

AMENDED IN SENATE APRIL 16, 2013

AMENDED IN SENATE APRIL 1, 2013

SENATE BILL

No. 749

**Introduced by Senator Wolk
(Coauthor: Senator Berryhill)**

February 22, 2013

An act to amend Section 2087 of, to amend, repeal, and add Sections 2074.2, 2074.6, 2074.8, and 2075.5 of, to add Sections 1745.1 and 3517 to, and to add Article 2.5 (commencing with Section 1758) to Chapter 7.5 of Division 2 of, the Fish and Game Code, *and to amend Sections 1725 and 1810 of the Water Code*, relating to fish and wildlife resources.

LEGISLATIVE COUNSEL'S DIGEST

SB 749, as amended, Wolk. Habitat protection: endangered species.

(1) Existing law authorizes the Department of Fish and Wildlife to enter into contracts or other agreements with nonprofit conservation groups, as specified, for the management and operation of department-managed lands, defined to include public shooting grounds, state marine recreational management areas, ecological reserves, and wildlife management areas. Existing law states that it is the policy of the state to maintain sufficient populations of all species of wildlife and native plants and the habitat necessary to insure their continued existence at the optimum levels possible to insure, among other things, the policy to perpetuate native plants and all species of wildlife for their intrinsic and ecological values, as well as for their direct benefits to humanity.

This bill would authorize the department to lease department-managed lands for agricultural activities, as specified. The bill would provide that the moneys collected from those agricultural leases may be used to support the maintenance and operations of department-managed lands

from which the moneys were originally collected. The bill would require the department to identify which department-managed lands the department will manage for the purpose of restoring and enhancing upland nesting cover and associated waterfowl brood habitat to support the production of resident waterfowl and upland game birds. The bill would also require the department, in the manner it deems appropriate, to annually solicit comment and recommendations regarding the management of these lands from ~~nonprofit waterfowl and upland game bird conservation groups~~ *the upland game bird advisory committee*.

(2) The California Endangered Species Act requires the Fish and Game Commission to establish a list of endangered species and a list of threatened species, and requires the department to recommend, and the commission to adopt, criteria for determining if a species is endangered or threatened. Under the ~~California Environmental Quality Act~~ *act*, an interested person may petition the commission to add a species to, or remove a species from, either the list of endangered species or the list of threatened species, and existing law requires the commission to consider the petition at a meeting, as prescribed.

This bill, until January 1, 2017, would establish an alternate process for the review of a petition, including public hearings.

(3) The California ~~Environmental Quality~~ *Endangered Species* Act also provides, until January 1, 2014, that the accidental take of candidate, threatened, or endangered species resulting from acts that occur on a farm or a ranch in the course of otherwise lawful routine and ongoing agricultural activities is not prohibited by the act.

This bill would make a technical change to these provisions and extend this exception to January 1, 2020. The bill would define “accidental” for these purposes.

(4) Existing law defines resident game birds and upland game bird species. Existing law permits the taking of certain nongame birds.

This bill would prohibit a state agency from prohibiting or otherwise restricting the establishment of upland nesting cover and associated waterfowl brood habitat for the purpose of propagating waterfowl, upland game birds, or other protected birds without the concurrence of the department.

(5) *Existing law prohibits, notwithstanding any other law, the state or any regional or local public agency from denying a bona fide transferor of water the use of a water conveyance facility that has unused capacity, for the period of time for which that capacity is available, if fair compensation is paid for that use, and, subject to*

specified conditions, the use of a water conveyance facility is to be made without injuring any legal user of water and without unreasonably affecting fish, wildlife, or other instream beneficial uses and without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred.

This bill would, unless expressly authorized by law and notwithstanding specified provisions of statutory law, prohibit a state agency from penalizing a landowner or imposing conditions on a water transfer because of evapotranspiration by vegetation that grows naturally and without irrigation on land fallowed pursuant to a water transfer.

(6) Existing law authorizes a permittee or licensee to temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change, would not injure any legal user of the water, and would not unreasonably affect fish, wildlife, or other instream beneficial uses.

