



California Regulatory Notice Register

REGISTER 2022, NUMBER 4-Z

PUBLISHED WEEKLY BY THE OFFICE OF ADMINISTRATIVE LAW

JANUARY 28, 2022

PROPOSED ACTION ON REGULATIONS

TITLE 2. DEPARTMENT OF CANNABIS CONTROL
Conflict-of-Interest Code — Notice File Number Z2022-0118-03 61

TITLE 4. GAMBLING CONTROL COMMISSION
180-Day Extension — Notice File Number Z2022-0118-01 62

TITLE 14. FISH AND GAME COMMISSION
Waterfowl — Notice File Number Z2022-0118-02 65

TITLE 16. BOARD OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS
Fee Schedule — Notice File Number Z2022-0114-01 68

GENERAL PUBLIC INTEREST

DEPARTMENT OF FISH AND WILDLIFE
CESA Consistency Determination Request for Elk River Sediment Remediation and Habitat Rehabilitation Project (Tracking Number: 2080-2022-001-01), Humboldt County 73

DEPARTMENT OF FISH AND WILDLIFE
Colgan Village Residential Housing Project Consistency Determination Request Number 2080-2021-015-03, Sonoma County 73

DEPARTMENT OF FISH AND WILDLIFE
9500 Batchelder Road, Los Alamos, CA 93440 (Assessor's Parcel Number (APN) 099-010-060)] Consistency Determination Request Number 2080-2021-014-05, Santa Barbara County 79

DEPARTMENT OF FISH AND WILDLIFE
East Weaver Dam Removal and Intake Relocation Project Tracking Number 1653-2022-088-001-R1, Trinity County 84

(Continued on next page)

Time-Dated Material

OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD <i>Public Meeting and Business Meeting</i>	84
PROPOSITION 65	
OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT <i>Carcinogen Identification Committee Data Call in 2022, Request for Relevant Information on the Carcinogenicity of Bisphenol A (BPA)</i>	85
OAL REGULATORY DETERMINATION	
DEPARTMENT OF CORRECTIONS AND REHABILITATION <i>2022 OAL Determination Number 1 (CTU2021-0706-01), Memorandum Dated October 4, 2017; Granting of Favorable Points For No Serious Disciplinary(s), Issued by the California Department of Corrections and Rehabilitation</i>	86
SUMMARY OF REGULATORY ACTIONS	
<i>Regulations filed with Secretary of State</i>	89

The *California Regulatory Notice Register* is an official state publication of the Office of Administrative Law containing notices of proposed regulatory actions by state regulatory agencies to adopt, amend or repeal regulations contained in the California Code of Regulations. The effective period of a notice of proposed regulatory action by a state agency in the *California Regulatory Notice Register* shall not exceed one year [Government Code § 11346.4(b)]. It is suggested, therefore, that issues of the *California Regulatory Notice Register* be retained for a minimum of 18 months.

CALIFORNIA REGULATORY NOTICE REGISTER is published weekly by the Office of Administrative Law, 300 Capitol Mall, Suite 1250, Sacramento, CA 95814-4339. The Register is printed by Barclays, a subsidiary of West, a Thomson Reuters Business, and is offered by subscription for \$205.00 (annual price). To order or make changes to current subscriptions, please call (800) 328-4880. The Register can also be accessed at <http://www.oal.ca.gov>.

PROPOSED ACTION ON REGULATIONS

Information contained in this document is published as received from agencies and is not edited by Thomson Reuters.

TITLE 2. DEPARTMENT OF CANNABIS CONTROL

NOTICE OF INTENTION TO ADOPT THE CONFLICT-OF-INTEREST CODE OF THE DEPARTMENT OF CANNABIS CONTROL

NOTICE IS HEREBY GIVEN that the Department of Cannabis Control, pursuant to the authority vested in it by section 87300 of the Government Code, proposes adoption of its conflict-of-interest code. A comment period has been established commencing on *January 28, 2022* and closing on *March 15, 2022*. All inquiries should be directed to the Department contact listed below.

