18 **Comment.** Section 65680 continues former Fish and Game Code Section 1799.1(b) without  
19 substantive change.

20 **§ 65685. Guidelines**

21 65685. (a) The department shall adopt and amend guidelines and criteria to  
22 implement this title.

23 (b) The department shall develop these guidelines and criteria in coordination  
24 with interested parties, including, but not limited to, bank sponsors, conservation  
25 organizations, and federal and state bank approving agencies. The guidelines shall  
26 incorporate all relevant documents and program guidance, including, but not  
27 limited to, the 2011 Memorandum of Understanding approved by the United  
28 States Fish and Wildlife Service, the United States Army Corps of Engineers, and  
29 the United States Environmental Protection Agency, for the purpose of jointly  
30 establishing a framework for developing and using combined or coordinated  
31 approaches to mitigation and conservation banking in California. Chapter 3.5  
32 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the  
33 Government Code shall not apply to the development, adoption, or amendment, of  
34 guidelines or criteria pursuant to this section. The guidelines and criteria shall be  
35 posted on the department's Internet Web site.

36 **Comment.** Section 65685 continues former Fish and Game Code Section 1799.1(c) without  
37 substantive change.

38 **§ 65690. Reimbursement of costs**

39 65690. The costs of a conservation and mitigation banking program, including,  
40 but not limited to, costs incurred by the department during its guideline adoption

1 and review, approval, establishment, monitoring, and oversight of banks, shall be  
2 reimbursed from revenues of conservation and mitigation bank application fees  
3 imposed pursuant to this title.

4      **Comment.** Section 65690 continues former Fish and Game Code Section 1799.1(d) without  
5 substantive change.

6      **☒ Staff Note.** Existing Section 1799.1(d) refers to fees imposed pursuant to Section 1798.5,  
7 1798.6, and 1799. Proposed Section 65690 simplifies this reference, referring instead to fees  
8 imposed pursuant to “this title.” **The staff does not believe that this would result in any**  
9 **substantive change, but invites comment on that point.**

10                    **TITLE 4. SACRAMENTO-SAN JOAQUIN  
11 VALLEY WETLANDS MITIGATION BANK ACT  
12 OF 1993**

13                    **CHAPTER 1. GENERAL PROVISIONS**

14                    **Article 1. Short Title**

15      **§ 65800. Short title**

16      65800. This title shall be known and may be cited as the Sacramento-San  
17 Joaquin Valley Wetlands Mitigation Bank Act of 1993.

18      **Comment.** Section 65800 continues former Fish and Game Code Section 1775 without  
19 substantive change.

20                    **Article 2. Findings, Declarations, and Intent**

21      **§ 65805. Findings and declarations**

22      65805. The Legislature finds and declares the following:

23      (a) Wetlands are an important natural resource of the Sacramento-San Joaquin  
24 Valley because they provide significant habitat for migratory waterfowl of the  
25 Pacific flyway, for endangered species, and for many other resident wildlife and  
26 fish populations. Wetlands provide additional public benefits, including water  
27 quality improvement, flood protection, stream bank stabilization, recreation, and  
28 scientific research.

29      (b) Active and voluntary involvement by private landowners is necessary for the  
30 long-term availability and productivity of wetlands in the Sacramento-San Joaquin  
31 Valley.

32      (c) Large wetland preserves in the Sacramento-San Joaquin Valley, under  
33 certain circumstances, can provide an environmentally preferable alternative to a  
34 number of small, isolated wetland preserves of the same type surrounded by urban  
35 development.

1       (d) It is the policy of the state with respect to the Sacramento-San Joaquin  
2       Valley:

3       (1) To provide for the protection, preservation, restoration, enhancement, and  
4       expansion of the wetland habitat in the Sacramento-San Joaquin Valley.

5       (2) To promote the protection, preservation, restoration, enhancement, and  
6       expansion of the Sacramento-San Joaquin Valley wetlands in concert with other  
7       federal, state, and local programs, and interested parties.

8       (3) To improve cooperative efforts among private, nonprofit, and public entities  
9       for the management and protection of wetlands.

10      (4) To assure that no net loss of either wetland acreage or habitat values results  
11     from activities pursuant to this title in the Sacramento-San Joaquin Valley that  
12     otherwise comply with state and federal law.

13      (5) To encourage and maintain a predictable, efficient, and timely regulatory  
14     framework for environmentally acceptable development.

15      (6) To assure that the construction or maintenance of wetland mitigation banks  
16     in the Sacramento-San Joaquin Valley does not reduce any local tax base, does not  
17     create any uncompensated increased requirement for local services, and does not  
18     create conditions that have the potential to adversely affect the public health.

19      (7) To provide an alternative for accomplishing offsite mitigation in the  
20     Sacramento-San Joaquin Valley when offsite mitigation is required under a fill  
21     permit issued pursuant to Section 404 of the federal Clean Water Act (33 U.S.C.  
22     Sec. 1344 et seq.).

23      (e) This title constitutes a nonexclusive alternative to other lawful methods of  
24     mitigating project impacts upon wetlands and maintaining and increasing wetlands  
25     acreage and habitat values generally. Specifically, this title is not intended to, and  
26     shall not be interpreted to:

27       (1) Condone or encourage the removal, loss, or degradation of wetlands.

28       (2) Condone or encourage the removal, loss, or degradation of habitat for any  
29       rare, threatened, or endangered species.

