Senate Bill No. 448

CHAPTER 184

An act to add and repeal Article 3.7 (commencing with Section 2089.2) of Chapter 1.5 of Division 3 of the Fish and Game Code, relating to fish and wildlife.

[Approved by Governor October 11, 2009. Filed with Secretary of State October 11, 2009.]

LEGISLATIVE COUNSEL'S DIGEST

SB 448, Pavley. California State Safe Harbor Agreement Program Act.

Existing law establishes various programs designed to conserve and protect endangered species and wildlife.

Existing law, the California Endangered Species Act (CESA), prohibits a person from importing, exporting, or taking, possessing, purchasing, or selling within the state, any species, or any part or product thereof, that the Fish and Game Commission determines to be an endangered species or a threatened species, with specified exceptions.

This bill would enact the California State Safe Harbor Agreement Program Act (act), which would establish a program to encourage landowners to manage their lands voluntarily, by means of state safe harbor agreements approved by the Department of Fish and Game, to benefit endangered, threatened, or candidate species without being subject to additional regulatory restrictions as a result of their conservation efforts.

The bill would authorize the department to authorize specified acts that are otherwise prohibited pursuant to the CESA pursuant to a safe harbor agreement entered into under the act.

The bill would repeal the act on January 1, 2020.

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

SECTION 1. Article 3.7 (commencing with Section 2089.2) is added to Chapter 1.5 of Division 3 of the Fish and Game Code, to read:

Article 3.7. California State Safe Harbor Agreement Program Act

2089.2. (a) This article shall be known and may be cited as the California State Safe Harbor Agreement Program Act.

(b) The Legislature finds that a key to the goals set forth in this article of conserving, protecting, restoring, and enhancing endangered, threatened, and candidate species, is their habitat. A significant portion of the state's current and potential habitat for these species exists on property owned by

private citizens, municipalities, tribes, and other nonfederal entities. Conservation efforts on these lands and waters are critical to help these declining species. Using a collaborative stewardship approach to these lands and waters will help ensure the success of these efforts.

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

(d) This article does not relieve landowners of any legal obligation with respect to endangered, threatened, or candidate species existing on their land. The program established by this article is designed to increase species populations, create new habitats, and enhance existing habitats. Although this increase may be temporary or long-term, California state safe harbor agreements shall not reduce the existing populations of species present at the time the baseline is established by the department.

2089.4. As used in this article, the following definitions apply:

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

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

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

(d) "Landowner" means any person or nonstate or federal entity or entities that lawfully hold any interest in land or water to which they are committing to implement the requirements of this article.

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

(f) "Monitoring program" means a program established or approved by the department in accordance with subdivision (f) of Section 2089.6.

(g) "Net conservation benefit" means the cumulative benefits of the management activities identified in the agreement that provide for an increase in a species' population or the enhancement, restoration, or maintenance of covered species' suitable habitats within the enrolled property. Net conservation benefit shall take into account the length of the agreement, any offsetting adverse effects attributable to the incidental taking allowed by the agreement, and other mutually agreed upon factors. Net conservation benefits shall be sufficient to contribute either directly or indirectly to the

recovery of the covered species. These benefits include, but are not limited to, reducing fragmentation and increasing the connectivity of habitats, maintaining or increasing populations, enhancing and restoring habitats, and buffering protected areas.

(h) "Programmatic agreement" means a state safe harbor agreement issued to a governmental or nongovernmental program administrator. The program administrator for a programmatic agreement shall work with landowners and the department to implement the agreement. The program administrator and the department shall be responsible for ensuring compliance with the terms of the agreement.

(i) "Qualified person" means a person with species expertise who has been approved by the department.

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

2089.6. In addition to the other provisions of this article, the department may authorize acts that are otherwise prohibited pursuant to Section 2080 through an agreement, including a programmatic agreement, if all the following conditions are met:

(a) The department receives a complete application containing all of the information described in Section 2089.8.

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

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

(d) The take authorized by the agreement will not jeopardize the continued existence of the species. This determination shall be made based on the provisions of subdivision (c) of Section 2081.

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

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

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

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

2089.8. The landowner shall submit all of the following:

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

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

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

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

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

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

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

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

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

2089.9. (a) As used in this section, "proprietary information" means information that is all of the following:

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

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

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

(b) Proprietary information received by the department pursuant to Section 2089.8 is not public information, and the department shall not release or disclose the proprietary information to any person, including any federal, state, or local governmental agency, outside of the department.

(c) Notwithstanding subdivision (b), the department may release or disclose proprietary information received pursuant to Section 2089.8 to the following entities under the following circumstances:

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

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

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

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

2089.10. If an agreement has been approved and the department finds that the agreement is being properly implemented, the department shall allow the landowner to alter or modify the enrolled property, even if that alteration or modification will result in the incidental take of a listed species, to the extent that the alteration or modification returns the species to baseline conditions.