The Department of Cannabis Control (“Department”) proposes to adopt its conflict-of-interest code to include employee positions that involve the making or participation in the making of decisions that may foreseeably have a material effect on any financial interest, as set forth in subdivision (a) of section 87302 of the Government Code. The adoption carries out the purposes of the law and no other alternative would do so and be less burdensome to affected persons.

The conflict-of-interest code includes:

- Incorporation by reference of the terms of 2 California Code of Regulations Section 18730 and any amendments to it duly adopted by the Fair Political Practices Commission;
- Provisions requiring the Director of the Department of Cannabis Control to file their statements of economic interests electronically with the Fair Political Practices Commission;
- Provisions requiring all other designated positions to file their statements of economic interests directly with the Department;
- Provisions identifying designated positions within the Department and corresponding disclosure categories, as specified; and
- Incorporation of Appendix A, which establishes three disclosure categories:
 - Category 1, which requires reporting of all investments, real property, business

positions, and sources of income (including gifts, loans, and travel payments);

- Category 2, which requires reporting of investments, business positions, and sources of income (including gifts, loans, and travel payments) if the business entity or source provides any goods or services of the type used by the Department; and
- Category 3, which requires reporting of (a) real property within a local jurisdiction in which entities subject to the licensing or other regulatory jurisdiction of the Department may lawfully operate, as well as (b) investments, business positions, and sources of income (including gifts, loans, and travel payments) if the business entity or source is either (1) an entity subject to the licensing or other regulatory jurisdiction of the Department or (2) an officer, employee, or owner (as defined in California Code of Regulations, title 4, section 15003, or any successor regulation) of, or any holder of a financial interest (as defined in California Code of Regulations, title 4, section 15004, or any successor regulation) in, such an entity.

The proposed conflict-of-interest code and explanation of the reasons can be obtained from the Department contact listed below.

Any interested person may submit written comments relating to the proposed adoption by submitting them no later than *March 15, 2022*, or at the conclusion of the public hearing, if requested, whichever comes later. At this time, no public hearing is scheduled. A person may request a hearing no later than *February 28, 2022*.

The Department of Cannabis Control has determined that the proposed adoption:

1. Imposes no mandate on local agencies or school districts.
2. Imposes no costs or savings on any state agency.
3. Imposes no costs on any local agency or school district that are required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.
4. Will not result in any nondiscretionary costs or savings to local agencies.
5. Will not result in any costs or savings in federal funding to the state.
6. Will not have any potential cost impact on private persons, businesses or small businesses.

All inquiries concerning this proposed adoption and any communication required by this notice should be directed to:

Kaila Fayne
Department of Cannabis Control
Legal Affairs Division
2920 Kilgore Road
Rancho Cordova, CA 95670
916-251-4544
publiccomment@cannabis.ca.gov

TITLE 4. GAMBLING CONTROL COMMISSION

180 DAY EXTENSION
CGCC-GCA-2021-08-R

NOTICE IS HEREBY GIVEN that the California Gambling Control Commission (Commission) is proposing to take the action described in the Informative Digest after consideration of all relevant public comments, objections, and recommendations received concerning the proposed action. Comments, objections, and recommendations may be submitted as follows:

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action to the Commission at any time during the 45-day public comment period, which closes on **March 14, 2022**. Written comments relevant to the proposed regulatory action may be sent by mail, facsimile, or e-mail, directed to one of the individuals designated in this notice as a contact person. To be eligible for the Commission's consideration, all written comments must be **received at its office no later than midnight on March 15, 2022. Comments sent to persons and/or addresses other than those specified under Contact Persons, or received after the date and time specified above, will be included in the record of this proposed regulatory action, but will not be summarized or responded to regardless of the manner of transmission.**

PUBLIC HEARING

The Commission has not scheduled a public hearing on this matter. Any interested person, or his or her authorized representative, may request a hearing pursuant to Government Code section 11346.8. A request for a hearing should be directed to the person(s) listed under Contact Persons no later than 15 days prior to the close of the written comment period.