30       (3) Abrogate any other local, state, or federal law or policy relating to wetlands,  
31       nor prohibit any city or county from prohibiting the removal, filling, or other  
32       destruction of particular wetlands.

33       (4) Establish maximum or minimum standards or any other requirements for  
34       wetland fill or mitigation, except for mitigation banks established pursuant to this  
35       title.

36       (5) Have legal or necessary precedential application to any other area of the  
37       state, or to other lands, resources, situations, or circumstances.

38       (6) Preclude other forms of mitigation banking, including private or for-profit  
39       programs, within the Sacramento-San Joaquin Valley.

40       (7) Be the exclusive method of providing compensation by permittees for the  
41       loss of wetlands within the Sacramento-San Joaquin Valley.

42      **Comment.** Section 65805 continues former Fish and Game Code Section 1776 without  
43      substantive change.

## § 65810. Legislative intent

65810. It is the intent of the Legislature that the funds necessary to cover the costs of administering this title be provided by the purchase of credits in mitigation bank sites.

**Comment.** Section 65810 continues former Fish and Game Code Section 1776.5 without substantive change.

## **§ 65815. Purpose**

65815. The purpose of this title is to ensure that no net loss of wetland acreage or habitat values within the Sacramento-San Joaquin Valley occurs as a result of fill permit activities pursuant to Section 404 of the federal Clean Water Act (33 U.S.C. Sec. 1344 et seq.).

**Comment.** Section 65815 continues former Fish and Game Code Section 1780 without substantive change.

## § 65820. Goal

65820. It is the state's goal to increase the total wetlands acreage and values within the Sacramento-San Joaquin Valley.

**Comment.** Section 65820 continues former Fish and Game Code Section 1781 without substantive change.

### Article 3. Definitions

## **§ 65850. Application**

65850. Unless the context otherwise requires, the definitions in this article govern the construction of this title.

**Comment.** Section 65850 continues former Fish and Game Code Section 1777 without substantive change.

## **§ 65855. Bank site or mitigation bank site**

65855. "Bank site" or "mitigation bank site" means a publicly or privately owned and operated site on which wetlands have been or will be created in accordance with this title to compensate for adverse impacts caused by removal or fill permit activities authorized pursuant to Section 404 of the federal Clean Water Act (33 U.S.C. Sec. 1344 et seq.). "Bank site" or "mitigation bank site" may include land on which rice is grown as long as those lands are managed as ricelands and those lands meet the other requirements of Sections 65950 and 65955.

**Comment.** Section 65855 continues former Fish and Game Code Section 1777.2 without substantive change.

## **§ 65860. Credit**

65860. "Credit" means a numerical value that represents the wetland acreage and habitat values of a mitigation bank site.

1       **Comment.** Section 65860 continues former Fish and Game Code Section 1777.5 without  
2 substantive change.

3       **§ 65865. Operator**

4       65865. “Operator” means the department, or a public or private person or entity  
5 approved by the department, to administer a wetlands mitigation bank site.

6       **Comment.** Section 65865 continues former Fish and Game Code Section 1778 without  
7 substantive change.

8       **§ 65870. Permittee**

9       65870. “Permittee” means a public or private person or entity that meets all of  
10 the following conditions:

11      (a) Has received a permit pursuant to Section 404 of the federal Clean Water Act  
12 (33 U.S.C. Sec. 1344 et seq.) for the removal or filling of wetlands, subject to a  
13 condition that allows the permittee to compensate for the wetland loss through  
14 participation in a wetland mitigation bank pursuant to this title.

15      (b) Proposes to compensate for the loss of the wetlands through participation in  
16 a wetlands mitigation bank pursuant to this title.

17      (c) Proposes the discharge at a site within a qualifying urban area and not more  
18 than 40 miles from a bank site with sufficient acreage of the same types of  
19 wetlands that will provide suitable replacement habitat for the values that may be  
20 lost from the conversion of the existing wetlands.

21       **Comment.** Section 65870 continues former Fish and Game Code Section 1778.5 without  
22 substantive change.

23       **§ 65875. Qualifying urban area**

24       65875. “Qualifying urban area” means any of the following when they occur  
25 within the Sacramento-San Joaquin Valley:

26      (a) A geographical area having a population of 50,000 or more inhabitants  
27 within the jurisdiction of a city, or a town, as defined by Sections 20 and 21 of the  
28 Government Code.

29      (b) A portion of any geographical area within a town, as defined in Section 21 of  
30 the Government Code, which has a population density equal to, or exceeding,  
31 1,500 persons per square mile and which has a population of 50,000 or more  
32 inhabitants.

33      (c) A geographical area having a population density equal to, or exceeding,  
34 1,500 persons per square mile, and an adjacent city, as defined in Section 20 of the  
35 Government Code, where the combined population of the geographical area and  
36 the city equals 50,000 or more inhabitants.

37      (d) A geographical area within the sphere of influence of a city or community  
38 services district for which the projected population of the adopted general plan  
39 equals 10,000 or more inhabitants.

40       **Comment.** Section 65875 continues former Fish and Game Code Section 1779 without  
41 substantive change.

1      **§ 65880. Sacramento-San Joaquin Valley**

2      65880. “Sacramento-San Joaquin Valley” means the central valley region, as  
3      defined in subdivision (g) of Section 13200 of the Water Code.

4      **Comment.** Section 65880 continues former Fish and Game Code Section 1779.5 without  
5      substantive change.

