



Submitted via email to fgc@fgc.ca.gov

April 2, 2020

Eric Sklar, President
California Fish and Game Commission
1416 9th Street, Room 1320
Sacramento, CA 95814

Re: Mountain lion CESA petition

President Sklar:

The above-listed organizations appreciate the opportunity to address the Commission as it considers “A Petition to List the Southern California/Central Coast Evolutionarily Significant Unit (ESU) of Mountain Lions as Threatened under the California Endangered Species Act (CESA)” submitted by the Center for Biological Diversity and the Mountain Lion Foundation (Petitioners).

Our organizations represent the farmers and ranchers, labor, businesses, homebuilders, and land developers who would be most significantly impacted by the proposed listing. We are concerned that the petition lacks sufficient scientific basis to meet the burden of proof that the petitioned action may be warranted, and we are troubled that the petition fails to more fully account for mountain lions’ full range and population throughout the state. Our organizations also believe the petitioned action would unjustifiably burden construction, development, livestock production, and the workforce dependent on those industries. Finally, our organizations believe that listing mountain lions in the Central Coast and Southern California as threatened under CESA would be illegal, and that **a finding that the petitioned action “may be warranted” would itself be an immediate, significant violation of California law under Proposition 117.** For these reasons, we urge the Commission to find that the petition does not provide sufficient information to indicate that the petitioned action may be warranted.

GENERAL OBJECTIONS

Our organizations are concerned that the petition focuses too narrowly on mountain lions’ range limited to the Central Coast and Southern California. While we are aware that caselaw such as *California Forestry Association v. California Fish and Game Commission* permits the Commission to define “range” as a species’ California range (and thus a “significant portion...of its range” under Fish and Game Code § 2062 as a subset of the species’ California range), it does not require that the Commission focus on extraordinarily-narrow ranges within the State. In *California Cattlemen’s Association v. California Fish and Game Commission*, we objected to the Commission disregarding the robust, recovering population of gray wolves nationwide and instead focusing on the limited, emerging population of gray wolves in California. Here, the focus is even narrower: not only have Petitioners overlooked the robust population of mountain

lions nationwide, they have ignored the robust population of mountain lions *statewide*, refining their focus more and more narrowly until they have honed in on a region small enough that its mountain lion population might justify listing. We urge the Commission to look holistically at mountain lions' status statewide, and to reject the petition on the grounds that mountain lions are not threatened based on a statewide analysis.

Even if the Commission adopts Petitioners' narrow range focus, Petitioners have failed to meet their burden of proof that mountain lions are threatened. The Commission has authority to list a species or subspecies as threatened, but determines whether to designate a species as a candidate for listing by evaluating whether the petition provides "*sufficient information* to indicate that the petitioned action may be warranted."¹ However, the Department's evaluation of the petition makes numerous references to the insufficiency of available data regarding mountain lion population and abundance² (for instance, the Department's analysis notes that "Studies are needed to more accurately determine regional and statewide mountain lion population size and trend"³). Anecdotally, it appears that existing models underestimate the population abundance of mountain lions in the Central Coast and Southern California—virtually any rancher in the region can pull up numerous mountain lion photos captured by trail cameras, for instance, many of those of uncollared lions.

Fortunately, efforts are being undertaken to improve data on mountain lion abundance and population: as the Department's evaluation notes, "Studies by the Department and other cooperators are in process to update the estimate" of statewide and regional populations.⁴ We urge the Commission to reject the petition unless and until the updated data and statistical analyses justify such listing. Listing the proposed ESU prior to such updated analyses—or even finding that listing "may be warranted" and thereby imposing regulatory burdens that attend a species' candidacy—would be premature at best and reckless at worst.

CONCERNS SPECIFIC TO THE PUBLIC WORKS, INFRASTRUCTURE, AND HOMEBUILDING SECTORS

The petitioned action would significantly burden—and in some instances, outright prohibit—new construction development. For *all* new development proposals in the Central Coast and Southern California, for instance, the petition proposes "Requir[ing] analysis of region-wide wildlife connectivity" as a prerequisite to the issuance of permits for such development.⁵ Additionally, the petition suggests outright "Prohibit[ing] large-scale development in primary travel corridors and habitat linkages."⁶

¹ CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, EVALUATION OF A PETITION FROM THE CENTER FOR BIOLOGICAL DIVERSITY AND THE MOUNTAIN LION FOUNDATION TO LIST THE SOUTHERN CALIFORNIA/CENTRAL COAST EVOLUTIONARILY SIGNIFICANT UNIT (ESU) OF MOUNTAIN LIONS AS THREATENED UNDER THE CALIFORNIA ENDANGERED SPECIES ACT (Jan. 31, 2020) at 5 (*emphasis added*) [*hereinafter* CDFW PETITION EVALUATION].

