

AMENDED IN ASSEMBLY JUNE 25, 2013

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, 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~~ *add Section 1018* to 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~~ *authorize* the moneys collected from those agricultural leases ~~may~~ *to* 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,~~ *as specified, and maintain* lands ~~the department will manage~~ for the purpose of restoring ~~and or~~ 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~~ *comments* and recommendations ~~regarding the management of these lands~~ from 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 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 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, *conditioning, penalizing,* or otherwise restricting the establishment of upland nesting cover ~~and or~~ 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.~~

~~(5) Existing law establishes various state water policies, including the policy that the use of water for domestic purposes is the highest use of water and the use of water for irrigation is the next highest use of water.~~

~~This bill would declare it is the policy of the state that when agricultural lands are being idled in order to provide water for transfer, the growth of nonirrigated cover crops or natural vegetation for waterfowl, upland game bird, and other wildlife habitat, carbon sequestration, and air quality benefits is required to be encouraged on those lands, as specified.~~

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 any other provision~~
4 ~~of this code, the leasing of department may lease~~
5 department-managed lands for agricultural activities ~~shall be,~~
6 *including, but not limited to, grazing, where* consistent with the
7 purpose for which the lands were acquired and compatible with
8 the department’s approved management plan for the area, if
9 available.

10 (b) Notwithstanding subdivision (c) of Section 1348, the moneys
11 collected from agricultural leases entered into pursuant to
12 subdivision (a) may be used to support the maintenance and
13 operations of department-managed lands ~~from which the moneys~~
14 ~~were originally collected.~~ *lands. The department may deposit those*
15 *moneys in the Wildlife Restoration Fund or the Fish and Game*
16 *Preservation Fund.*

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

19
20 Article 2.5. Bird Habitat Conservation

21
22 1758. (a) ~~The department shall identify which~~
23 ~~department-managed lands, within the meaning of paragraph (1)~~
24 ~~of subdivision (a) of Section 1745, the department will manage~~ *In*
25 *the annual work plans for the department’s wildlife management*
26 *areas, the department shall identify those lands, including a*
27 *description of proposed habitat management areas, which it shall*
28 *maintain* for the purpose of restoring ~~and~~ or enhancing upland
29 nesting cover and associated waterfowl brood habitat to support
30 the production of resident waterfowl and upland game birds.

31 (b) For lands *and proposed habitat management activities*
32 *identified and described* in subdivision (a), the department, in the
33 manner it deems appropriate, shall annually solicit ~~comment~~
34 *comments* and recommendations ~~regarding the management of~~
35 ~~these lands~~ from the upland game bird advisory committee
36 *described in subdivision (e) of Section 3684.*

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

1 2074.2. (a) At the meeting scheduled pursuant to Section 2074,
2 the commission shall hold a public hearing on the petition and
3 shall receive information, written or otherwise, and oral testimony.
4 After the conclusion of oral testimony from the commission and
5 department staff, the petitioner, or any other persons, the
6 commission may close the public hearing and administrative record
7 for the commission's decision pursuant to this section.

8 (b) After the commission closes the public hearing, the
9 administrative record for the commission's decision is closed and
10 it shall not be reopened except as provided in subdivision (c). Once
11 the public hearing is closed, no person shall submit further
12 information to the commission for consideration on that petition
13 and the commission shall not accept any further information for
14 consideration on that petition except as provided in subdivision
15 (c).

16 (c) The administrative record for the commission's decision
17 pursuant to this section shall not be reopened once the commission
18 closes the public hearing unless one of the following occurs prior
19 to the commission's decision:

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

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

1 (d) In its discretion, the commission may either close the public
2 hearing and continue the meeting on the petition for the purpose
3 of deliberation or continue both the public hearing and the meeting
4 on the petition to a subsequent date, which shall be no later than
5 90 days after the meeting scheduled pursuant to Section 2074, and
6 subject to applicable notice and agenda requirements. If the
7 commission closes the public hearing but continues the meeting
8 for the purpose of deliberation, a person shall not submit, and the
9 commission shall not receive, further information relating to the
10 petition except as provided in subdivision (c).

11 (e) At the meeting scheduled pursuant to Section 2074 or at a
12 continued meeting scheduled pursuant to subdivision (d), the
13 commission shall consider the petition, the department's written
14 report, written comments received, and oral testimony provided
15 during the public hearing, and the commission shall make and
16 enter in its record one of the following findings:

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

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

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

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

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

38 2074.2. (a) At the scheduled meeting, the commission shall
39 consider the petition, the department's written report, and

1 comments received, and the commission shall make and enter in
2 its public record one of the following findings:

3 (1) If the commission finds that the petition does not provide
4 sufficient information to indicate that the petitioned action may
5 be warranted, the commission shall publish a notice of finding that
6 the petition is rejected, including the reasons why the petition is
7 not sufficient.