6      **CHAPTER 2. WETLANDS MITIGATION BANKS**

7      **§ 65950. Standards and criteria**

8      65950. (a) The department, in cooperation with those agencies specified in  
9      65970, shall adopt regulations that establish standards and criteria for the bank site  
10     qualification process, for the evaluation of wetland habitat acreage and values  
11     created at the bank sites, and for the operation and evaluation of bank sites, and  
12     any other regulations that are necessary to implement this title.

13     (b) These criteria shall require, at a minimum, that the newly created wetland  
14     provide the hydrologic, vegetative, and wildlife characteristics, including the food  
15     web components, of a naturally occurring wetland system that is equal to the site  
16     being mitigated.

17     (c) With respect to bank site standards and operator qualifications, the  
18     department shall consider, at a minimum, all of the following criteria:

19        (1) A requirement that the bank site have a reliable, adequate, and available  
20        water supply necessary to provide wetland values. For wetlands dependent only on  
21        rainfall, rainfall satisfies this requirement.

22        (2) The relative ease or difficulty of converting uplands into wetlands at the  
23        bank site.

24        (3) The anticipated maintenance necessary to sustain the recreated and created  
25        wetlands at the bank site.

26        (4) The proximity of the bank site to other established preserves or natural  
27        features historically associated with abundant wildlife values.

28        (5) The proximity of the bank site to urban or populated areas that could reduce  
29        the bank site's long-term biological values.

30        (6) The demonstrated ability of the bank site operator to create, administer,  
31        maintain, and protect the bank site in perpetuity in its enhanced state, including  
32        financial, technical, and management ability.

33        (7) The relative abundance or scarcity of the wetland type to be created at the  
34        bank site.

35      **Comment.** Section 65950 continues former Fish and Game Code Section 1784(a)-(b) without  
36      substantive change.

37      **§ 65955. Ricelands**

38      65955. (a) A bank site or mitigation bank site may include any lands on which  
39      rice is grown as long as those lands are managed as ricelands with the required

1 enhanced wetland values if they otherwise qualify under this title and either of the  
2 following conditions exist:

3 (1) The lands are lands on which rice was grown after January 1, 1996. For  
4 purposes of this paragraph, to qualify as new wetland values, rice shall not have  
5 been grown on the lands for 10 years before the application is submitted pursuant  
6 to Section 65960.

7 (2) The lands are lands on which rice was grown before January 1, 1996. These  
8 lands shall qualify only if there is an increase in wetland habitat value that is equal  
9 to the site being mitigated. For purposes of this paragraph, a wetland value shall  
10 only be provided for lands on which rice was grown that are proposed for wetlands  
11 mitigation for the period when that land is flooded between the harvesting of rice  
12 and the planting of the next crop. This paragraph shall apply only to lands that  
13 were not flooded after harvest between January 1, 1982, and January 1, 1992.

14 (b) Any mitigation site established pursuant to subdivision (a) may be replaced  
15 by a new site of an equal wetland value.

16 (c) This section and Section 65950 shall not be construed to permit waters used  
17 to flood rice fields in order to create wetlands mitigation to be credited as  
18 beneficial to wildlife under federal law.

19 **Comment.** Section 65955 continues former Fish and Game Code Section 1784(c)-(e) without  
20 substantive change.

21 **§ 65960. Application**

22 65960. If any person desires to establish a wetlands mitigation bank site under  
23 this title, the person shall apply to the department for a determination that the bank  
24 site and the operator qualify under the criteria established by the department  
25 pursuant to this title.

26 **Comment.** Section 65960 continues the first sentence of former Fish and Game Code Section  
27 1785 without substantive change.

28 **§ 65965. Determination is “project”**

29 65965. A determination that a bank site qualifies under this title is a project for  
30 purposes of Section 21065 of the Public Resources Code.

31 **Comment.** Section 65965 continues the second sentence of former Fish and Game Code  
32 Section 1785 without substantive change.

33 **§ 65970. Memorandum of understanding requirement**

34 65970. (a) Before any wetlands are created on the bank site qualified pursuant to  
35 Section 65960, the department shall coordinate and shall be a signatory to a  
36 memorandum of understanding with the operator.

37 (b) The United States Environmental Protection Agency, the United States  
38 Army Corps of Engineers, the Fish and Wildlife Service of the United States  
39 Department of the Interior, the Central Valley Regional Water Quality Control  
40 Board, and the State Department of Health Services or its designee, or any of

1 them, may be signatories by indicating to the department their interest in  
2 participating within 90 days of being notified by the department of the  
3 department's intent to initiate the procedures described in this section and Section  
4 69575.

5 (c) Any county located in whole or in part in the Sacramento-San Joaquin  
6 Valley may, by ordinance, require that it be a signatory to any memorandum of  
7 understanding for a bank site to be established within its boundary.

8 **Comment.** Section 65970 continues former Fish and Game Code Section 1786(a) without  
9 substantive change.

10 **§ 65975. Content of memorandum of understanding**

11 65975. The memorandum of understanding shall include, but is not limited to,  
12 all of the following items:

13 (a) Identification of the mitigation bank site, including the legal property  
14 description, acreage, types, and location of existing wetlands within the  
15 boundaries of the bank site.

16 (b) An agreement, by each of the governmental agencies in Section 65970, that  
17 all new, successfully created wetland acreage shall qualify to be credited against  
18 the approved removal or fill of wetlands located in the qualifying urban area and  
19 within 40 miles of the bank site and is consistent with the procedures set out in this  
20 title.