2089.12. (a) Unless the department determines that it is inappropriate to do so based on the nature of the management actions being proposed, the species listed in the permit, or other factors, the agreement shall require that the landowner provide the department with at least 60 days advance notice of any of the following:

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

(2) The landowner's plan to return to baseline at the end of the agreement.

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

(b) (1) If the department receives any notice described in subdivision (a), the 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.

(2) The department shall provide notice to the landowner at least seven days prior to accessing the land or water for the purposes of paragraph (1). The notice shall identify each person selected by the department, its contractors, or agents to access the land or water.

(3) Notwithstanding paragraph (1), during the seven-day notice period, a landowner may object, in writing, to a person selected to access the land or water. If a landowner objects, another person shall be selected by the department, its contractors, or agents, and notification shall be provided to the landowner pursuant to paragraph (2). However, if a landowner objects to a selection on two successive occasions, the 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 a landowner to object to the selection within the seven-day period shall be deemed consent to access the land or water by a person selected by the department, its contractors, or agents.

(4) If the landowner objects to a person selected to access the land or water pursuant to paragraph (3), the 60-day notice period described in subdivision (a) shall be tolled for the period between the landowner's

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

2089.14. An agreement may be amended with the mutual consent of the landowner and the department.

2089.16. If a landowner seeks to sell, transfer, or otherwise alienate the land or water enrolled in the agreement during the term of the agreement, the person or entity assuming that interest in the property shall (a) assume the existing landowner's duties under the agreement, (b) enter into a new agreement with the department, or (c) withdraw from an existing agreement under the terms provided in the agreement, as approved by the department.

2089.18. The suspension and revocation of the agreement shall be governed by suspension and revocation regulations adopted by the department.

2089.20. (a) This section does not provide the public a right of entry onto the enrolled land or water. The landowner shall provide the department, its contractors, or agents with access to the land or water proposed to be enrolled in the agreement to develop the agreement, determine the baseline conditions, monitor the effectiveness of management actions, or safely remove or salvage species proposed to be taken.

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

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

(d) (1) Notwithstanding any other law, the landowner is not required to do either of the following:

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

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

(2) Notwithstanding any other law, the landowner shall not be liable for any injury, and does not owe a duty of care, to the department, its contractors,

or agents resulting from any act or omission described in subparagraph (A) or (B) of paragraph (1).

(3) The provision of access to land pursuant to subdivision (a) shall not be construed as any of the following:

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

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

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

(4) Notwithstanding paragraphs (1) to (3), inclusive, this subdivision shall not be construed to limit a landowner's liability for an injury under either of the following circumstances:

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

(B) Express invitation to a person by the landowner to access the land or water, in a manner that is beyond the access required to be provided pursuant to subdivision (a).

(e) Nothing in this section creates a duty of care or a ground of liability for injury to person or property.

2089.22. (a) If a federal safe harbor agreement has been approved pursuant to applicable provisions of federal law and the federal safe harbor agreement contains species that are endangered, threatened, or are candidate species pursuant to this chapter, no further authorization or approval is necessary under this article for any person authorized by that agreement to take the species identified in and in accordance with the federal Safe Harbor Agreement, if that person and the department follow all of the procedures specified in Section 2080.1, except that the determination of consistency shall be made by the department based only on the issuance criteria contained in this article.

(b) The department may adopt nonregulatory guidelines to clarify how the provisions of this chapter may be used in connection with voluntary local programs for routine and ongoing agricultural activities adopted pursuant to Article 3.5 (commencing with Section 2086) and natural community conservation plans adopted pursuant to Chapter 10 (commencing with Section 2800).

2089.23. (a) A landowner that owns land that abuts a property enrolled in a state safe harbor agreement shall not be required, for purposes of an incidental take permit, to undertake the management activities set forth in the state safe harbor agreement, if all of the following conditions are met:

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

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

(3) The department determines that allowing the neighboring landowner to receive an incidental take permit for the abutting property does not

undermine the net conservation benefit determination made by the department in the approval of the safe harbor agreement.

(4) The take authorized by the department will not jeopardize the continued existence of the species. This determination shall be made in accordance with subdivision (c) of Section 2081.

(b) (1) Unless the department determines that it is inappropriate to do so based on the species listed in the permit, or any other factors, the neighboring landowner shall provide the department with at least 60 days advance notice of any of the following:

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

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

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

(2) (A) If the department receives any notice described in paragraph (1), 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.

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

(C) Notwithstanding subparagraph (B), 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 subparagraph (B). 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.

2089.24. The department, for informational purposes, shall maintain a list of qualified persons who have worked with the department on an approved agreement, and persons, entities, and organizations serving as program administrators for approved agreements.

2089.25. The department may promulgate regulations to implement this article.

2089.26. This article shall remain in effect only until January 1, 2020, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2020, deletes or extends that date.

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