8 (2) If the commission finds that the petition provides sufficient
9 information to indicate that the petitioned action may be warranted,
10 the commission shall publish a notice of finding that the petition
11 is accepted for consideration. If the accepted petition recommends
12 the addition of a species to either the list of endangered species or
13 the list of threatened species, the commission shall include in the
14 notice that the petitioned species is a candidate species. The
15 commission shall maintain a list of species which are candidate
16 species.

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

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

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

22 2074.6. (a) The department shall promptly commence a review
23 of the status of the species concerned in the petition. Within 12
24 months of the date of publication of a notice of acceptance of a
25 petition for consideration pursuant to paragraph (2) of subdivision
26 (e) of Section 2074.2, the department shall produce and make
27 publicly available on the department's Internet Web site a written
28 peer reviewed report, based upon the best scientific information
29 available to the department, which indicates whether the petitioned
30 action is warranted, which includes a preliminary identification of
31 the habitat that may be essential to the continued existence of the
32 species, and which recommends management activities and other
33 recommendations for recovery of the species. The department shall
34 amend the draft status review report as appropriate to incorporate
35 scientific information from the independent peer review. The
36 revised report shall be posted on the department's Internet Web
37 site for a minimum of 30 days for public review prior to the hearing
38 scheduled pursuant to Section 2075. The commission may grant
39 an extension of up to six months if the director determines an
40 extension is necessary to complete independent peer review of the

1 report, and to provide a minimum of 30 days for public review of
2 the peer reviewed report prior to the public hearing specified in
3 Section 2075.

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

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

9 2074.6. (a) The department shall promptly commence a review
10 of the status of the species concerned in the petition. Within 12
11 months of the date of publication of a notice of acceptance of a
12 petition for consideration by the commission pursuant to paragraph
13 (2) of subdivision (a) of Section 2074.2, the department shall
14 provide a written report to the commission, based upon the best
15 scientific information available to the department, which indicates
16 whether the petitioned action is warranted, which includes a
17 preliminary identification of the habitat that may be essential to
18 the continued existence of the species, and which recommends
19 management activities and other recommendations for recovery
20 of the species.

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

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

24 2074.8. (a) This article does not impose any duty or obligation
25 for, or otherwise require, the commission or the department to
26 undertake independent studies or other assessments of any species
27 when reviewing a petition and its attendant documents and
28 comments. However, the department shall seek independent
29 scientific peer review of the department’s status report. The director
30 may approve an extension of time for completion of the status
31 report if necessary for the purposes of obtaining independent peer
32 review pursuant to Section 2074.6.

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

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

38 2074.8. (a) This article does not impose any duty or obligation
39 for, or otherwise require, the commission or the department to
40 undertake independent studies or other assessments of any species

1 when reviewing a petition and its attendant documents and
2 comments.

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

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

6 2075.5. (a) At the meeting scheduled pursuant to Section 2075,
7 the commission shall hold a public hearing on the petition and
8 shall receive information, written or otherwise, and oral testimony.
9 After the conclusion of oral testimony from department staff, the
10 petitioner, or any other persons, the commission may close the
11 public hearing and the administrative record for the department's
12 decision pursuant to this section.

13 (b) After the commission closes the public hearing the
14 administrative record for the commission's decision is closed and
15 it shall not be reopened except as provided in subdivision (c). Once
16 the public hearing is closed a person shall not submit further
17 information to the department for consideration on that petition
18 and the commission shall not accept any further information for
19 consideration on that petition except as provided in subdivision
20 (c).

21 (c) The administrative record for the commission's decision
22 pursuant to this section shall not be reopened once the department
23 closes the public hearing unless one of the following occurs prior
24 to the commission's decision:

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

28 (2) The commission determines that it requires further
29 information to evaluate whether the petitioned action is warranted.
30 If the commission makes that determination during its deliberation,
31 the commission may request, on the record at the scheduled
32 meeting or at a continued meeting, further information on any
33 issue relevant to making its determination as to whether the
34 petitioned action is warranted. Any request by the commission
35 pursuant to this paragraph shall specify a date by which the
36 information must be submitted to the commission and shall serve
37 to reopen the administrative record for the limited purpose of
38 receiving further information relating to the issues specified by
39 the commission in the request. Commission and department staff,

1 the petitioner, or any other person may submit information in
2 response to a request pursuant to this paragraph.

3 (d) The commission, in its discretion, may either close the public
4 hearing and continue the meeting on the petition for the purpose
5 of deliberation or continue both the public hearing and the meeting
6 on the petition to a subsequent date which is no later than 90 days
7 after the meeting scheduled pursuant to Section 2075, and subject
8 to applicable notice and agenda requirements. If the commission
9 closes the public hearing but continues the meeting for the purpose
10 of deliberation, a person shall not submit, and the commission
11 shall not receive, further information relating to the petition except
12 as provided in subdivision (c).

