

Natural Community Conservation Plan Approval and Take Authorization

**California Department of Fish and Game
Approval and Supporting Findings
for the
Kern Water Bank Habitat Conservation Plan/
Natural Community Conservation Plan**

I. Introduction.

A. The Natural Community and Conservation Planning Act (“NCCP Act”).

The NCCP Act, California Fish & Game Code §2800, et seq.,¹ provides for the preparation and implementation of large-scale natural resource conservation plans. A natural communities conservation plan, or “NCCP,” must identify and provide for “the regional or area wide protection and perpetuation of natural wildlife diversity, while allowing compatible and appropriate development and growth.” (§2805(a).) NCCPs are intended “to provide comprehensive management and conservation of multiple wildlife species” including, but not limited to, species listed pursuant to the California Endangered Species Act, §2050, et seq. (§2810.) (“CESA”).

The NCCP Act promotes cooperation and coordination among public agencies, landowners, and other private interests in developing NCCPs. The California Department of Fish and Game (“CDFG”) is authorized to prepare and implement NCCPs with a wide variety of private and public interests, including individuals, organizations, companies, and state and local government agencies. (§2810 and §711.2.) Natural community conservation planning may be undertaken by local, state, and federal agencies independently or in cooperation with other individuals and entities. (§2820.)

An NCCP Plan must be approved by CDFG before it is implemented. (§2820.) To be approved, an NCCP Plan must meet standards established by CDFG. (§2820.) CDFG is authorized to prepare non-regulatory guidelines to establish NCCP standards and to guide the development and implementation of NCCP Plans. (§2825(a).) NCCP Plans are also subject to review under the California Environmental Quality Act, Public Resources Code §21000, et seq.

¹All further references are to the Fish and Game Code, unless otherwise indicated.

CDFG may authorize the “taking” of any identified species whose conservation and management is provided for in a CDFG approved NCCP Plan. (§2835.) Under the Fish and Game Code, “Take” means “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” (§86.)

B. Kern Water Bank Habitat Conservation Plan/
Natural Community Conservation Plan

The Kern Water Bank Habitat Conservation Plan/Natural Community Consecration Plan (“**KWB HCP/NCCP**”) is designed to achieve both water conservation and environmental objectives. The primary water conservation objective is the storage of water in aquifers during times of surplus for later recovery during times of shortage. The primary environmental objective is to protect large areas of wildlife habitat within the Kern Water Bank and to implement a program to protect and enhance the habitat. The basic elements of the Kern Water Bank project are to: 1) allow the economical development of water recharge and recovery facilities, 2) preserve compatible upland habitat and other sensitive areas of natural habitat and rare plants, 3) conserve species listed as threatened or endangered under to CESA, 4) recreate intermittent wetland/rangeland habitat, 5) provide a conservation bank for third parties, and 6) permit farming.

Of the 19,900 acres that constitute the Kern Water Bank, 5,900 acres are proposed for basins for routine recharge activities and 481 acres will be used for permanent water banking facilities. Between the basins will be areas that will never be flooded. Some of these areas have existing populations of listed plants. These plants will be preserved in special areas totaling 960 acres. Other areas between basins totaling 5,592 acres will revert to habitat. Additionally, 530 acres will be preserved and managed for mitigation of Department of Water Resources projects. Of the remaining land, 3,170 acres will be used for farming and 3,267 acres will be used as a conservation bank (to be used as potential mitigation for activities by third parties within designated areas of the Southern San Joaquin Valley). Of the 3,267 acres in the conservation bank, the Kern Water Bank Authority (“**KWBA**”) may use up to 490 acres for commercial development, subject to additional processes.