² *Id.* at 9-13, 18-19.

³ *Id.* at 13.

⁴ *Id.* at 19.

⁵ CENTER FOR BIOLOGICAL DIVERSITY, A PETITION TO LIST THE SOUTHERN CALIFORNIA/CENTRAL COAST EVOLUTIONARILY SIGNIFICANT UNIT (ESU) OF MOUNTAIN LIONS AS THREATENED UNDER THE CALIFORNIA ENDANGERED SPECIES ACT (CESA) 71 (June 25, 2019) [*hereinafter* PETITION].

⁶ *Id.*

CESA listing is not warranted because projects—large and small—are already subjected to numerous environmental reviews including the California Environmental Quality Act. And, in various regions of California, large-scale planning efforts already adequately ensure protection of Central Coast and Southern California populations of mountain lions. For instance, CEQA requires analysis of whether a project may “substantially reduce the habitat of a...wildlife species [or] cause a fish or wildlife population to drop below self-sustaining levels”⁷ *regardless* of whether that species is designated as threatened or endangered under CESA. Additionally, as the petition itself notes, there are a number of Natural Community Conservation Plans (NCCPs) and Habitat Conservation Plans (HCPS) in place throughout the Central Coast and Southern California which explicitly provide for the protection of mountain lions and the conservation of mountain lions habitat.

CESA listing of mountain lions would result in additional regulatory burdens for public agencies, builders, and developers without meaningfully increasing protections for mountain lions. The result, unfortunately, would be to disincentivize future voluntary efforts akin to existing NCCPs and HCPs that rely on local government and landowner participation and perhaps to disincentive construction and development outright in jurisdictions already struggling to meet the housing needs of their communities.

Californians currently identify homelessness, housing availability, and housing affordability as top policy priorities. Even in the midst of the COVID-19 crisis, those issues remain top-of-mind for California residents, Governor Gavin Newsom, and California legislators. Given the housing crisis in California, the Commission should not be considering regulatory proposals which will merely serve to *increase* obstacles to necessary construction and development and directly impact the jobs associated with those projects. Consequently, the Commission should reject the petition.

CONCERNS SPECIFIC TO THE LIVESTOCK SECTOR

A. CESA LISTING JEOPARDIZES RANCHERS’ ABILITY TO PROTECT THEIR LIVESTOCK AND THREATENS THE VIABILITY OF RANCHES

Mountain lions throughout the Central Coast and Southern California routinely prey upon livestock. The impacts of depredation can be severe for an individual rancher, particularly when mountain lions chronically prey upon an individual herd. While ranchers diligently tend to their herds and often implement deterrents to haze mountain lions away from their ranches, depredations nevertheless occur. Fortunately, Fish and Game Code §§ 4801-4809 (codified by 1990’s Proposition 117) recognize the importance of ranchers’ ability to protect their livestock and include provisions which allow ranchers to take mountain lions that injure or kill livestock. However, under CESA, these important livestock protection provisions would be eliminated.

⁷ 14 CCR § 15065(a)(1).

Mountain lions are the second most prolific killers of cattle in California, killing 34.3 percent of all cattle killed by predators and 18.7 percent of calves killed by predators.⁸ By comparison, coyotes—which are far more abundant and receive no special protections under California law—account for only slightly more depredations of cattle at 34.9 percent.⁹ Additionally, in 2015 at least 387 sheep and 132 lambs were killed by mountain lions statewide,¹⁰ resulting in losses of approximately \$107,201.¹¹ These totals do not include livestock injured but not killed by mountain lions, nor do they include the costly and burdensome tools used by producers to protect their livestock from depredating mountain lions.

Mountain lion depredations can be devastating for impacted producers. One beef producer in Southern California, for instance, reported losing 22 calves to two mountain lions between 2014 and 2016. Given the small profit margins of most cattle ranches, such losses can jeopardize the continued viability of cattle ranching, which can have cascading impacts on rural economies.