21 (c) An agreement by the operator to do both of the following:

22 (1) Maintain all wetland habitat within the bank in optimum condition in  
23 perpetuity, barring an unforeseen natural catastrophe that precludes the viability of  
24 wetlands.

25 (2) Establish a trust or bond in favor of the department that provides sufficient  
26 funds to ensure administration, protection, operation, and maintenance in  
27 perpetuity of the wetland habitat acreage and values at the mitigation bank site if  
28 the operator defaults in performing the duties required pursuant to paragraph (1).

29 (d) In the case of privately owned bank sites, identification of the circumstances  
30 that would constitute a major breach of the agreement and that would result in  
31 either the replacement of the operator, or the passing of title from the owner to the  
32 state, or both, including identification of procedures for adequate notice and  
33 opportunity for the operator to be heard and to correct any breach.

34 **Comment.** Section 65975 continues former Fish and Game Code Section 1786(b) without  
35 substantive change.

36 **§ 65980. Payment to county**

37 65980. (a) If the bank site owner is a public entity, that entity shall pay annually  
38 to the county in which the property is located an amount equal to the county taxes  
39 levied on the property at the time title to the bank site is transferred to that entity.  
40 The public entity shall also pay the assessments levied upon the property by any  
41 irrigation, drainage, or reclamation district.

(b) Payments under this section shall be made on or before December 10 of each year, except for newly acquired bank sites, for which payments shall be made pursuant to subdivision (c).

(c) Payments for newly acquired bank sites shall be made within one year of the date title to the property was transferred to the state, prorated for the balance of the year from the date title was transferred to the 30th day of June following the date title was transferred, and, thereafter, payments shall be made on or before December 10 of each year.

**Comment.** Section 65980 continues former Fish and Game Code Section 1787 without substantive change.

## CHAPTER 3. WETLANDS

## **§ 66050. Creation of wetland or vernal pool**

66050. (a) Upon the successful creation of any wetlands of at least 20 acres, or in the case of vernal pools, upon successful creation of vernal pools on a site at least 20 acres in size, the operator may request a determination by the department of the number of acres in the mitigation bank site, and the relative habitat value thereof, that qualify for credit against prospective wetland loss in the qualifying urban area.

(b) In determining the amount of mitigation bank credit, no credit shall be provided for habitat values or acreage that was in existence prior to the establishment of the bank.

**Comment.** Section 66050 continues former Fish and Game Code Section 1790 without substantive change.

## **§ 66055. Determination and classification of wetlands**

66055. (a) Upon receipt of a request pursuant to Section 66050, the department shall determine the number of acres that are wetlands in the bank site based on the criteria established pursuant to Sections 65950 and 69555, and the department shall classify those wetlands according to established biological criteria.

(b) The classifications shall include, but are not limited to, the following wetland types:

- (1) Perennial freshwater marsh.
  - (2) Perennial brackish marsh.
  - (3) Seasonal freshwater marsh.
  - (4) Wet meadow.
  - (5) Vernal pool.
  - (6) Riparian woodland.
  - (7) Riparian scrub.

**Comment.** Section 66055 continues former Fish and Game Code Section 1791 without substantive change.

1   **§ 66060. Pricing and costs**

2   66060. (a) In the interest of assuring that the minimum price for wetland credit  
3   is sufficient to ensure the financial integrity of the bank, the department may  
4   establish a minimum price for each bank established pursuant to this title.

5   (b) The operator may set a higher price to the extent that price is consistent with  
6   the terms of the memorandum of understanding executed pursuant to Section  
7   65960.

8   (c) After the department determines the number of wetland acres in the bank site  
9   that qualify for credit against wetland loss in a qualifying urban area, the operator  
10   shall provide to the department, and the department shall verify, an accounting of  
11   the average cost for each wetland acre created, by wetland type for the purpose of  
12   determining credits, using the following factors:

13   (1) Land costs, including the reasonable interest cost of holding the land.

14   (2) Wetland creation costs.

15   (3) Wetland administration, maintenance, and protection costs.

16   (4) Annual taxes, including all tax increases allowed under applicable state law,  
17   and in-lieu payments pursuant to Section 65980, if applicable.

18   (5) Costs incurred by the department in establishing the bank site, and the direct  
19   cost of necessary ongoing monitoring and oversight.

20   (6) Any other information relevant to a determination of the cost of preserving  
21   the wetlands in perpetuity.

22   **Comment.** Section 66060 continues former Fish and Game Code Section 1792 without  
23   substantive change.

24   **§ 66065. Reimbursement of department expenses**

25   The department shall be reimbursed for those expenses of the department  
26   identified in Section 66060 according to a schedule contained in an agreement  
27   with the person establishing a wetland mitigation bank. The agreement shall be  
28   approved by all parties prior to the commencement of planning activities.

29   **Comment.** Section 66065 continues former Fish and Game Code Section 1792.5 without  
30   substantive change.

31                   **CHAPTER 4. DISCHARGE INTO WETLANDS**

32   **§ 66100. Compensation**

33   66100. A permittee shall provide compensation pursuant to Section 404 of the  
34   federal Clean Water Act (33 U.S.C. Sec. 1344 et seq.). The department shall  
35   classify the wetlands that the permittee will remove according to wetland type,  
36   consistent with Chapter 3 (commencing with Section 66050).

37   **Comment.** Section 66100 continues former Fish and Game Code Section 1793 without  
38   substantive change.