A “Master Permit/CESA MOU” will allow the incidental take of listed species by qualified third persons, and in certain circumstances by KWBA, for activities in specified areas of Kern County, the Allensworth area of Tulare County, and the Kettleman Hills area of Kings County, California. Third persons will have to enter into an agreement with the U. S. Fish and Wildlife Service and CDFG which sets out that person’s mitigation obligations, including the number of off-site acres the person must acquire in order to obtain incidental take authority. The USFWS, with the CDFG will have absolute discretion to determine whether a third party may satisfy its off-site mitigation obligations by acquiring Conservation Credits. The purpose of the Master Permit/CESA MOU is to encourage the use of the conservation bank (thereby insuring protection in perpetuity of bank lands) and to streamline the USFWS’ permitting process for projects with minor impacts.

Adaptive management practices will be applied to all Kern Water Bank lands, with the intent of preserving and enhancing wildlife habitat. Recharge basins will be managed to avoid impacts to waterfowl and shorebirds, and will likely benefit these species. Designated sensitive habitat areas will be protected, and the conservation bank and mitigation easement lands will be additionally managed to the benefit of the target species conserved there. Annual management plans and compliance reports will be reviewed by CDFG and the USFWS. Implementation of management measures is secured through several mechanisms; a non-wasting endowment is provided to ensure that the conservation bank lands will be managed in perpetuity.

C. Implementing Agreement.

The KWB HCP/NCCP will be implemented according to an implementing agreement. The purpose of the implementing agreement is to ensure the implementation of the KWB HCP/NCCP, to bind each party to the terms of the KWB HCP/NCCP, and to provide remedies and recourse for failure to adhere to the terms of the KWB HCP/NCCP. This NCCP Approval specifically applies to the KWB HCP/NCCP as implemented pursuant to the *Kern Water Bank Natural Community Conservation Plan/Habitat Conservation Plan Implementing Agreement by and among the United States Fish and Wildlife Service, the California Department of Fish and Game and the Kern Water Bank Authority* (“**Implementing Agreement**”), executed concurrently with this NCCP Approval.

II. Findings.

All NCCPs must contain certain substantive elements identified in the NCCP Act. In addition, the Department must ensure that its approval of the KWB HCP/NCCP is consistent with its responsibilities as a State agency under CESA.

A. The NCCP Act.

In addressing the scope and purpose of NCCPs, the NCCP Act identifies the following essential NCCP elements:

1. An NCCP must be regional or area-wide in scope (§2805(a).)

The KWB NCCP conforms with general conservation strategies for the southern San Joaquin Valley and central Kern County. The KWB HCP/NCCP area encompasses a 19,900 acre block of upland, riparian, wetland and agricultural habitats that adjoin other conservation areas, and are typical of a land-use mosaic suitable for the regional conservation goals.

CDFG hereby finds that the KWB HCP/NCCP addresses wildlife conservation on a regional or area-wide scale, as required by §2805(a).

2. An NCCP must protect and perpetuate natural wildlife diversity (§2805(a).)

The KWB HCP/NCCP promotes wildlife diversity through adaptive management of a variety of habitat types that were formerly extensive in the area, but currently persist as only 3-10% of their historical extent. The habitat mosaic created and preserved by the KWB HCP/NCCP mimics the habitat mosaic that may have existed on and near the site prior to human manipulation. The goals of land management include preserving and enhancing the quality of natural habitats within the Kern Water Bank.

CDFG hereby finds that the KWB HCP/NCCP Plan/Subarea Plan protect and perpetuate wildlife diversity, as required by §2805(a).

3. An NCCP must allow compatible and appropriate development and growth (§2805(a).)

The KWB HCP/NCCP will allow the use of portions of the Kern Water Bank for groundwater recharge. This water management is crucial to ongoing agriculture in the region, and also influences urban and industrial growth. The KWB HCP/NCCP will allow commercial development in locations outside of the Kern Water Bank by providing a conservation bank. It will allow agricultural uses on the Kern Water Bank and could allow some limited commercial development within the Kern Water Bank.

CDFG hereby finds that the KWB HCP/NCCP allow compatible and appropriate development and growth, as required by §2805(a).