In circumstances in which mountain lions are not caught-in-the-act of depredation, take of mountain lions is typically a last resort for livestock producers. Most producers will not seek a take permit after a single depredation event, but rather seek to dispatch a problem lion only after depredation has become chronic. For instance, the rancher referenced above lost 22 calves before finally making the determination that lethal control was necessary. Even in circumstances in which depredation permits are sought and obtained, only a minority of those permits result in take of a mountain lion.¹²

Finally, the take of a mountain lion often comes down to an animal welfare question for ranchers. In instances of lethal depredation, surviving members of the herd may exhibit signs of severe trauma, and animals injured-but-not-killed by mountain lions suffer extensively from their injuries. Particularly where depredations are chronic, take of mountain lions is necessary to ensure the health and well-being of livestock throughout California.

B. RECENT DEPARTMENT ACTIONS SEVERELY DIMINISH PETITIONERS' ARGUMENT THAT EXISTING REGULATORY MECHANISMS ARE INADEQUATE

In arguing the “Inadequacy of Existing Regulatory Mechanisms,” the Petition details Departmental Bulletin 2017-07, which established a ‘three-strikes’ policy for mountain lions in the Santa Ana and Santa Monica mountain ranges. Under the policy, reporting parties may only seek non-lethal take permits after the first two instances in which a mountain lion preys upon livestock, only obtaining a lethal take permit upon a third depredation.

⁸ UNITED STATES DEPARTMENT OF AGRICULTURE NATIONAL AGRICULTURAL STATISTICAL SERVICE, DEATH LOSS IN U.S. CATTLE AND CALVES DUE TO PREDATOR AND NONPREDATOR CAUSES, 2015 at 57 tbl.D.1.c. and 65 tbl.D.2.d. (2017).

⁹ *Id.* at 55 tbl.D.1.c.

¹⁰ Unfortunately, NASS’s statistics do not break out data to the county level, only to the state level.

¹¹ UNITED STATES DEPARTMENT OF AGRICULTURE NATIONAL AGRICULTURAL STATISTICAL SERVICE, SHEEP AND LAMB PREDATOR AND NONPREDATOR DEATH LOSS IN THE UNITED STATES, 2015, at 12tbl.A.2.a.; 14 tbl.A.2.b; and 40 tbl.C.9. (2015).

¹² CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, ANNUAL MOUNTAIN LION DEPREDACTION SUMMARY TABLE (2011-2019) (*available at* <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=177513&inline>).

According to Petitioners, this regulatory mechanism is inadequate because it “does not apply to other vulnerable populations, like the [San Gabriel/San Bernardino Mountains], [Eastern Peninsular Range], [Central Coast-North], and [Central Coast-Central] mountain lions.”¹³

As of February 13, 2020, however, the ‘three-strikes’ policy is applicable throughout the Central Coast and Southern California boundaries identified within the Petition, including all “vulnerable populations” identified above.¹⁴ Application of the ‘three-strikes’ policy throughout the Central Coast and Southern California is a regulatory mechanism which *significantly* curtails the availability of lethal depredation permits for mountain lions, greatly diminishing the merit of Petitioners’ argument that existing regulatory mechanisms are insufficient to protect the species.¹⁵

C. CESA LISTING OF MOUNTAIN LIONS IS ILLEGAL UNDER PROPOSITION 117

1. *Petitioners fail to establish that CESA protection is consistent with Proposition 117*

Commission action listing mountain lions as threatened under CESA would be inconsistent with Proposition 117. While the Petition summarily concludes that “CESA protections for Southern California and Central Coast mountain lions are consistent with and supplemental to those established by Proposition 117,”¹⁶ it provides little analysis in support of this conclusion. The scant two paragraphs of examination merely overview the fact that both CESA and Proposition 117 have “take prohibitions” (first paragraph) and that “Both CESA and Proposition 117’s take prohibitions are subject to certain exceptions” (paragraph 2).¹⁷

Petitioners’ analysis in support of their conclusion that CESA protection is consistent with Proposition 117 is misleading at best. Petitioners allege that exceptions to take prohibitions in CESA and Proposition 117 “are sufficiently similar that *in most cases* take of mountain lions properly authorized by Proposition 117 *could be* consistent with CESA’s exceptions for wildlife management activities or law enforcement purposes.”¹⁸ While this analysis accurately reflects § 4801 of the Fish and Game Code enacted by Proposition 117, it ignores §§ 4802-4807, which pertain to take authorization for mountain lions depredating livestock and which comprise the bulk of the Proposition’s operative provisions regarding mountain lion management.

Disappointingly, the Department’s evaluation of the Petition, which concludes that “there is sufficient scientific information available at this time to indicate the petitioned action may be

¹³ PETITION, *supra* note 5, at 55.