## **§ 66105. Conditions on compensation**

66105. Compensation pursuant to Section 66100 is subject to the condition that the operator establish the trust or bond required by paragraph (2) of subdivision (c) of Section 65975 and, in addition, is subject to the following conditions:

- (a) The full payment shall be used to purchase credits in the mitigation bank site.
  - (b) The payment shall provide for purchase of bank site wetland acreage required by Section 66100 that has the same hydrologic, vegetative, and other characteristics as the system for which it will serve as mitigation.
  - (c) A permittee shall not participate in a wetlands mitigation bank if a net loss of wetland habitat values or acreage occurs.

**Comment.** Section 66105 continues former Fish and Game Code Section 1794 without substantive change.

## § 66110. Permittee obligations

66110. After payment to the operator pursuant to this chapter, the permittee has no further obligations with respect to the operation of the bank site to which payment was made, unless the permittee has an equity involvement in the bank.

**Comment.** Section 66110 continues former Fish and Game Code Section 1795 without substantive change.

## **§ 66115. Last date for qualification of bank sites**

66115. No bank site shall be qualified under Section 65960 on or after January 1, 2015.

**Comment.** Section 66115 continues former Fish and Game Code Section 1796 without substantive change.

## TITLE 5. PROJECT FEES

## **§ 66200. Fee to defray costs**

66200. (a) The department shall impose and collect a filing fee in the amount prescribed in Section 66215 to defray the costs of managing and protecting fish and wildlife trust resources, including, but not limited to, consulting with other public agencies, reviewing environmental documents, recommending mitigation measures, developing monitoring requirements for purposes of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), consulting pursuant to Section 21104.2 of the Public Resources Code, and other activities protecting those trust resources identified in the review pursuant to the California Environmental Quality Act.

(b) The filing fees shall be proportional to the cost incurred by the department and shall be annually reviewed and adjustments recommended to the Legislature in an amount necessary to pay the full costs of department programs as specified. The department shall annually adjust the fees pursuant to **Section 713**.

1       **Comment.** Section 66200 continues former Fish and Game Code Section 711.4(a)-(b) without  
2 substantive change.

3       **§ 66205. CEQA filing fee**

4       66205. (a) All project applicants and public agencies subject to the California  
5 Environmental Quality Act shall pay a filing fee for each proposed project, as  
6 specified in Section 66215.

7       (b) Filing fees shall be paid at the time and in the amount specified in Section  
8 66215.

9       (c) Notwithstanding Sections 21080.5 and 21081 of the Public Resources Code,  
10 a project shall not be operative, vested, or final, and local government permits for  
11 the project shall not be valid, until the filing fees required pursuant to this article  
12 are paid.

13     **Comment.** Section 66205 continues former Fish and Game Code Section 711.4(c)(1) & (3)  
14 without substantive change.

15     **§ 66210. Exceptions to CEQA filing fee**

16     66210. Notwithstanding subdivision (a) of Section 66205, a filing fee shall not  
17 be paid pursuant to this article if any of the following conditions exist:

18       (a) The project has no effect on fish and wildlife.

19       (b) The project is being undertaken by the department.

20       (c) The project costs are payable by the department from any of the following  
21 sources that are held by the department:

22       (1) The Public Resources Account in the Cigarette and Tobacco Products Surtax  
23 Fund.

24       (2) The California Wildlife, Coastal, and Park Land Conservation Fund of 1988.

25       (3) The Habitat Conservation Fund.

26       (4) The Fisheries Restoration Account in the Fish and Game Preservation Fund.

27       (5) The Commercial Salmon Stamp Dedicated Subaccount in the Fish and Game  
28 Preservation Fund.

29       (6) Striped bass stamp funds collected pursuant to **Section 7360**.

30       (7) The California Ocean Resource Enhancement Account.

31       (d) The project is implemented by the department through a contract with either  
32 a nonprofit entity or a local government agency.

33     **Comment.** Section 66210 continues former Fish and Game Code Section 711.4(c)(2) without  
34 substantive change.

35     **§ 66215. Fee amount**

36     66215. The fees shall be in the following amounts:

37       (a) For a project that is statutorily or categorically exempt from the California  
38 Environmental Quality Act, including those certified regulatory programs that  
39 incorporate statutory and categorical exemptions, a filing fee shall not be paid.

40       (b) For a project for which a negative declaration is prepared pursuant to  
41 subdivision (c) of Section 21080 of the Public Resources Code, the filing fee is

1 one thousand eight hundred dollars (\$1,800). A local agency collecting the filing  
2 fee shall remit the fee to the county clerk at the time of filing a notice of  
3 determination pursuant to Section 21152 of the Public Resources Code. A state  
4 agency collecting the filing fee shall remit the fee to the Office of Planning and  
5 Research at the time of filing a notice of determination pursuant to Section 21108  
6 of the Public Resources Code.

7 (c) For a project with an environmental impact report prepared pursuant to the  
8 California Environmental Quality Act, the filing fee is two thousand five hundred  
9 dollars (\$2,500). A local agency collecting the filing fee shall remit the fee to the  
10 county clerk at the time of filing a notice of determination pursuant to Section  
11 21152 of the Public Resources Code. A state agency collecting the filing fee shall  
12 remit the fee to the Office of Planning and Research at the time of filing a notice  
13 of determination pursuant to Section 21108 of the Public Resources Code.