4. Is consistent with NCCP planning agreement (§2820.)

A planning agreement was not used in preparing the KWB HCP/NCCP. This requirement is therefore does not apply to this NCCP Approval.

5. Provides for the conservation and management of species subject to take (§2835.)

All species subject to take under the KWB HCP/NCCP are addressed in the KWB HCP/NCCP. Implementation of the KWB HCP/NCCP will conserve these species by creating, preserving, and enhancing habitat. CDFG has determined that implementation of the KWB HCP/NCCP will not result in death of individuals of Fully Protected species of birds or reptiles that may occur in the area. Thus, the KWB NCCP is not contrary to §3511 or § 5050.

CDFG hereby finds that the KWB HCP/NCCP provides for the conservation and management of all species subject to the take authorization provided as part of this NCCP Approval, as required by §2835.

B. CESA.

In CESA,

The Legislature . . . finds and declares that it is the policy of the state that state agencies should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent alternatives available consistent with conserving the species or its habitat which would prevent jeopardy.

Furthermore, it is the policy of this state and the intent of the Legislature that reasonable and prudent alternatives shall be developed by the department, together with the project proponent and the state lead agency, consistent with conserving the species, while at the same time maintaining the project purpose to the greatest extent possible. (§2053.)

CESA also requires that all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of CESA. (§2055.) CDFG must ensure that its approval of the KWB HCP/NCCP does not conflict with this responsibility.

CDFG hereby finds, based on the best information available, that the KWB HCP/NCCP, if properly implemented, will not jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species. The KWB HCP/NCCP will assist in the conservation of species addressed in the KWB HCP/NCCP and will enhance the species' ability survive and reproduce within the KWB HCP/NCCP area.

III. CDFG Approval.

Based on the foregoing analysis and findings, CDFG finds,

- ◆ the KWB HCP/NCCP meets all necessary requirements for a natural community conservation plan;
- ◆ the KWB HCP/NCCP authorizes only take that is incidental to otherwise lawful activity;
- ◆ if the KWB HCP/NCCP is fully implemented, the impacts of the take authorized under the Plan will be minimized and fully mitigated impacts;

- ◆ the KWB HCP/NCCP prescribes minimization and mitigation measures that are proportional in extent to the impacts of the take authorized under the Plan;
- ◆ the minimization and mitigation measures prescribed in the KWB HCP/NCCP evidence a clear nexus between the mitigation required and the expected adverse impacts to wildlife;
- ◆ the minimization and mitigation measures prescribed in the KWB HCP/NCCP maintain the KWBA's objectives to the greatest extent possible;
- ◆ all minimization and mitigation measures prescribed in the KWB HCP/NCCP are capable of successful implementation;
- ◆ KWBA has ensured adequate funding to implement the minimization and mitigation measures prescribed in the KWB HCP/NCCP and to monitor compliance with, and effectiveness of, the measures.

Based on these findings, pursuant to §2820, CDFG hereby approves the KWB HCP/NCCP for implementation as an NCCP.

IV. Take Authorization.

Pursuant to §2835, CDFG may permit the taking of any identified species whose conservation and management is provided for in a CDFG approved natural communities conservation plan. CDFG hereby authorizes take of the species identified below incidental to activities that are subject to, and are carried out in compliance with, the KWB HCP/NCCP and the Implementing Agreement.

A. Scope of Take Authorization.

Activities potentially subject to and covered by the KWB HCP/NCCP are described in Section II of the KWB HCP/NCCP. They include,

1. Construction, maintenance, and operation of water recharge, recovery, and conveyance facilities.
2. Construction and operation of buildings and storage facilities.
3. Construction and maintenance of fences and access roads.
4. Flood prevention measures.
5. Farming within designated areas.
6. Habitat management activities.
7. Educational and research activities.
8. Certain recreational activities.