¹⁴ “Amendment to DB2017-07 Boundaries and Regional Guidance Team Requirements,” Memorandum from Charlton H. Bonham, Director, California Department of Fish and Wildlife, to Deputy Directors, Regional Managers, Branch Chiefs, and Law Enforcement Division Assistant Chiefs, California Department of Fish and Wildlife (Feb. 13, 2020) (*available online at* <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=177324&inline>).

¹⁵ It should be noted that we firmly believe the ‘three strikes’ policy is illegal under Proposition 117. In the event that the Commission is not persuaded by our analysis of Proposition 117, however, the ‘three strikes’ policy provides an independent basis for rejecting the Petition.

¹⁶ PETITION at 69.

¹⁷ *Id.*

¹⁸ *Id.* (*emphasis added*).

warranted,”¹⁹ fails to meaningfully examine Petitioners’ claims relative to Proposition 117, instead merely parroting the warrantless assertions advanced by Petitioners.²⁰

2. CESA protection for mountain lions would violate numerous provisions of Proposition 117

Proposition 117 enacted Chapter 10 (then comprising §§ 4800-4809)²¹ to Part 3 of Division 4 of the California Fish and Game Code. Section 4800(d) of the Fish and Game Code specifies that “Section 219 does not apply to this chapter”²² and that “Neither the commission nor the department shall adopt any regulation that conflicts with or supersedes a provision of this chapter.”²³ CESA listing for Southern California and Central Coast mountain lions would constitute the adoption of a regulation which “conflicts with or supersedes” various provisions of Chapter 10; as such, listing Southern California and Central Coast mountain lions as threatened under CESA would be in clear violation of Proposition 117.

Proposition 117 dictates 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.”²⁴ The only precondition to issuance of a take permit for mountain lions, then, is confirmation by the department that “livestock or other property is being or has been injured, damaged, or destroyed by a mountain lion.”²⁵ CESA, by contrast, imposes numerous preconditions on the issuance of a take permit, specifically that “The take is incidental to an otherwise lawful activity,”²⁶ that the impacts of the take be minimized and fully mitigated,²⁷ and that the applicant

¹⁹Memorandum from Charlton Bonham, Director, California Department of Fish and Wildlife, to Melissa Miller-Henson, Executive Director, California Fish and Game Commission (Jan. 31, 2020).

²⁰ CDFW PETITION EVALUATION, *supra* note 1, at 33 (stating that “*The Petition asserts* that CESA listing would build upon protections established by Proposition 117” (*emphasis added*) and “*the Petition states* that Proposition 117 is to be ‘liberally construed to further its purposes’” (*emphasis added*)).

²¹ An additional code section within Chapter 10, Section 4810, was added with the passage of AB 1784 in 2012.

²² While statutes typically control over conflicting regulations, Fish and Game Code § 219 provides for exceptions to this general rule in circumstances where either (a) the superseding regulation is “necessary for the protection of fish, wildlife, and other natural resources under the jurisdiction of the commission,” or (b) “The commission determines that an emergency exists...[which] is an immediate threat to the population or habitat of any species.” By dictating that § 219 does not apply to Chapter 10, Proposition 117 ensured that its provisions would not be altered as a result of a commission decision that protection of wildlife resources was “necessary” or a commission determination that an “emergency exists” relative to a species’ population or habitat. The petitioned action seeks just such a commission determination, in clear contravention of the express intent of § 4800(d).

²³ CAL. FISH & GAME CODE § 4800(d).

²⁴ *Id.* at § 4803.

²⁵ *Id.* at § 4802.

²⁶ *Id.* at § 2081(b)(1). While the term “incidental” is not defined in California statute or regulations, analogous federal regulations define “incidental taking” as taking that is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.” 50 C.F.R. § 17.3. The California Department of Fish and Wildlife’s interpretation of that term appears to be consistent with the federal definition. *See, e.g.,* CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, CHOOSING THE RIGHT PERMIT (2018), <https://www.wildlife.ca.gov/Conservation/CESA/Permits> (“Take will be incidental to, and not the purpose of, carrying out an otherwise lawful activity.”); CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE, INCIDENTAL TAKE PERMITS (2018), <https://www.wildlife.ca.gov/Conservation/CESA/Incidental-Take-Permits> (“Incidental Take Permits allow a permittee to take a CESA-listed species if such taking is incidental to, and not the purpose of, carrying out an otherwise lawful activity.”).

