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August 5, 2008

Mr. John Kirlin
Executive Director
Delta Vision Task Force
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

RE: Summary of California Supreme Court's Ruling Regarding the California Endangered Species Act in *Environmental Protection Information Center et al v. California Department of Forestry et al.*

Dear Mr. Kirlin:

The Delta Vision Blue Ribbon Task Force has asked the Attorney General's Office to prepare a summary of the portion of the California Supreme Court's recent decision in *Environmental Protection Information Center et al. v. California Dep't of Forestry et al.* (2008) __ Cal.4th __; 2008 WL 2757358 (hereafter "*EPIC v. CDF*") that pertains to the California Endangered Species Act (CESA). All citations are to the slip opinion, which is available on the Supreme Court's website at www.courtinfo.ca.gov/opinions/documents/S140547.PDF.

Introduction

Among other things, *EPIC v. CDF* involved a challenge to a CESA incidental take permit (ITP or "take permit") issued by the Department of Fish and Game (DFG) to the Pacific Lumber Company (PALCO) for timber harvesting and related activities on PALCO lands. The ITP applied to PALCO's activities on 211,000 acres of timberlands for a fifty-year period. (*EPIC v. CDF, supra*, Slip. Op. at pp. 6-7.)¹ As discussed in a separate memorandum to you also dated August 5, 2008, section 2081 of the Fish and Game Code allows DFG to issue permits authorizing the "take"² of any endangered, threatened or candidate species incidental to an

¹ PALCO had concurrently obtained an ITP from the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service for the same activities and property pursuant to the federal Endangered Species Act (ESA). The state ITP was based on the habitat conservation plan (HCP) PALCO had prepared for its federal ITP. However, the federal permit was not at issue in this state court litigation.

² Fish and Game Code section 86 defines "take" as to "hunt, pursue, catch, capture or kill" or to attempt to do any of these things.

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otherwise lawful activity, provided, among other requirements, that “the impacts of the authorized take” are “minimized and fully mitigated.” (Fish & G. Code, § 2081, subds. (b)(1) and (b)(2).) The “full mitigation” provision of CESA also provides that “[t]he measures required to meet this obligation shall be roughly proportional in extent to the impact of the authorized taking on the species. Where various measures are available to meet this obligation, the measures required shall maintain the applicant’s objectives to the greatest extent possible. All required measures shall be capable of successful implementation.” (Fish & G. Code, § 2081, subd. (b)(2).) The ITP issued to PALCO authorized the take of the endangered marbled murrelet and threatened bank swallow.

Validity of No Surprises Regulatory Assurances Under CESA

In the Supreme Court, the environmental petitioners challenged the CESA take permit primarily on the ground it violated CESA’s requirement that the impacts of the authorized take be “minimized and fully mitigated.” (Fish & G. Code, § 2081, subd. (b)(2).) Specifically, the petitioners challenged the inclusion in the take permit of so-called “no surprises” regulatory assurances that attempted to limit PALCO’s obligation to provide additional mitigation to address changed and unforeseen circumstances during the 50-year term of the permit. These “no surprises” regulatory assurances were identical to assurances that the FWS likewise had granted in connection with its issuance of an ITP to PALCO under the federal ESA. (See 50 C.F.R. §§ 17.22, subd. (b)(5), 17.32, subd. (b)(5).)

As the Supreme Court explained:

the no surprises provision consists of two major components. First, if there are changed circumstances that were anticipated in the HCP, and mitigation measures were prescribed to meet the adverse impacts of those changed circumstances, then if and when those circumstances occur, the landowner will be expected to implement those measures and no others. As the HCP’s Implementation Agreement makes clear, this is the case even if “additional conservation and mitigation measures are deemed necessary by [DFG] to respond to a Changed Circumstance.” Second, in the case of unforeseen circumstances, the government will not require the commitment by the landowner of additional land, water or financial compensation, or additional restrictions on the use of land, water or other natural resources unless the landowner consents. “Unforeseen circumstances” are defined as “those changes in circumstances affecting a species or geographic area covered by an HCP, that could not reasonably be anticipated by a landowner and the wildlife agencies at the time of the HCP development and that results in a substantial and adverse change in the status of a species covered by the HCP.”

(*EPIC v. CDF*, *supra*, Slip Op. at pp. 58-59.)

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The Court agreed with EPIC's argument that the no surprises provision violated DFG's and PALCO's duty to ensure that all impacts of any take caused by PALCO's activities are minimized and fully mitigated. In so holding, the Court interpreted the meaning of CESA's "full mitigation" provision. First, the Court determined that the no surprises provision could not be reconciled with the "roughly proportional" language of section 2081, subdivision (b)(2). The Court reasoned that this language is not a limitation on the requirement to minimize and fully mitigate impacts. Rather, the Court held, the "roughly proportional" requirement must be read together with the obligation to "fully mitigate," leading to the conclusion that "the Legislature intended that the landowner bear no more – but also no less – than the costs incurred from the impact of its activity on listed species." (*EPIC v. CDF, supra*, Slip Op. at p. 63.)

