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Submitted via email to director@wildlife.ca.gov

April 17, 2020

Charlton Bonham, Director
California Department of Fish and Wildlife
1416 9th Street, 12th Floor
Sacramento, CA 95814

Re: Harmonizing Mountain Lion Management Under CESA and Proposition 117

Director Bonham:

I appreciate your comments at yesterday's Fish and Game Commission meeting that you do not see an inherent conflict between CESA and Proposition 117, and that your door is open to stakeholders to "make it work" now that mountain lions in the Central Coast and Southern California are a candidate species for CESA listing. I would welcome the opportunity to 'meet' with you (via phone, given our new social-distancing reality) in the coming days or weeks to discuss our concerns about mountain lion candidacy and how the Department can address those concerns. My phone number is (208) 403-4422, and I will gladly take your call whenever you are available.

In the coming weeks, expect a letter from me laying out our concerns about the separate—but certainly related—"three-strikes policy." For now, however, I would like to address some of your statements at yesterday's Commission hearing.

First, you mentioned at the beginning of the agenda item that the Department has a "legal obligation to harmonize conflicting laws." You further argued that there is no "automatic conflict" between CESA and Proposition 117, and that the Department's "obligation would be to reconcile and harmonize" those statutory schemes.

I write you today to request clarification regarding that harmonization. **We ask that the Department clarify that depredation permits will continue to issue in accordance with Fish and Game Code § 4803 (and related provisions of Proposition 117) despite the species' candidacy.** Section 4803 states that "If satisfied that there has been depredation by a mountain lion as reported, the department shall promptly issue a permit to take the depredating mountain lion." At least two factors justify issuance of take permits despite CESA listing. First, § 4800(d) states that "Neither the commission nor the department shall adopt any regulation that conflicts with or supersedes a provision of" Proposition 117, so the Commission's decision to extend candidacy to mountain lions may not preclude take permits issued in accordance with Proposition 117. Secondly, as you are well-aware, a latter-in-time statute typically controls over an earlier conflicting statute; to the extent that CESA (codified in 1984) and Proposition 117 (codified in 1990) conflict, then, the provisions of Proposition 117 should control.

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It is worth noting that the above-requested clarification would also necessitate a revision of the Department's "three-strikes policy" (which, again, I will address in more detail in a later letter). While you and I may disagree over whether Proposition 117 requires the *availability* of lethal take permits, it is clear that § 4803 requires the issuance of a permit for *some form* of "take." It is also clear that "hazing" is not a "take" under either § 86 or Proposition 117, and that—at a minimum—permits issued pursuant to the "first strike" of the "three-strikes" policy thus violate § 4803's mandate that "If satisfied that there has been depredation by a mountain lion as reported, the department shall promptly issue a permit to take the depredating mountain lion." **In addition to clarifying that depredation permits will continue to issue, then, we ask that the Department revise its policy to omit non-take permits issued in response to livestock depredations.**

Second, just prior to the Commissioners' vote on the agenda item, you argued that you see a "logical fallacy" in our concerns about the conflict between CESA and Proposition 117. After quoting § 4801.5, you argued that our concerns "assume[] a conflict that doesn't exist" because "nowhere else [in Proposition 117] does it say whether a permit will be for lethal or nonlethal actions."

With due respect, that argument misses the point, and I am concerned that it may have misled the Commissioners just before they took their vote. The question is not over *lethal vs. nonlethal take*, but rather Proposition 117's *required issuance of take permits vs. CESA prohibition upon [non-incidentally] take*.

Fish and Game Code § 2080 states that "No person...shall...take...a threatened species." Note that it *does not* say that "No person shall *lethally* take a threatened species." The distinction over lethal and nonlethal take is irrelevant to the question of whether there is a conflict between Proposition 117 and CESA.

There *is* a real conflict between the two statutory schemes, and it is not merely "assumed," but rather explained in painstaking detail in our letters to the Commission. Sections 2080 (of CESA) and 4803 (of Proposition 117) are particularly illustrative of this clear conflict: Section 4803 states that "If satisfied that there has been depredation by a mountain lion as reported, the department shall promptly issue *a permit to take* the depredating mountain lion" (*emphasis added*) while § 2080 states that "No person...shall...*take*...a threatened species" (*emphasis added*). Note that neither statute makes any distinction between *lethal* and *nonlethal* take—that distinction is irrelevant to whether a statutory conflict exists. Rather, Proposition 117 *explicitly requires* issuance of a take permit, while CESA *explicitly prohibits* take. That is not an "assumed" conflict, it is an explicit conflict. And where an explicit conflict exists, § 4800(d) controls.

Finally, during yesterday's hearing you referenced Tricolored blackbird as a circumstance in which the Department was able to harmonize CESA with the concerns of the ranching community. While the Tricolored blackbird Voluntary Local Program (VLP) is indeed a laudable example of the Commission and Department working to address ranchers' concerns with regard to a CESA-listed species, it is not relevant to the current discussion. The VLP only covers *incidental* take, which is permissible under CESA. Proposition 117 is not concerned with

incidental take, but rather with targeted take of problem lions. As we noted in our April 2 letter to the Commission,

By limiting take of mountain lions to circumstances in which such take is “incidental to an otherwise lawful activity,” extending CESA protections to mountain lions would also conflict with § 4804 of Proposition 117. Implicit in the concept of incidental take is that no particular member of a species is targeted for take, but rather that unidentified members of the species may be taken by the “otherwise lawful activity.” Proposition 117, however, envisions the targeted take of individual mountain lions. For instance, § 4804 seeks to “ensure that only the depredating mountain lion will be taken,” and implementing regulations refer to “the particular mountain lion believed to be responsible for damage to livestock or domestic animals.” By limiting take to circumstances where it is merely “incidental to an otherwise lawful activity,” then, extending CESA protections to mountain lions would not only conflict with the take authorization provisions of § 4803, but also the targeted pursuit provisions of § 4804. Again, such conflicts between CESA and Proposition 117 render Commission action to list mountain lions as threatened a violation of § 4800(d) enacted by Proposition 117.

Unfortunately, the Tricolored blackbird example is not instructive here, as take of mountain lions under Proposition 117 will never be “incidental” as allowed under CESA and the Tricolored blackbird VLP.

Again, I appreciate your commitment to harmonizing CESA with Proposition 117. I look forward to discussing this matter with you as soon as possible, as yesterday’s decision by the Commission (to say nothing of the three-strikes policy, including its application *outside* of the ESU boundary) has created a great deal of uncertainty for ranchers seeking to protect their livestock from mountain lions, particularly lions which are chronic depredators of livestock.

Sincerely,



Kirk Wilbur
Vice President of Government Affairs

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