²⁷ CAL. FISH & GAME CODE § 2081(b)(2).

ensure all funding for such mitigation efforts.²⁸ Under Proposition 117, the take of a depredating mountain lion is not merely incidental to a lawful activity, but rather is precisely the lawful activity which is the express purpose of obtaining the permit. By limiting the purposes for which an individual may seek a take permit, CESA listing of mountain lions would constitute a “commission...regulation that conflicts with or supersedes a provision of” Chapter 10, and would violate Proposition 117. Additionally, CESA protection for mountain lions would conflict with Proposition 117 by imposing numerous additional conditions upon permitted take beyond those contemplated by Proposition 117.

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.”²⁹ 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.

Proposition 117 authorizes “the department or the animal damage control officer [to] orally authorize the pursuit and taking of [a] depredating mountain lion” in order to effectuate “immediate authorization.”³⁰ Neither CESA nor its implementing regulations have an analogous provision allowing for oral authorization to take a threatened species.³¹ Rather, CESA and its implementing regulations dictate strict requirements for a permit application not found in Proposition 117 or its implementing regulations.³² Commission action listing mountain lions as endangered under CESA would impose permit-application processes and conditions which would negate the oral authorization provisions of Proposition 117, conflicting with the provisions of Chapter 10 and thereby violating Proposition 117.

Proposition 117 authorizes *immediate* take of “Any mountain lion that is encountered while in the act of pursuing, inflicting injury to, or killing livestock, or domestic animals.”³³ CESA, by contrast, prohibits any take of a listed species unless done subsequent to issuance of a take permit or pursuant to a memorandum of understanding.³⁴ Because CESA has no provision for

²⁸ *Id.* at § 2081(b)(3).

²⁹ 14 CCR § 402(a) (*emphasis added*).

³⁰ CAL. FISH & GAME CODE § 4805.

³¹ *See generally id.* at §§ 2080-2085; 14 CCR §§ 783.0-783.8.

³² *Compare* 14 CCR § 783.2(a)(1)-(11) (detailing information required in an application for an incidental take permit under CESA), *with* 14 CCR § 402 (authorizing the department to “orally authorize...take of a mountain lion” “Whenever immediate action will assist in the pursuit of the particular mountain lion believed to be responsible for damage to livestock or domestic animals”).

³³ CAL. FISH & GAME CODE § 4807(a).

³⁴ *Id.* at § 2081.

immediate take of a listed species “encountered while in the act of” depredation, listing mountain lions as threatened under CESA would *entirely negate* the effect of § 4807(a). Negating a provision of the law is a clear “conflict” with Proposition 117 in violation of Fish and Game Code § 4800(d).

3. Merely accepting the petition would violate Proposition 117

The Commission must find that the petition does not provide sufficient information to indicate that the petitioned action may be warranted lest the Commission violate § 4800(d) by establishing the mountain lion as a “candidate species.”

Accepting the petition and finding “that the petition provides sufficient information to indicate that the petitioned action may be warranted” would immediately establish mountain lions as a “candidate species” for listing.³⁵ Candidate species are given the full range of protections afforded to threatened or endangered species under CESA.³⁶ Thus, merely accepting the petition will result in the numerous violations of § 4800(d) (enacted by Proposition 117) detailed above. Not only may the Commission not ultimately list Southern California and Central Coast mountain lions as threatened, then, but the Commission is legally bound to *reject* the petition.

4. Proposition 117’s proponents and California voters did not contemplate CESA protection for mountain lions

The California Endangered Species Act was adopted in 1984. Proposition 117 was put before the voters of California in 1990. The proponents of Proposition 117 were certainly aware of CESA when they drafted Proposition 117, and had they intended to extend to mountain lions the protections of CESA, they could have included a provision within Proposition 117 doing so. But the proponents elected *not* to list mountain lions as threatened under CESA when they drafted Proposition 117, and voters did not contemplate CESA protections for mountain lions when they approved Proposition 117 as written in 1990.

Proposition 117’s proponents and California’s voters elected *not* to list mountain lions as threatened when they approved Proposition 117 in 1990, and neither Petitioners nor the Commission may seek to overturn the will of the voters by approving the petitioned action.

5. Liberal construction of Proposition 117 does not justify CESA protection

Petitioners allege that “To the extent there is any tension between the provisions in Proposition 117 and CESA, Proposition 117 is to be ‘liberally construed to further its purposes.’ (Prop. 117 § 9.) Because Proposition 117 and CESA both have similar purposes, Proposition 117 should be construed to be consistent with CESA.”³⁷ Petitioner’s assertion that Section 9 of Proposition 117 justifies the petitioned action is simply without merit.

³⁵ *Id.* at § 2074.2(e)(2).