14 (d) For a project that is subject to a certified regulatory program pursuant to  
15 Section 21080.5 of the Public Resources Code, the filing fee is eight hundred fifty  
16 dollars (\$850). The filing fee shall be paid to the department before the filing of  
17 the notice of determination pursuant to Section 21080.5 of the Public Resources  
18 Code.

19 **Comment.** Section 66215 continues former Fish and Game Code Section 711.4(d) without  
20 substantive change.

21 **§ 66220. County clerk**

22 66220. (a) The county clerk may charge a documentary handling fee of fifty  
23 dollars (\$50) per filing in addition to the filing fee specified in Section 66215.

24 (b) The county clerk of each county and the Office of Planning and Research  
25 shall maintain a record, both electronic and in paper, of all environmental  
26 documents received. The record shall include, for each environmental document  
27 received, the name of each applicant or lead agency, the document filing number,  
28 the project name as approved by the lead agency, and the filing date. The record  
29 shall be made available for examination or audit by authorized personnel of the  
30 department during normal business hours.

31 **Comment.** Section 66220 continues former Fish and Game Code Section 711.4(e)(1) without  
32 substantive change.

33 **§ 66225. Remittance of fee**

34 66225. (a) The filing fee imposed and collected pursuant to Section 66215 shall  
35 be remitted monthly to the department within 30 days after the end of each month.  
36 The remittance shall be accompanied with the information required pursuant to  
37 Section 66220. The amount of fees due shall be reported on forms prescribed and  
38 provided by the department.

39 (b) The department shall assess a penalty of 10 percent of the amount of fees  
40 due for a failure to remit the amount payable when due. The department may

1 pursue collection of delinquent fees through the Controller's office pursuant to  
2 **Section 12419.5 of the Government Code.**

3     **Comment.** Section 66225 continues former Fish and Game Code Section 711.4(e)(2)-(3)  
4 without substantive change.

5     **§ 66230. Nonpayment**

6     66230. (a) Notwithstanding **Section 12000**, failure to pay the fee under Section  
7 66215 is not a misdemeanor.

8     (b) All unpaid fees are a statutory assessment subject to collection under  
9 procedures as provided in the Revenue and Taxation Code.

10    **Comment.** Section 66230 continues former Fish and Game Code Section 711.4(f) without  
11 substantive change.

12    **§ 66235. Number of fees per project**

13    66235. Only one filing fee shall be paid for each project unless the project is  
14 tiered or phased, or separate environmental documents are required.

15    **Comment.** Section 66235 continues former Fish and Game Code Section 711.4(g) without  
16 substantive change.

17    **§ 66240. Effect on specified department duties**

18    66240. This article does not preclude or modify the duty of the department to  
19 recommend, require, permit, or engage in mitigation activities pursuant to the  
20 California Environmental Quality Act.

21    **Comment.** Section 66240 continues former Fish and Game Code Section 711.4(h) without  
22 substantive change.

23    **§ 66245. Coastal Commission permit process**

24    66245. The permit process of the California Coastal Commission, as certified by  
25 the Secretary of the Resources Agency, is exempt from the payment of the filing  
26 fees prescribed by subdivision (d) of Section 66215 insofar as the permits are  
27 issued under any of the following regulations:

28     (a) Subchapter 4 (commencing with Section 13136) of Chapter 5 of Division 5.5  
29 of Title 14 of the California Code of Regulations.

30     (b) Subchapter 1 (commencing with Section 13200), Subchapter 3 (commencing  
31 with Section 13211), Subchapter 3.5 (commencing with Section 13214),  
32 Subchapter 4 (commencing with Section 13215), Subchapter 4.5 (commencing  
33 with Section 13238), Subchapter 5 (commencing with Section 13240), Subchapter  
34 6 (commencing with Section 13250), and Subchapter 8 (commencing with Section  
35 13255.0) of Section 66215 14 of the California Code of Regulations.

36    **Comment.** Section 66245 continues former Fish and Game Code Section 711.4(i) without  
37 substantive change.

38    **☒ Staff Note.** Existing Section 711.4(i) refers to "Subchapter 3 (commencing with Section  
39 13213)." That appears to be an error. Subchapter 3 begins with Section 13211, not Section 13213.

1 Proposed Section 66245 corrects that error. **The staff invites comment on whether the change**  
2 **would cause any problems.**

3 **§ 66250. Federal agencies**

4 66250. (a) The fish and wildlife resources are held in trust for the people of the  
5 state by and through the department.

6 (b) Insofar as state wildlife trust resources exist and depend upon federal  
7 proprietary lands or federal land and water adjacent to or affecting state trust  
8 resources, all persons engaging in projects or activities under federal license,  
9 contract, or permit, to the extent permitted by federal law, shall be governed by  
10 this **article** and shall pay project filing fees unless the payment of state filing and  
11 permit fees is explicitly preempted by the authority of the federal agency  
12 permitting the use or modification of state trust resources.

13 (c) Insofar as state wildlife trust resources exist and depend upon federal  
14 proprietary lands or federal lands and waters adjacent to or affecting state trust  
15 resources, all federal agencies acting in their proprietary capacity, to the extent  
16 permitted by federal law, shall be governed by this article and Sections 10005 and  
17 21089 of the Public Resources Code, unless the payment of state filing and permit  
18 fees is explicitly preempted by the authority of a particular federal agency.

19 (d) If a court of competent jurisdiction finds that any provision of this section or  
20 the application thereof to any federal agency, person, or circumstances is held  
21 invalid, that invalidity shall not affect other provisions or applications of the  
22 section which can be given effect without the invalid provision or application, and  
23 to this end the provisions of this section are severable.