ADOPTION OF PROPOSED ACTION

After the close of the public comment period, the Commission, upon its own motion or at the instance of any interested party, may thereafter formally adopt the proposals substantially as described below or may modify such proposals if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as contact person and will be mailed to those persons who submit oral or written testimony related to this proposal or who have requested notification of any changes to the proposal.

AUTHORITY AND REFERENCE

Pursuant to the authority vested by sections 19811, 19823, 19824, 19840, and 19841 of the Business and Professions Code; and to implement, interpret or make specific sections 19816, 19823, 19824, 19869, 19870, 19871, and 19876 of the Business and Professions Code, the Commission is proposing to adopt the following changes to Chapter 1 of Division 18 of Title 4 of the California Code of Regulations:

INFORMATIVE DIGEST AND POLICY STATEMENT

Introduction:

The Commission is the state agency charged with the administration and implementation of the Gambling Control Act (Act).¹ The Commission is authorized to adopt regulations governing applications for licenses, permits, registrations, findings of suitability, or other approvals,² including the consideration of an application at an evidentiary hearing.³

This proposed regulatory action will implement one of the changes made in Senate Bill (SB) 819 (Committee on Governmental Organization, Chapter 553, Statutes of 2021), which becomes effective January 1, 2022. SB 819 made four changes to the Act, one of which is covered in this proposed action: providing the Commission the authority to extend current work permits or findings of suitability for up to 180 days.

EXISTING LAW:

Business and Professions Code section 19876(c) provides that if an owner licensee has submitted an application for renewal prior to the original expiration date of the current license and the Commission is

¹ Business and Professions Code, Division 8, Chapter 5, section 19800 et seq.

² Business and Professions Code section 19824, subdivision (a).

³ Business and Professions Code section 19870.

unable to act on the application prior to the expiration date, the commission may extend the license for up to 180 days.

Business and Professions Code section 19876.5 provides that if an applicant has submitted an application for renewal prior to the original expiration date of a work permit or finding of suitability and the Commission is unable to act on the application prior to the expiration date, the commission may extend the current work permit or finding of suitability for up to 180 days.

Business and Professions Code sections 19811, 19823, 19824, 19840, and 19841 provide the authority and ability for the Commission to promulgate regulations regarding the application process within the controlled gambling industry.

EFFECT OF REGULATORY ACTION:

This proposed action has been prepared to modify existing regulations to include additional license types in the Commission’s present authority to grant extensions for up to 180 days. This includes the ability for the Commission to now grant extensions for applications beyond owner–licensee type applications. The Commission will have regulations to allow for the granting of applications for the following additional application types: Commission work permit, key employee, registrations, third–party provider of proposition player services (TPPPS) supervisor, and TPPPS worker.

ANTICIPATED BENEFITS OF PROPOSED REGULATION:

This proposed action will have the benefit of providing the Commission a process to consider an application that potentially saves additional steps such as a referral to an evidentiary hearing, Commission meeting for rescission, and additional Commission meeting for consideration of the original application.

SPECIFIC PROPOSAL:

This proposed action will make changes within the California Code of Regulations, Title 4, Division 18 as follows:

CHAPTER 1. GENERAL PROVISIONS

ARTICLE 2. PROCEDURES FOR HEARINGS AND MEETINGS ON APPLICATIONS

Amend 12054. Consideration at Regular Commission Meeting.

Section 12054 provides a limited list of the possible actions that may be taken by the Commission at a non–evidentiary hearing meeting.