³⁶ 14 CCR § 783.1(b).

³⁷ PETITION at 70.

While liberal construction is intended to further the ‘spirit’ or purpose of a law, no statute can be so liberally-construed as to negate its explicit, unambiguous provisions.³⁸ As detailed above, granting CESA protection to mountain lions would negate numerous express provisions of Proposition 117. While liberal construction may be justified to further the purposes of Proposition 117 where provisions of the Proposition are ambiguous, interpreting the Proposition so liberally as to negate, at a minimum, §§ 4802, 4803, 4805, and 4807(a) *in their entirety* would be absurd.

Where liberal construction of a statute is exercised, it is employed “so as to suppress the mischief at which [the statute] is directed.”³⁹ In determining the mischief at which a statute is directed, “The printed ballot arguments may be used to determine the object and intent” of a Proposition.⁴⁰ The “Argument in Favor of Proposition 117” printed in the 1990 Primary Voter Guide makes clear the ‘object and intent’ of the special-status designation for mountain lions:

In order to protect this last magnificent predator, Proposition 117 OUTLAWS THE TROPHY HUNTING OF MOUNTAIN LIONS.

Mountain lions have not been trophy hunted since GOVERNOR RONALD REGAN signed a bill protecting this elusive animal. We need Proposition 117 to continue that protection.

Mountain lions hunting is cruel and unnecessary. A pack of hounds is set on the trail of the big cat until the exhausted lion seeks refuge in a tree. The trophy-hunter (who sometimes is brought in from hundreds of miles away after paying a huge fee to the houndsman) then walks over and blasts the lion off the limb at point-blank range. When nursing mothers are shot, the kittens starve. *THIS IS NOT SPORT; THIS IS SLAUGHTER.*⁴¹

The intent of Proposition 117 was to extend a prohibition on *trophy hunting* of mountain lions, *not* to outlaw *any and all take* of mountain lions. While the Commission should liberally construe Proposition 117, where ambiguous, to prohibit *trophy hunting* of mountain lions, then, it would be a misapplication of principles of statutory interpretation to liberally construe Proposition 117 to prohibit *any* take of mountain lions, as it is clear that this was not the intent of Proposition 117 upon its proposal in 1990.

Additionally, in arguing that Proposition 117 should be “liberally construed to further its purposes,” Petitioners ignore that protection of livestock and domestic animals *is* a purpose of Proposition 117. That purpose is clearly enshrined in §§ 4802 and 4807(a), both of which explicitly provide for take of a specific depredating animal in order to safeguard livestock.

³⁸ In examining other remedial Fish and Game Code provisions afforded liberal construction, courts have noted that such liberal construction is only to be resorted to “when [the statute’s] meaning is doubtful, so as to suppress the mischief at which it is directed.” In *re Makings*, 200 Cal. 474, 478-479 (Cal. 1927) (*quoting* 23 CAL.JUR. 801); *see also* *Young v. Dep’t of Fish & Game*, 124 Cal.App.3d 257, 270-271 (Cal. Ct. App. 1981) (*quoting In re Makings*); *Siskiyou Co. Farm Bureau v. Dep’t of Fish & Wildlife*, 237 Cal.App.4th 411, 427 n.6 (Cal. Ct. App. 2015) (noting that liberal construction is “relevant only in cases of demonstrated ambiguity”).

³⁹ In *re Makings*, 200 Cal. 474, 478-479 (Cal. 1927) (*quoting* 23 CAL.JUR. 801).

⁴⁰ *Young v. Dep’t of Fish & Game*, 124 Cal.App.3d 257, 273 (Cal. Ct. App. 1981).

⁴¹ John Van de Kamp, Attorney General; Ed Davis, State Senator; and Richard Katz, State Assemblymember, “Argument in Favor of Proposition 117” in CALIFORNIA SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET: PRIMARY ELECTION 42 (June 5, 1990) (*emphasis in original*).

Moreover, that purpose is evidenced by the “Argument in Favor of Proposition 117” published in the 1990 Primary Voter Guide, which sought to sway voters to support the Proposition by, among other things, expressing an intent to “PROTECT[] THE PUBLIC SAFETY by permitting the taking of any lion which threatens livestock or people.”⁴²

While protection of mountain lions was indeed a purpose of Proposition 117, it was not the only purpose of the Proposition, and it was more specifically intended to protect mountain lions *from trophy hunting*. Petitioners may not rely on the ‘liberal construction’ clause in Section 9 to negate the express terms and additional purposes of Proposition 117.