24 **Comment.** Section 66250 continues former Fish and Game Code Section 711.7 without  
25 substantive change.

26 **☒ Staff Note.** To the extent permitted by federal law, existing Section 711.7 provides for the  
27 application of “this article” to “all persons engaging in projects or activities under federal license,  
28 contract, or permit” and to “all federal agencies acting in their proprietary capacity.” The  
29 language of the section strongly suggests that its purpose is to require such persons and agencies  
30 to pay state filing and permit fees.

31 Technically, the reference to “this article” has broader application than that. Section 711.7 is  
32 included in an article that contains numerous provisions addressing different topics. However,  
33 with the exception of Section 711.4, none of those provisions appear to be relevant to the matters  
34 addressed by Section 711.7. For that reason, Section 711.7 has been located within an article  
35 containing Section 711.4; the references to “this article” have not been changed. Consequently,  
36 those references would only encompass Section 711.4. **The staff believes that this would**  
37 **preserve the meaning of the references, without substantive change, but invites public**  
38 **comment on that point.**



## DISPOSITION OF FORMER LAW

The table below shows the relationship between each provision of the existing Fish and Game Code and the corresponding provision of the proposed law (if any).

<b><i>Existing Provision</i></b>	<b><i>Proposed Provision(s)</i></b>	<b><i>Existing Provision</i></b>	<b><i>Proposed Provision(s)</i></b>
711.4(a)-(b) .....	66200	1797.5(h) .....	65345
711.4(c)(1) & (3) .....	66205	1798(a) .....	65450
711.4(c)(2) .....	66210	1798(b) .....	65455
711.4(d) .....	66215	1798(c)-(d) .....	65460
711.4(e)(1) .....	66220	1798(e) .....	65465
711.4(e)(2)-(3) .....	66225	1798(f) .....	65470
711.4(f) .....	66230	1798.5(a)(1) .....	65500
711.4(g) .....	66235	1798.5(a)(2) .....	65505
711.4(h) .....	66240	1798.5(b) .....	65510
711.4(i) .....	66245	1798.5(c)-(d) .....	65515
711.7 .....	66250	1798.5(e) .....	65520
1775 .....	65800	1798.5(f) .....	65525
1776 .....	65805	1798.5(g) .....	65530
1776.5 .....	65810	1798.5(h) .....	65535
1777 .....	65850	1798.6(a) .....	65550
1777.2 .....	65855	1798.6(b), 1st-4th sent. .....	65555
1777.5 .....	65860	1798.6(b), 5th sent. .....	65585
1778 .....	65865	1798.6(c)(1) .....	65560
1778.5 .....	65870	1798.6(c)(2)-(3) .....	65565
1779 .....	65875	1798.6(c)(4) & (d) .....	65570
1779.5 .....	65880	1798.6(e) .....	65575
1780 .....	65815	1798.6(f) .....	65580
1781 .....	65820	1798.6(g) .....	65590
1784(a)-(b) .....	65950	1798.6(h) .....	65600
1784(c)-(e) .....	65955	1798.7 .....	65400
1785, 1st sent. .....	65960	1799(a) .....	65650
1785, 2d sent. .....	65965	1799(b) .....	65655
1786(a) .....	65970	1799(c) .....	65660
1786(b) .....	65975	1799(d) .....	65665
1787 .....	65980	1799(e) .....	65670
1790 .....	66050	1799.1(a) .....	65675
1791 .....	66055	1799.1(b) .....	65680
1792 .....	66060	1799.1(c) .....	65685
1792.5 .....	66065	1799.1(d) .....	65690
1793 .....	66100	1850 .....	64700
1794 .....	66105	1851, intro. cl. .....	64710
1795 .....	66110	1851(a) .....	64715
1796 .....	66115	1851(b) .....	64720
1797 .....	65300	1851(c) .....	64725
1797.5, intro. cl. .....	65305	1851(d) .....	64730
1797.5(a) .....	65310	1851(e) .....	64735
1797.5(b) .....	65315	1851(f) .....	64740
1797.5(c) .....	65320	1851(g) .....	64745
1797.5(d) .....	65325	1851(h) .....	64750
1797.5(e) .....	65330	1851(i) .....	64755
1797.5(f) .....	65335	1851(j) .....	64760
1797.5(g) .....	65340	1851(k), 1st & 2d sent. .....	64765