The no surprises provision violated the roughly proportional and full mitigation requirements because it went further than simply guaranteeing that PALCO would only be "required to mitigate its own impacts on the species," as contemplated by the language of Fish and Game Code section 2081, subdivision (b)(2). (*EPIC v. CDF, supra*, Slip Op. at p. 63.) Instead, the no surprises provision attempted to "categorically exempt" PALCO "from mitigating the impacts of its own activities on listed species and their habitat." (*Ibid.*) For example, the no surprises provision defined "changed and unforeseen circumstances" to include "fires 'originating from timber operations'." (*Ibid.*) Additionally, the differences between changed and unforeseen circumstances caused by landslides and floods were "cast solely in terms of magnitude, and [did] not differentiate between those events partially caused or exacerbated by timber harvesting and those that are not." (*Ibid.*)

Thus, the Court concluded:

[a] catastrophic event such as a fire or flood is classified as unforeseen when it reaches a certain magnitude, whether or not [PALCO's] timber operations contributed to that event. Moreover, when natural disasters change baseline conditions, then logging activities that previously would not have had a significant impact on endangered species may now have such an impact, and therefore fall within the scope of CESA's obligation to fully mitigate impacts. To be sure, there is no obligation for a permit holder to mitigate the impacts of the natural disasters themselves when it did not contribute to them. But when these impacts are exacerbated by the permit holder's own subsequent purposeful activities, then section 2081(b)(2) mandates the full mitigation of the impacts of a take, guided by the principle of rough proportionality.

(*EPIC v. CDF, supra*, Slip Op. at p. 66.)

The Court also rejected the argument that the no surprises provision could be upheld under the language in Fish and Game Code section 2081, subdivision (b)(2) providing that "[w]here various measures are available to meet [the] obligation [to fully mitigate], the measures

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required shall maintain the applicant's objectives to the greatest extent possible." The Court held that "[t]his language does not diminish the extent of a landowner's obligation under CESA . . . , but merely provides that when that obligation can be met in several ways, the way most consistent with a landowner's objectives should be chosen. It does not relieve the landowner of the obligation to fully mitigate its own impacts." (*EPIC v. CDF, supra*, Slip Op. at p. 65.)

Furthermore, the Court held that, because the Legislature granted DFG express authority to provide "no surprises" assurances for take permits issued pursuant to the Natural Communities Conservation Planning Act (NCCPA), Fish and Game Code section 2800 et seq., this necessarily implied that DFG did not have such authority under CESA. (*EPIC v. CDF, supra*, Slip Op. at pp. 61-62; see Fish & G. Code, § 2820, subd. (f).) The Court reasoned that, "although CESA and the NCCPA are distinct statutes, they share a common objective" of authorizing "the incidental taking of threatened and endangered species in a way that minimizes impacts on those species." (*Id.* at p. 61.) Thus, the Court concluded, "[w]here as here the Legislature has established alternative statutory schemes for authorizing and minimizing the taking of endangered species, but has provided a particular benefit to landowners – regulatory assurances – in only one of those schemes, the natural inference is that it did not intend the same assurances to be provided in the other scheme." (*Id.* at p. 62; see also p. 68 ["the Legislature has already provided a means for DFG to validly provide the types of regulatory assurances at issue here to landowners pursuant to the NCCPA"].)

Applicability of CESA Take Permit to Unlisted Species

The Court also referenced the Court of Appeal's holding with respect to the applicability of PALCO's CESA take permit to unlisted species. Specifically, in footnote 18, the Court noted that the state take permit "also authorized in advance the take of 13 'unlisted' species should they become listed in the future under CESA. The Court of Appeal held that DFG erred in issuing a permit in advance for unlisted species, concluding that [PALCO] must seek new permits if and when the species become listed. . . . [PALCO] and DFG do not challenge this ruling." (*EPIC v. CDF, supra*, Slip Op. at p. 58 n.18.)

Although the Court of Appeal decision is no longer citable as precedent, a discussion of the Court of Appeal's holding and reasoning with respect to unlisted species is necessary to provide a context for the footnote quoted above. The Court of Appeal had held that DFG "exceeded its authority in granting the permit-in-advance for the Unlisted Species." (*EPIC v. CDF* (2005) 37 Cal.Rptr. 31, 68, review granted Mar. 29, 2006.) Specifically, the court held that the permit-in-advance for unlisted species violated the requirement that no CESA take permit may be issued if it "would jeopardize the continued existence of the species." (*Ibid.*; see Fish & G. Code, § 2081, subd. (c).) Fish and Game Code section 2081 subdivision (c) provides that, prior to issuing an ITP, DFG must determine whether the permit would jeopardize the species authorized to be taken based on "the best scientific and other information that is reasonably available." In making this jeopardy determination, DFG must consider the "species' capability

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to survive and reproduce, and any adverse impacts of the taking on those abilities in light of (1) known population trends; (2) known threats to the species; and (3) reasonably foreseeable impacts on the species from other related projects and activities.” (Fish & G. Code, § 2081, subd. (c).)

The Court of Appeal held that DFG must make a jeopardy determination based on the information available at the time the permit is issued. (*EPIC v. CDF, supra*, 37 Cal.Rptr.3d at pp. 69.) An automatic permit-in-advance provision, the court stated, contravenes this requirement because it “eliminates consideration of new information concerning population trends, threats to the species, or impacts from other projects” that may be available at the time the species is listed. (*Id.* at pp. 69-70.) The court also noted that, because the NCCPA expressly authorizes issuance of take permits for unlisted species (see Fish & G. Code, § 2835), while CESA does not, DFG had no statutory authority to issue a permit for unlisted species under CESA. (*EPIC v. CDF, supra*, 37 Cal.Rptr.3d at pp. 68-69.)

Conclusion

The net effect of the Supreme Court’s decision is that ITPs issued pursuant to CESA may no longer contain no surprises regulatory assurances, nor may they cover currently unlisted species that may become listed in the future. Person and entities who must obtain a permit to take state-listed species and who wish to obtain regulatory assurances for such permit and/or take permit coverage for unlisted species must apply for a take permit under the NCCPA.

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Please feel free to contact me at 510-622-2136 if you have any questions or would like any additional information. Thank you.

Sincerely,

[Original signed by]

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Deputy Attorney General

For EDMUND G. BROWN JR.
Attorney General

cc: J. Matthew Rodriguez
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