6. *Petitioners’ arguments that CESA listing can be harmonized with Proposition 117 are fundamentally flawed*

In response to our assertion that CESA listing is inconsistent with Proposition 117, Petitioners and other supporters of the petition have sought to harmonize the two statutory schemes in written and oral testimony presented at the Commission’s July 2019, December 2019, and February 2020 hearings. Unfortunately, a careful analysis of these claims demonstrates that CESA prohibition of take cannot be harmonized with Proposition 117’s explicit take provisions.

a. *Fish and Game Code § 2081(a)*

Petitioners and other supporters of the petition have contended that there is no conflict between Proposition 117 and CESA listing⁴³ because Fish and Game Code § 2081(a) provides that “the department may authorize individuals...to import, export, take, or possess any endangered species, threatened species, or candidate species for scientific, educational, or management purposes.”⁴⁴

We first note that there is apparent conflict in the CESA take provision and the Proposition 117 take provisions because the former provides for discretionary permit issuance (“may authorize”) while the latter provides for mandatory permit issuance (“shall promptly issue a permit”).

More importantly, however, this argument fails to acknowledge that § 2081(a) does not operate independently, but rather has been interpreted by California courts as being further constrained

⁴² *Id.*

⁴³ *See, e.g.*, PETITION at 69 (“Under CESA, CDFW may authorize that a person, agency, or institution take a listed species ‘for scientific, educational, or management purposes.’ (Cal. Fish & Game Code § 2081(a).) ... These exceptions are sufficiently similar that in most cases take of mountain lions properly authorized by Proposition 117 could be consistent with CESA’s exceptions for wildlife management activities or law enforcement purposes.”); Letter from Sabrina Ashjian, California State Director, The Humane Society of the United States, to Eric Sklar, President, California Fish and Game Commission and Esther Burkett, California Department of Fish and Wildlife (Jan. 16, 2020) [*hereinafter* “HSUS Letter”] (“CESA expressly authorizes the Department to issue take permits allowing non-governmental ‘individuals’ to take listed species ‘for...management purposes.’ Cal. Fish and Game Code § 2081(a). The depredation-related Proposition 117 take allowances that CCA and CFBF point to as the source of irresolvable conflict would, in fact, likely qualify as the issuance of permits ‘for...management purposes’ and thus would also fall into an exception under CESA’s take prohibition.”).

⁴⁴ CAL. FISH & GAME CODE § 2081(a).

by § 2081(b),⁴⁵ which requires that “The take is incidental to an otherwise lawful activity”⁴⁶ and that “The impacts of the authorized take shall be minimized and fully mitigated.”⁴⁷ Despite the provisions of § 2081(a), then, listing the proposed ESU as threatened would, at a minimum, violate § 4804’s provision for *targeted* take of depredating mountain lions, rendering the listing decision illegal under § 4800(d).

b. “Nonlethal forms of take” and Fish and Game Code § 4801.5

Petitioners have stated that “nonlethal forms of take such as hazing, if done properly and judiciously, could very well be consistent with the conservation mandate of CESA. Consequently, we see no conflict whatsoever between the two statutes.”⁴⁸ Firstly, we note that while hazing *is* recognized as a “nonlethal procedure” for *removing* or taking a mountain lion, **hazing is not a ‘take.’**⁴⁹ It is noteworthy that Petitioners have not identified a *take* provided for by Proposition 117 that would be consistent with CESA protections.

While Petitioners have failed to identify any take which would be permitted under CESA, they appear to acknowledge that *lethal* take, at a minimum, *would* be prohibited under a CESA listing.⁵⁰ Petitioners argue, however, that CESA’s prohibition of lethal take is not in conflict with Proposition 117 because “Prop. 117 does not require lethal permits.”⁵¹ In support of this contention, Petitioners allege that “Section 4801.5, an amendment to the provisions of Prop. 117 that passed with over 80% support in the legislature in 2014,^[52] expressly states that ‘nonlethal procedures shall be used when removing or taking any mountain lion that has not been designated an imminent threat to public health or safety.’”⁵³

⁴⁵ See *Watershed Enforcers v. Department of Water Resources*, 185 Cal.App.4th 969, 975 (Cal. Ct. App. 2010) (“But a section 2081, subdivision (a) taking is subject to stringent conditions, as set forth in subdivision (b)(1) and (2).”). The Humane Society of the United State’s contention that “CCA and CFBF’s focus on the more burdensome CESA ‘incidental take’ permit process under Section 2081(b) is a red herring” because “the take permit provision that would actually operate to harmonize CESA with Proposition 117 is the ‘management purposes’ take permit under Section 2081(a)” (HSUS Letter, *supra* note 43) is explicitly contradicted by such judicial interpretations of § 2081.