This bill would, for these purposes, exclude from the definition of “consumptively used” evapotranspiration by vegetation that grows naturally and without irrigation on land fallowed pursuant to the transfer or exchange of water or water rights.

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

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

- 1 SECTION 1. Section 1745.1 is added to the Fish and Game
- 2 Code, to read:
- 3 1745.1. (a) Notwithstanding Section 1745, the leasing of
- 4 department-managed lands for agricultural activities shall be
- 5 consistent with the purpose for which the lands were acquired and
- 6 compatible with the department’s approved management plan for
- 7 the area, if available.
- 8 (b) Notwithstanding subdivision (c) of Section 1348, the moneys
- 9 collected from agricultural leases entered into pursuant to
- 10 subdivision (a) may be used to support the maintenance and
- 11 operations of department-managed lands from which the moneys
- 12 were originally collected.

1 SEC. 2. Article 2.5 (commencing with Section 1758) is added
2 to Chapter 7.5 of Division 2 of the Fish and Game Code, to read:

3
4 Article 2.5. Bird Habitat Conservation
5

6 1758. (a) The department shall identify which
7 department-managed lands, within the meaning of paragraph (1)
8 of subdivision (a) of Section 1745, the department will manage
9 for the purpose of restoring and enhancing upland nesting cover
10 and associated waterfowl brood habitat to support the production
11 of resident waterfowl and upland game birds.

12 (b) For lands identified in subdivision (a), the department, in
13 the manner it deems appropriate, shall annually solicit comment
14 and recommendations regarding the management of these lands
15 from ~~nonprofit waterfowl and upland game bird conservation~~
16 ~~groups~~ *the upland game bird advisory committee.*

17 SEC. 3. Section 2074.2 of the Fish and Game Code is amended
18 to read:

19 2074.2. (a) At the meeting scheduled pursuant to Section 2074,
20 the commission shall hold a public hearing on the petition and
21 shall receive information, written or otherwise, and oral testimony.
22 After the conclusion of oral testimony from the commission and
23 department staff, the petitioner, or any other persons, the
24 commission may close the public hearing and administrative record
25 for the commission’s decision pursuant to this section.

26 (b) After the commission closes the public hearing, the
27 administrative record for the commission’s decision is closed and
28 it shall not be reopened except as provided in subdivision (c). Once
29 the public hearing is closed, no person shall submit further
30 information to the commission for consideration on that petition
31 and the commission shall not accept any further information for
32 consideration on that petition except as provided in subdivision
33 (c).

34 (c) The administrative record for the commission’s decision
35 pursuant to this section shall not be reopened once the commission
36 closes the public hearing unless one of the following occurs prior
37 to the commission’s decision:

38 (1) There is a change in state or federal law or regulation that
39 has a direct and significant impact on the commission’s

1 determination as to whether the petition provides sufficient
2 information to indicate that the petitioned action may be warranted.

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

19 (d) In its discretion, the commission may either close the public
20 hearing and continue the meeting on the petition for the purpose
21 of deliberation or continue both the public hearing and the meeting
22 on the petition to a subsequent date, which shall be no later than
23 90 days after the meeting scheduled pursuant to Section 2074, and
24 subject to applicable notice and agenda requirements. If the
25 commission closes the public hearing but continues the meeting
26 for the purpose of deliberation, a person shall not submit, and the
27 commission shall not receive, further information relating to the
28 petition except as provided in subdivision (c).

29 (e) At the meeting scheduled pursuant to Section 2074 or at a
30 continued meeting scheduled pursuant to subdivision (d), the
31 commission shall consider the petition, the department's written
32 report, written comments received, and oral testimony provided
33 during the public hearing, and the commission shall make and
34 enter in its record one of the following findings:

35 (1) If the commission finds that the petition does not provide
36 sufficient information to indicate that the petitioned action may
37 be warranted, the commission shall publish a notice of finding that
38 the petition is rejected, including the reasons why the petition is
39 not sufficient.