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

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

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

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

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

34 2075.5. (a) At the meeting scheduled pursuant to Section 2075,
35 the commission shall make one of the following findings:

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

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

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

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

13 2087. (a) Accidental take of candidate, threatened, or
14 endangered species resulting from an act that occurs on a farm or
15 a ranch in the course of otherwise lawful routine and ongoing
16 agricultural activities is not prohibited by this chapter.

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

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

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

24 3517. (a) *It is the policy of the state that when agricultural*
25 *lands are being idled in order to provide water for transfer, the*
26 *growth of nonirrigated cover crops or natural vegetation for*
27 *waterfowl, upland game bird, and other wildlife habitat, carbon*
28 *sequestration, and air quality benefits shall be encouraged on*
29 *those lands if the cover vegetation does not cause more than a de*
30 *minimis or insignificant change in the amount of water being*
31 *transferred.*

32 (b) A state agency shall not prohibit, *condition, penalize,* or
33 otherwise restrict the establishment of upland nesting cover ~~and~~
34 or associated waterfowl brood habitat for the purpose of
35 propagating waterfowl, upland game birds, or other birds protected
36 pursuant to this code without the concurrence of the department.

37 ~~(b) Unless expressly authorized by law, and notwithstanding~~
38 ~~paragraph (1) of subdivision (d) of Section 1810 of the Water~~
39 ~~Code, a state agency shall not penalize a landowner or impose~~
40 ~~conditions on a water transfer because of evapotranspiration by~~

1 ~~vegetation that grows naturally and without irrigation on land~~
2 ~~fallowed pursuant to a water transfer.~~

3 *SEC. 13. Section 1018 is added to the Water Code, to read:*

4 *1018. It is the policy of the state that when agricultural lands*
5 *are being idled in order to provide water for transfer pursuant to*
6 *this division, the growth of nonirrigated cover crops or natural*
7 *vegetation for waterfowl, upland game bird, and other wildlife*
8 *habitat, carbon sequestration, and air quality benefits shall be*
9 *encouraged on those lands if the cover vegetation does not cause*
10 *more than a de minimis or insignificant change in the amount of*
11 *water being transferred.*

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

13 ~~1725. A permittee or licensee may temporarily change the point~~
14 ~~of diversion, place of use, or purpose of use due to a transfer or~~
15 ~~exchange of water or water rights if the transfer would only involve~~
16 ~~the amount of water that would have been consumptively used or~~
17 ~~stored by the permittee or licensee in the absence of the proposed~~
18 ~~temporary change, would not injure any legal user of the water,~~
19 ~~and would not unreasonably affect fish, wildlife, or other instream~~
20 ~~beneficial uses. For purposes of this article, “consumptively used”~~
21 ~~means the amount of water that has been consumed through use~~
22 ~~by evapotranspiration, has percolated underground, or has been~~
23 ~~otherwise removed from use in the downstream water supply as a~~
24 ~~result of direct diversion. “Consumptively used” does not include~~
25 ~~evapotranspiration by vegetation that grows naturally and without~~
26 ~~irrigation on land fallowed pursuant to the transfer or exchange of~~
27 ~~water or water rights.~~

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

29 ~~1810. Notwithstanding any other law, the state or any regional~~
30 ~~or local public agency shall not deny a bona fide transferor of water~~
31 ~~the use of a water conveyance facility that has unused capacity,~~
32 ~~for the period of time for which that capacity is available, if fair~~
33 ~~compensation is paid for that use, subject to all of the following:~~

34 ~~(a) Any person or public agency that has a long-term water~~
35 ~~service contract with or the right to receive water from the owner~~
36 ~~of the conveyance facility shall have the right to use any unused~~
37 ~~capacity prior to any bona fide transferor.~~

38 ~~(b) The commingling of transferred water does not result in a~~
39 ~~diminution of the beneficial uses or quality of the water in the~~
40 ~~facility, except that the transferor may, at the transferor’s own~~

1 ~~expense, provide for treatment to prevent the diminution, and the~~
2 ~~transferred water is of substantially the same quality as the water~~
3 ~~in the facility.~~

4 ~~(e) Any person or public agency that has a water service contract~~
5 ~~with or the right to receive water from the owner of the conveyance~~
6 ~~facility who has an emergency need may utilize the unused capacity~~
7 ~~that was made available pursuant to this section for the duration~~
8 ~~of the emergency.~~

9 ~~(d) (1) This use of a water conveyance facility is to be made~~
10 ~~without injuring any legal user of water and without unreasonably~~
11 ~~affecting fish, wildlife, or other instream beneficial uses and~~
12 ~~without unreasonably affecting the overall economy or the~~
13 ~~environment of the county from which the water is being~~
14 ~~transferred.~~

15 ~~(2) Notwithstanding paragraph (1), and unless expressly~~
16 ~~authorized by law, a state agency shall not penalize a landowner~~
17 ~~or impose conditions on a water transfer because of~~
18 ~~evapotranspiration by vegetation that grows naturally and without~~
19 ~~irrigation on land fallowed pursuant to a water transfer.~~