1851(k), 3d & 4th sent.....	64850	2064 .....	62125
1851(l), 1st sent .....	64770	2065 .....	62130
1851(l), 2d sent .....	64905	2067 .....	62135
1851(m).....	64775	2068 .....	62105
1851(n).....	64780	2069(a), intro. cl.....	63000
1852(a).....	64935	2069(a)(1).....	63005
1852(b).....	64900	2069(a)(2).....	63015
1852(c).....	64910	2069(b) .....	63050
1852(d).....	64925	2069(c) .....	63055
1852(e).....	64915	2069(d)-(e) .....	63065
1853(a).....	64855	2069(f)(1) .....	63070
1853(b).....	64920	2069(f)(2) .....	63075
1853(c).....	64860	2069(g) .....	63080
1854(a).....	65000	2070 .....	62200
1854(b).....	64705	2071 .....	62250
1854(c)(1) .....	64960	2071.5 .....	62205
1854(c)(2) .....	64965	2072 .....	62255
1854(c)(3) .....	64970	2072.3 .....	62260
1854(c)(4) .....	64975	2072.7 .....	62275
1854(c)(5) .....	64980	2073 .....	62265
1854(c)(6) .....	64985	2073.3 .....	62270
1854(d).....	64995	2073.4 .....	62285
1854(e).....	64930	2073.5 .....	62280
1855(a).....	65050	2073.7 .....	62290
1855(b).....	65055	2074 .....	62350
1855(c).....	65060	2074.2(a), 1st sent .....	62355
1855(d).....	65150	2074.2(a), 2d sent .....	62360(a)
1855(e).....	64990	2074.2(b) .....	62360(b)-(c)
1856(a).....	65100	2074.2(c) .....	62365
1856(b).....	65105	2074.2(d) .....	62370
1856(c).....	65110	2074.2(e)-(f) .....	62375
1856(d).....	65115	2074.4 .....	62380
1856(e).....	65120	2074.6, 1st sent.....	62400
1856(f).....	65125	2074.6, 2d sent., 1st part .....	62405(a)
1856(g).....	65135	2074.6, 2d sent., 2d part .....	62415
1856(h).....	65130	2074.6, 3d sent .....	62410
1856(i).....	65140	2074.6, 4th sent .....	62405(b)
1856(j).....	65145	2074.6, 5th sent .....	62405(c)
1856(k).....	65155	2074.8 .....	62420
1857 .....	64805	2075 .....	62450
1858 .....	64800	2075.5(a), 1st sent .....	62455
1859 .....	64815	2075.5(a), 2d sent.....	62460(a)
1860 .....	64820	2075.5(b) .....	62460(b)-(c)
1861 .....	64810	2075.5(c) .....	62465
2050 .....	62000	2075.5(d) .....	62470
2051 .....	62005	2075.5(e) .....	62475
2052 .....	62010	2076 .....	62480
2052.1 .....	62015	2076.5 .....	62485
2053 .....	62020	2077(a) .....	62500
2054 .....	62025	2077(b) .....	62505
2055 .....	62030	2077(c) .....	62510
2056 .....	62035	2077(d) .....	62520
2060 .....	62100	2077(e) .....	62515
2061 .....	62110	2078 .....	62210
2062 .....	62115	2079 .....	62525
2063 .....	62120	2080 .....	62600

2080.1 .....	62705	2089.10 .....	64015
2080.2 .....	63350	2089.12(a) .....	64020
2080.3 .....	63355	2089.12(b) .....	64025
2080.4 .....	63360	2089.14 .....	64035
2081(a).....	62650	2089.16 .....	64030
2081(b)-(d).....	62700	2089.18 .....	64040
2081.1 .....	62670	2089.20(a)-(c) .....	64010
2081.2(a).....	63600	2089.20(d)-(e) .....	64045
2081.2(b).....	63605	2089.22(a) .....	63930
2081.2(c).....	63615	2089.22(b) .....	63720, 64525
2081.2(d).....	63625	2089.23 .....	64050
2081.2(e).....	63610	2089.24 .....	63925
2081.2(f)(1).....	63620	2089.25 .....	63920
2081.2(f)(2).....	63640	2089.26 .....	63935
2081.2(f)(3).....	63630	2098 .....	64100
2081.2(g).....	63635	2099(a)(1).....	63010
2081.4 .....	63400	2099(a)(2).....	63015
2081.5, intro. cl.....	63200	2099(b) .....	63100
2081.5(a).....	63205	2099(c) .....	63105
2081.5(b)-(c).....	63210	2099(d) .....	63110
2081.6 .....	63450	2099.5 .....	63010, 63115
2081.7(a).....	63300	2099.20 .....	omitted
2081.7(b)-(d).....	63305	2800 .....	64500
2081.7(e)(1)-(3).....	63310	2801 .....	64505
2081.7(e)(4).....	63315	2802 .....	64510
2081.7(f) .....	63320	2805 .....	64515
2081.8 .....	63325	2809 .....	64550
2081.9 .....	63500	2810(a), 1st sent .....	64555
2081.10 .....	63455	2810(a), 2d sent .....	64560(j)
2082 .....	62675	2810(b) .....	64560(a)-(i)
2083, 1st cl.....	62655	2810(c) .....	64585
2083, 2d cl.....	62680	2810(d) .....	64575
2084 .....	62665	2815 .....	64570
2085 .....	62605	2820(a) .....	64580
2086(a).....	63750	2820(b) .....	64565
2086(b).....	63755	2820(c) .....	64645
2086(c).....	63760	2820(d) .....	64625
2086(d)(1).....	63765	2820(e) .....	64620
2086(d)(2).....	63770	2820(f) .....	64610
2086(e).....	63775	2821 .....	64600
2086(f).....	63780	2822 .....	64635
2087 .....	63700	2823 .....	64640
2088, 1st part .....	63710	2825 .....	64520
2088, 2d part .....	63715	2826 .....	64615
2089 .....	63705	2827 .....	64630
2089.2(a).....	63900	2828 .....	64650
2089.2(b).....	63905	2829 .....	64530
2089.2(c)-(d).....	63915	2830 .....	64655
2089.4 .....	63910	2831 .....	64660
2089.6 .....	63950	2835 .....	64605
2089.7 .....	63955	12008 .....	64150
2089.8 .....	64000	12008.1(a) .....	64155
2089.9 .....	64005	12008.1(b) .....	64160