1 (2) If the commission finds that the petition provides sufficient
2 information to indicate that the petitioned action may be warranted,
3 the commission shall publish a notice of finding that the petition
4 is accepted for consideration. If the accepted petition recommends
5 the addition of a species to either the list of endangered species or
6 the list of threatened species, the commission shall include in the
7 notice that the petitioned species is a candidate species. The
8 commission shall maintain a list of species which are candidate
9 species.

10 (f) The commission shall publish and distribute the findings
11 relating to the petition pursuant to Section 2078.

12 (g) This section shall remain in effect only until January 1, 2017,
13 and as of that date is repealed, unless a later enacted statute, that
14 is enacted before January 1, 2017, deletes or extends that date.

15 SEC. 4. Section 2074.2 is added to the Fish and Game Code,
16 to read:

17 2074.2. (a) At the scheduled meeting, the commission shall
18 consider the petition, the department's written report, and
19 comments received, and the commission shall make and enter in
20 its public record one of the following findings:

21 (1) If the commission finds that the petition does not provide
22 sufficient information to indicate that the petitioned action may
23 be warranted, the commission shall publish a notice of finding that
24 the petition is rejected, including the reasons why the petition is
25 not sufficient.

26 (2) If the commission finds that the petition provides sufficient
27 information to indicate that the petitioned action may be warranted,
28 the commission shall publish a notice of finding that the petition
29 is accepted for consideration. If the accepted petition recommends
30 the addition of a species to either the list of endangered species or
31 the list of threatened species, the commission shall include in the
32 notice that the petitioned species is a candidate species. The
33 commission shall maintain a list of species which are candidate
34 species.

35 (b) The commission shall publish and distribute the findings
36 relating to the petition pursuant to Section 2078.

37 (c) This section shall become operative on January 1, 2017.

38 SEC. 5. Section 2074.6 of the Fish and Game Code is amended
39 to read:

1 2074.6. (a) The department shall promptly commence a review
2 of the status of the species concerned in the petition. Within 12
3 months of the date of publication of a notice of acceptance of a
4 petition for consideration pursuant to paragraph (2) of subdivision
5 (e) of Section 2074.2, the department shall produce and make
6 publicly available on the department's Internet Web site a written
7 peer reviewed report, based upon the best scientific information
8 available to the department, which indicates whether the petitioned
9 action is warranted, which includes a preliminary identification of
10 the habitat that may be essential to the continued existence of the
11 species, and which recommends management activities and other
12 recommendations for recovery of the species. The department shall
13 amend the draft status review report as appropriate to incorporate
14 scientific information from the independent peer review. The
15 revised report shall be posted on the department's Internet Web
16 site for a minimum of 30 days for public review prior to the hearing
17 scheduled pursuant to Section 2075. The commission may grant
18 an extension of up to six months if the director determines an
19 extension is necessary to complete independent peer review of the
20 report, and to provide a minimum of 30 days for public review of
21 the peer reviewed report prior to the public hearing specified in
22 Section 2075.

23 (b) This section shall remain in effect only until January 1, 2017,
24 and as of that date is repealed, unless a later enacted statute, that
25 is enacted before January 1, 2017, deletes or extends that date.

26 SEC. 6. Section 2074.6 is added to the Fish and Game Code,
27 to read:

28 2074.6. (a) The department shall promptly commence a review
29 of the status of the species concerned in the petition. Within 12
30 months of the date of publication of a notice of acceptance of a
31 petition for consideration by the commission pursuant to paragraph
32 (2) of subdivision (a) of Section 2074.2, the department shall
33 provide a written report to the commission, based upon the best
34 scientific information available to the department, which indicates
35 whether the petitioned action is warranted, which includes a
36 preliminary identification of the habitat that may be essential to
37 the continued existence of the species, and which recommends
38 management activities and other recommendations for recovery
39 of the species.

40 (b) This section shall become operative on January 1, 2017.

1 SEC. 7. Section 2074.8 of the Fish and Game Code is amended
2 to read:

3 2074.8. (a) This article does not impose any duty or obligation
4 for, or otherwise require, the commission or the department to
5 undertake independent studies or other assessments of any species
6 when reviewing a petition and its attendant documents and
7 comments. However, the department shall seek independent
8 scientific peer review of the department's status report. The director
9 may approve an extension of time for completion of the status
10 report if necessary for the purposes of obtaining independent peer
11 review pursuant to Section 2074.6.