Subsection (a) provides a list of nine possible actions that the Commission may take at a non–evidentiary hearing meeting, now renamed Commission meeting. Paragraph (4) provides that the Commission may extend an existing license up to 180 days if an applicant has submitted their renewal application prior to the original expiration date of the current license and the Commission is unable to act on the application

prior to the expiration date. This proposed action would amend the provision to add the other approvals the Commission issues in order to make the provision consistent with the Act. This includes key employees, Commission work permits, all third–party of proposition player services license types, and registrations. Additionally, the reference to Business and Professions Code section 19876, subdivision (c) is replaced with the specific extension allowance.

COMPARABLE FEDERAL LAW

There are no existing federal regulations or statutes comparable to the proposed regulations.

FISCAL IMPACT ESTIMATES

FISCAL IMPACT ON PUBLIC AGENCIES INCLUDING COSTS OR SAVINGS TO STATE AGENCIES OR COSTS/SAVINGS IN FEDERAL FUNDING TO THE STATE:

Amend 12054. Consideration at Regular Commission Meeting.

Existing practices provide for the extension of various application types. The proposed action makes specific the circumstances in which the extension may be granted. There is no anticipated fiscal savings or cost as this regulation is not anticipated to impact any existing process today.

NON–DISCRETIONARY COST OR SAVINGS IMPOSED UPON LOCAL AGENCIES: None.

MANDATE IMPOSED ON ANY LOCAL AGENCY OR SCHOOL DISTRICT FOR WHICH PART 7 (COMMENCING WITH SECTION 17500) OF DIVISION 4 OF THE GOVERNMENT CODE REQUIRES REIMBURSEMENT: None.

COST TO ANY LOCAL AGENCY OR SCHOOL DISTRICT FOR WHICH PART 7 (COMMENCING WITH SECTION 17500) OF DIVISION 4 OF THE GOVERNMENT CODE REQUIRES REIMBURSEMENT: None.

EFFECT ON HOUSING COSTS: None.

IMPACT ON BUSINESS:

The Commission has determined that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This determination is based on the following facts or evidence/documents/testimony:

The basis for this determination is that this proposed action imposes no mandatory requirement on businesses or individuals and does not significantly change the Commission’s current practices and procedures. The proposed action provides an alternative option for the Commission, which is already in use

for additional application types; it does not remove or significantly alter any existing process.

COST IMPACT ON REPRESENTATIVE PRIVATE PERSON OR BUSINESS:

The Commission has determined there would be no increase in costs to representative private persons or businesses as a result of complying with the proposed action. The proposed action provides an alternative option for the Commissioners in the course of processing applications; it does not remove or significantly alter any existing process.

EFFECT ON SMALL BUSINESS:

The Commission has made a determination that the proposed regulatory action would have no significant impact on small businesses as the proposed action only provides an alternative option for the Commissioners in the course of processing applications; it does not remove or significantly alter any existing process.

RESULTS OF ECONOMIC IMPACT ASSESSMENT/ANALYSIS

IMPACT ON JOBS/NEW BUSINESSES:

The Commission has determined that this regulatory proposal will not have a significant impact on the creation of new jobs or businesses, the elimination of jobs or existing businesses, or the expansion of businesses in California. For this purpose, the consolidated small business definition provided in Government Code section 11346.3, subdivision (b), paragraph (4) was utilized.

The basis for this determination is that this proposed action imposes no mandatory requirement on businesses or individuals and does not significantly change the Commission's current practices and procedures. The proposed action provides an alternative timeline on how applications can be considered; it does not remove or significantly alter any existing process.

BENEFITS OF PROPOSED REGULATION:

This proposed action will have the benefit of providing the Commission a process to consider an application in a more cost-effective manner. Rather than requiring a referral to evidentiary hearing if an investigation could not yet be completed for exceptional circumstances, this process allows an extension of time to allow the Commission to receive the full investigation and allow for the option of approval or approval with conditions for pending applications.

HEALTH AND WELFARE OF CALIFORNIA RESIDENTS:

It has been determined that the proposed action will protect the health, safety, and general welfare of California residents by aiding and preserving the integrity of controlled gambling.