9. Required public health activities (e.g. mosquito control measures).
10. Weed control.
11. Emergency access.
12. Mitigation for third party activities in the Kern Water Bank Conservation Bank.
13. Limited commercial development.

B. Identified Species.

The following species will be affected by projects and activities covered by the KWB HCP/NCCP. While the KWB HCP/NCCP provides benefits for these species, it may also subject them to direct and indirect adverse impacts associated with projects and activities covered by the KWB HCP/NCCP. Species evaluations and findings are described in Section III of the KWB HCP/NCCP. This list constitutes the portion of the list of "Covered Species" described in the Implementing Agreement that are covered by a take authorization pursuant to Fish & Game Code §2835 (the "NCCP Covered Species").

Mammals

1. Tipton kangaroo rat (*Dipodomys nitratoides nitratoides*) (endangered)
2. San Joaquin kit fox (*Vulpes macrotis mutica*) (endangered)
3. San Joaquin antelope squirrel (*Ammospermophilus nelsoni*) (threatened)

Reptiles

4. Blunt-nosed leopard lizard (*Gambelia sila*) (endangered)
5. Western pond turtle (*Clemmys marmorata*)

Birds

6. Loggerhead Shrike (*Lanius ludovicianus*)
7. Tricolored Blackbird (*Aegelius tricolor*)
8. White-faced Ibis (*Plegadis chihi*)
9. LeConte's Thrasher (*Toxostoma lecontei*)
10. Swainson's Hawk (*Buteo swainsoni*)
11. Burrowing Owl (*Athene cunicularia*)
12. Western Snowy Plover (*Charadrius alexandrinus*)
13. Great Blue Heron (*Ardea herodias*)
14. Great Egret (*Casmerodius albus*)
15. Snowy Egret (*Egretta thula*)
16. Cattle Egret (*Bubulcus ibis*)
17. Black-Crowned Night Heron (*Nycticorax nycticorax*)
18. Mallard (*Anas platyrhynchos*)

19. Northern Pintail (*Anas acuta*)
20. Gadwall (*Anas strepera*)
21. Cinnamon Teal (*Anas cyanoptera*)
22. Green-winged Teal (*Anas crecca*)
23. Northern Shoveler (*Anas clypeata*)
24. American Avocet (*Recurvirostra americana*)
25. Black-necked Stilt (*Himantopus mexicanus*)

Plants

26. Bakersfield saltbush (*Atriplex tularensis*) (endangered)
27. Hoover's woolly-star (*Eriastrum hooveri*)
28. California jewelflower (*Caulanthus californicus*) (endangered)
29. Kern mallow (*Eremalche kernensis*)
30. San Joaquin woolly-threads (*Lembertia congdonii*)
31. Slough thistle (*Cirsium crassiale*)

C. Conservation and Management Measures.

This take authorization is specifically contingent on the following:

- ◆ All requirements detailed in the KWB HCP/NCCP shall be implemented by KWBA as specified in the Implementing Agreement between the Department, the USFWS and the KWBA.
- ◆ This take authorization shall commence on the date of this NCCP Approval and shall remain effective, subject to the Implementing Agreement, for so long as this NCCP Approval is effective.

D. Additional Species.

Additional species may be added to the list of NCCP Covered Species identified above as provided in the KWB HCP/NCCP.

E. Limitations.


This take authorization does not constitute or imply compliance with, or entitlement to proceed with any project under laws and regulations beyond the authority and jurisdiction of the Department. KWBA has independent responsibility for compliance with any and all applicable laws and regulations.

V. Suspension and Termination.

This NCCP Approval is subject to suspension or termination by action of the Director of CDFG.

VI. Duration.

This NCCP Approval shall remain effective for 75 years from the effective date below, unless suspended, terminated or extended by earlier action of the Director of CDFG.

Signed:  Date: 10/2/97
Jacqueline E. Schafer, Director
California Department of Fish and Game