12 (b) This section shall remain in effect only until January 1, 2017,
13 and as of that date is repealed, unless a later enacted statute, that
14 is enacted before January 1, 2017, deletes or extends that date.

15 SEC. 8. Section 2074.8 is added to the Fish and Game Code,
16 to read:

17 2074.8. (a) This article does not impose any duty or obligation
18 for, or otherwise require, the commission or the department to
19 undertake independent studies or other assessments of any species
20 when reviewing a petition and its attendant documents and
21 comments.

22 (b) This section shall become operative on January 1, 2017.

23 SEC. 9. Section 2075.5 of the Fish and Game Code is amended
24 to read:

25 2075.5. (a) At the meeting scheduled pursuant to Section 2075,
26 the commission shall hold a public hearing on the petition and
27 shall receive information, written or otherwise, and oral testimony.
28 After the conclusion of oral testimony from department staff, the
29 petitioner, or any other persons, the commission may close the
30 public hearing and the administrative record for the department's
31 decision pursuant to this section.

32 (b) After the commission closes the public hearing the
33 administrative record for the commission's decision is closed and
34 it shall not be reopened except as provided in subdivision (c). Once
35 the public hearing is closed a person shall not submit further
36 information to the department for consideration on that petition
37 and the commission shall not accept any further information for
38 consideration on that petition except as provided in subdivision
39 (c).

1 (c) The administrative record for the commission’s decision
2 pursuant to this section shall not be reopened once the department
3 closes the public hearing unless one of the following occurs prior
4 to the commission’s decision:

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

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

22 (d) The commission, in its discretion, may either close the public
23 hearing and continue the meeting on the petition for the purpose
24 of deliberation or continue both the public hearing and the meeting
25 on the petition to a subsequent date which is no later than 90 days
26 after the meeting scheduled pursuant to Section 2075, and subject
27 to applicable notice and agenda requirements. If the commission
28 closes the public hearing but continues the meeting for the purpose
29 of deliberation, a person shall not submit, and the commission
30 shall not receive, further information relating to the petition except
31 as provided in subdivision (c).

32 (e) At the meeting scheduled pursuant to Section 2075, or at a
33 continued meeting scheduled pursuant to subdivision (d), the
34 commission shall make one of the following findings:

35 (1) The petitioned action is not warranted, in which case the
36 finding shall be entered in the public records of the commission
37 and the petitioned species shall be removed from the list of
38 candidate species maintained pursuant to Section 2074.2.

39 (2) The petitioned action is warranted, in which case the
40 commission shall publish a notice of that finding and a notice of

1 proposed rulemaking pursuant to Section 11346.4 of the
2 Government Code, to add the species to, or remove the species
3 from, the list of endangered species or the list of threatened species.
4 Further proceedings of the commission on the petitioned action
5 shall be made in accordance with Chapter 3.5 (commencing with
6 Section 11340) of Part 1 of Division 3 of Title 2 of the Government
7 Code.

8 (f) This section shall remain in effect only until January 1, 2017,
9 and as of that date is repealed, unless a later enacted statute, that
10 is enacted before January 1, 2017, deletes or extends that date.

11 SEC. 10. Section 2075.5 is added to the Fish and Game Code,
12 to read:

13 2075.5. (a) At the meeting scheduled pursuant to Section 2075,
14 the commission shall make one of the following findings:

15 (1) The petitioned action is not warranted, in which case the
16 finding shall be entered in the public records of the commission
17 and the petitioned species shall be removed from the list of
18 candidate species maintained pursuant to Section 2074.2.

19 (2) The petitioned action is warranted, in which case the
20 commission shall publish a notice of that finding and a notice of
21 proposed rulemaking pursuant to Section 11346.4 of the
22 Government Code to add the species to, or remove the species
23 from, the list of endangered species or the list of threatened species.
24 Further proceedings of the commission on the petitioned action
25 shall be made in accordance with Chapter 3.5 (commencing with
26 Section 11340) of Part 1 of Division 3 of Title 2 of the Government
27 Code.

