

Use of Consistency Determinations Under the California Endangered Species Act

The California Endangered Species Act (CESA) generally prohibits the take of endangered and threatened species, unless authorized by the Department of Fish and Game (DFG) pursuant to one of several mechanisms provided in the Fish and Game Code. One common form of authorization is the issuance of an Incidental Take Permit (ITP) that authorizes the incidental take of a species during typical activities such as agriculture and land development. When the target species is listed under both CESA and the federal Endangered Species Act (ESA), another common method is through the issuance of a Consistency Determination (CD). A CD, which constitutes DFG's determination that no CESA take authorization is necessary, can be used only when the permittee already has received take authorization from the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service consistent with ESA. In order for DFG to issue a CD, it must review the federal authorization itself and determine whether it meets the requirements set forth in CESA, thus finding "consistency" between the federal take authorization and CESA. This review is critical since ESA imposes a different standard for incidental take authorizations than CESA.

The use of CDs is considered a relatively simple process and serves as an example of good government – efficiently addressing state law under circumstances where federal regulatory processes have already taken place. The broad use of CDs has been recommended by many entities that also support increased flexibility for DFG to consider all documents provided with the federal permit application. Right now, DFG's evaluation is limited to the federal Biological Opinion itself to determine whether CESA standards have been satisfied.

Others caution the broad use of CDs would allow permittees to circumvent a detailed analysis by DFG, and the fact that there are different standards under ESA and CESA should substantiate stricter requirements under which a CD may be appropriate.

DFG views CDs as a valuable tool that allows it to efficiently manage its CESA program and seeks to use CDs broadly, yet consistently with existing legal authority. DFG is currently in discussions with the USFWS to develop broad guidance for both DFG and USFWS staff on the use of CDs, the required elements of underlying federal authorizations and the appropriate application of ESA and CESA authorizations. DFG also continues to develop and evaluate other methods for providing incidental take authorization, including the use of the 2009 Safe Harbor Program that provides broad authorization under CESA for agricultural land users.