

INCIDENTAL TAKE AUTHORIZED FOR PROJECTS BENEFITING SPECIES AND THEIR HABITAT

Governor Schwarzenegger recently signed into law the California State Safe Harbor Agreement Program Act (SB 448, Pavley). This Act is of particular relevance to landowners proposing projects that may conserve or enhance species and their habitats. Significantly, the Act provides landowners with incidental take coverage for these types of projects and limits the ability of the California Department of Fish and Game to impose future land use restrictions on their property.

The California State Safe Harbor Agreement Program Act establishes a program to encourage landowners to manage their lands voluntarily, by means of a "Safe Harbor Agreement," to benefit listed species without being subject to additional regulatory restrictions as a result of their conservation efforts. Key aspects of the Act include:

- allows CDFG to authorize incidental take of listed species for projects subject to a Safe Harbor Agreement;
- allows the landowner "to alter or modify" property enrolled in the program so long as the alteration or modification returns the species to baseline conditions;
- requires the landowner to provide CDFG with access to its property, subject to certain terms and conditions;
- incorporates the "consistency determination" procedures of Fish and Game Code Section 2080.1 for property already subject to a federal Safe Harbor Agreement under the federal Endangered Species Act;
- allows neighboring landowners who own land that abuts property enrolled in the program to secure an incidental take permit without undertaking the management activities set forth in the Agreement, provided certain conditions are met; and
- contains a sunset clause repealing the legislation on January 1, 2020 unless a later enacted statute extends that date.

The Act is essentially the state analog to the federal Safe Harbor Agreement program. The federal program authorizes incidental take of listed species pursuant to an "enhancement of survival" permit under Section 10(a)(1)(A) of the federal Endangered Species Act for projects that may restore, enhance, or maintain habitat for a listed species. Like the state's Safe Harbor Agreement Program, the benefit of a federal Safe Harbor Agreement is that a landowner is given assurances that in exchange for its activities that will enhance the survival of a species, the government's ability to impose future land use restrictions on the property is limited.

If you have any questions regarding this client alert, please contact:

R. Clark Morrison at 415.262.5113 or cmorrison@coxcastle.com

Scott B. Birkey at 415.262.5162 or sbirkey@coxcastle.com

Lesa A. Hutnak at 415.262.5178 or lhutnak@coxcastle.com

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