⁴⁶ CAL. FISH & GAME CODE § 2081(b)(1).

⁴⁷ *Id.* at (b)(2).

⁴⁸ Brendan Cummings, Center for Biological Diversity, in Video recording: Meeting of February 21, 2020, held by the California Fish & Game Commission, at 1:10:48 (Feb. 21, 2020) (*available at* <http://videobookcase.org/california/fish-game-commission/february-21-2020/>) [*hereinafter* CUMMINGS].

⁴⁹ California Fish & Game Code § 4801.5(a) provides that “nonlethal procedures shall be used when *removing or taking* any mountain lion that has not been designated as an imminent threat to public health or safety” (*emphasis added*). “Hazing” is identified as a form of “nonlethal procedure[]” under § 4801.5(c). Hazing is *not* identified as a “take,” however, either under Fish and Game Code § 86 (“‘Take’ means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.”) or under Proposition 117. Presumably, then, hazing is a form of nonlethal procedure directed at “removing” a mountain lion, but hazing *does not* constitute take.

⁵⁰ See, e.g., CUMMINGS, *supra* note 48 (acknowledging that “it’s difficult to see how lethal depredations permits would be consistent with CESA’s conservation mandate”).

⁵¹ *Id.*

⁵² SB 132 (Hill) was chaptered in 2013 and took effect in 2014.

⁵³ CUMMINGS, *supra* note 48.

In quoting § 4801.5, however, Petitioners have omitted the introductory clause of the section: “*Unless authorized in this chapter.*”⁵⁴ Under certain circumstances, lethal take is authorized within Proposition 117, providing an exception to § 4801.5’s directive that nonlethal procedures shall be used. Firstly, § 4805 authorizes “killing” as among the range of options available in circumstances when livestock have been “injured, damaged, or destroyed.” Secondly, § 4809 states that “Mountain lions authorized to be taken pursuant to this chapter shall be taken by the most effective means available to take the mountain lion,” and the only limitation placed on those ‘most effective means’ is that “no mountain lion shall be taken by means of poison, leg-hold or metal jawed traps, and snares.” Section 4809 implicitly permits the killing of mountain lions, then, where killing is the “most effective means available to take the mountain lion.”

Had the Legislature intended to prohibit lethal take in all instances in which a mountain lion is not “designated an imminent threat to public health or safety,” it could have omitted the phrase “Unless authorized in this chapter,” and/or explicitly clarified the prohibition via amendments to §§ 4804 and 4809. It did not do so. Additionally, that the Department has continued to issue lethal depredation permits in the six years since § 4801.5 took effect is evidence that the Department understands Proposition 117—inclusive of § 4801.5—to permit lethal take in certain circumstances outside those in which mountain lions are deemed an imminent threat to public health or safety.

Even if lethal take is not *required* under Proposition 117, as Petitioners contend, lethal take is *allowed* under the Proposition. CESA protection would *disallow* lethal take, however, thereby creating a conflict with Proposition 117 in direct violation of § 4800(d).

7. Petitioners’ remedy is in the Legislature, not the Commission

Proposition 117 dictated in explicit terms the circumstances under which it could be amended: “this act shall be amended only by a statute approved by a vote of four fifths of the members of both houses of the Legislature.” In explicitly providing that Fish and Game Code § 219 did not apply to Chapter 10 of Part 3 of Division 4 of the Fish and Game Code, Proposition 117 made it clear that the Commission is not authorized to alter the legal status or the legal protections afforded to mountain lions. Petitioners cannot make an end-run around Proposition 117 by seeking threatened status under CESA via the Commission; Petitioners must go through the legislature to obtain the ends sought by the petition.

CONCLUSION

Our associations appreciate the opportunity to address the Commission on this important matter. We believe that the wide array of policy considerations detailed above warrant the Commission’s denial of the petition. Most importantly, perhaps, we believe that designating mountain lions in the Central Coast and Southern California as a ‘candidate species’ would violate Proposition 117. Consequently, **the Commission *must find* “that the petition does not provide sufficient information to indicate that the petitioned action may be warranted”** pursuant to Fish and Game Code § 2074.2(e)(1) lest it run afoul of the law.

⁵⁴ CAL. FISH & GAME CODE § 4801.5(a) (*emphasis added*).

Sincerely,



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