28 (b) This section shall become operative on January 1, 2017.

29 SEC. 11. Section 2087 of the Fish and Game Code is amended
30 to read:

31 2087. (a) Accidental take of candidate, threatened, or
32 endangered species resulting from an act that occurs on a farm or
33 a ranch in the course of otherwise lawful routine and ongoing
34 agricultural activities is not prohibited by this chapter.

35 (b) For purposes of this section “accidental” means ~~unintended,~~
36 ~~unforeseen, and injurious~~ *unintended or unforeseen*.

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

1 SEC. 12. Section 3517 is added to the Fish and Game Code,
2 to read:

3 3517. (a) A state agency shall not prohibit or otherwise restrict
4 the
5 establishment of upland nesting cover and associated waterfowl
6 brood habitat for the purpose of propagating waterfowl, upland
7 game birds, or other birds protected pursuant to this code without
8 the concurrence of the department.

9 (b) *Unless expressly authorized by law, and notwithstanding*
10 *paragraph (1) of subdivision (d) of Section 1810 of the Water*
11 *Code, a state agency shall not penalize a landowner or impose*
12 *conditions on a water transfer because of evapotranspiration by*
13 *vegetation that grows naturally and without irrigation on land*
14 *fallowed pursuant to a water transfer.*

15 SEC. 13. Section 1725 of the Water Code is amended to read:

16 1725. A permittee or licensee may temporarily change the point
17 of diversion, place of use, or purpose of use due to a transfer or
18 exchange of water or water rights if the transfer would only involve
19 the amount of water that would have been consumptively used or
20 stored by the permittee or licensee in the absence of the proposed
21 temporary change, would not injure any legal user of the water,
22 and would not unreasonably affect fish, wildlife, or other instream
23 beneficial uses. For purposes of this article, “consumptively used”
24 means the amount of water ~~which~~ *that* has been consumed through
25 use by evapotranspiration, has percolated underground, or has been
26 otherwise removed from use in the downstream water supply as a
27 result of direct diversion. “*Consumptively used*” *does not include*
28 *evapotranspiration by vegetation that grows naturally and without*
29 *irrigation on land fallowed pursuant to the transfer or exchange*
30 *of water or water rights.*

31 SEC. 14. Section 1810 of the Water Code is amended to read:

32 1810. Notwithstanding any other ~~provision of law, neither the~~
33 ~~state, nor state or any regional or local public agency may shall~~
34 *not deny a bona fide transferor of water the use of a water*
35 *conveyance facility which that* has unused capacity, for the period
36 of time for which that capacity is available, if fair compensation
37 is paid for that use, subject to *all of* the following:

38 (a) Any person or public agency that has a long-term water
39 service contract with or the right to receive water from the owner

1 of the conveyance facility shall have the right to use any unused
2 capacity prior to any bona fide transferor.

3 (b) The commingling of transferred water does not result in a
4 diminution of the beneficial uses or quality of the water in the
5 facility, except that the transferor may, at the transferor's own
6 expense, provide for treatment to prevent the diminution, and the
7 transferred water is of substantially the same quality as the water
8 in the facility.

9 (c) Any person or public agency that has a water service contract
10 with or the right to receive water from the owner of the conveyance
11 facility who has an emergency need may utilize the unused capacity
12 that was made available pursuant to this section for the duration
13 of the emergency.

14 (d) (1) This use of a water conveyance facility is to be made
15 without injuring any legal user of water and without unreasonably
16 affecting fish, wildlife, or other instream beneficial uses and
17 without unreasonably affecting the overall economy or the
18 environment of the county from which the water is being
19 transferred.

20 (2) *Notwithstanding paragraph (1), and unless expressly*
21 *authorized by law, a state agency shall not penalize a landowner*
22 *or impose conditions on a water transfer because of*
23 *evapotranspiration by vegetation that grows naturally and without*
24 *irrigation on land fallowed pursuant to a water transfer.*