WORKER SAFETY:

It has been determined that the proposed action will not affect worker safety because it does not pertain to working conditions or worker safety issues.

STATE'S ENVIRONMENT:

It has been determined that the proposed action will not affect the State's environment because it has nothing to do with environmental issues.

CONSIDERATION OF ALTERNATIVES

The Commission must determine that no reasonable alternative considered by the Commission or that has otherwise been identified and brought to the attention of the Commission would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

INITIAL STATEMENT OF REASONS, INFORMATION AND TEXT OF PROPOSAL

The Commission has prepared an Initial Statement of Reasons and the exact language for the proposed action and has available all the information upon which the proposal is based. Copies of the language and of the Initial Statement of Reasons, and all of the information upon which the proposal is based, may be obtained at the hearing or prior to the hearing upon request from the Commission at 2399 Gateway Oaks Drive, Suite 220, Sacramento, CA 95833-4231.

AVAILABILITY AND LOCATION OF THE RULEMAKING FILE AND THE FINAL STATEMENT OF REASONS

All the information upon which the proposed action is based is contained in the Rulemaking File that will be available for public inspection and copying at the Commission's office throughout the rulemaking process. Arrangements for inspection and/or copying may be made by contacting the primary contact person named below.

You may obtain a copy of the Final Statement of Reasons, once it has been prepared, by making a written request to one of the contact persons named below or by accessing the Commission's website listed below.

CONTACT PERSONS

All comments and inquiries concerning the substance of the proposed action should be directed to the following *primary* contact person:

Joshua Rosenstein, Legislative and Regulatory Specialist
 Legislative and Regulatory Affairs Division
 California Gambling Control Commission
 2399 Gateway Oaks Drive, Suite 220
 Sacramento, CA 95833-4231
 Telephone: (916) 274-5823
 Fax: (916) 263-0499
 E-mail: jrosenstein@cgcc.ca.gov

Requests for a copy of the Initial Statement of Reasons, proposed text of the regulation, modified text of the regulation, if any, or other technical information upon which the proposed action is based should be directed to the following *backup* contact person:

Adrianna Alcala-Beshara, Deputy Director
 Legislative and Regulatory Affairs Division
 California Gambling Control Commission
 2399 Gateway Oaks Drive, Suite 220
 Sacramento, CA 95833-4231
 Telephone: (916) 261-4259
 Fax: (916) 261-4259
 E-mail: aalcalabeshara@cgcc.ca.gov

WEBSITE ACCESS

Materials regarding this proposed action are also available on the Commission’s website at www.cgcc.ca.gov.

TITLE 14. FISH AND GAME COMMISSION

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 265 and 355 of the Fish and Game Code and to implement, interpret, or make specific sections 265, 355 and 356 of said Code, proposes to amend Section 502, Title 14, California Code of Regulations, relating to Waterfowl.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

Current regulations in Section 502, Title 14, California Code of Regulations (CCR), provide definitions, hunting zone descriptions, season opening and closing dates, and daily bag and possession limits for hunting of waterfowl. The proposed Frameworks for the 2022-23 season were approved by the four

regional Flyway councils in August and at the U.S. Fish and Wildlife Service (Service’s) Regulations Committee meeting in September. The Frameworks allow for a liberal duck season which includes: a 107-day season; a 7 daily duck limit including 7 mallards but only 2 hen mallards, 1 pintail, 2 canvasback, 2 redheads, and 2 scaup (during an 86-day season); and closing no later than January 31. The duck daily bag limits and season length, as well as the season lengths for geese, are provided as ranges below, to allow the Commission flexibility in determining the final regulations.

A range of season length and bag limit (zero bag limit represents a closed season) are also provided for black brant. The range is necessary, as the black brant Framework cannot be determined until the Pacific Flyway Winter Brant Survey is conducted in January 2022 because the regulatory package is determined by the most current Winter Brant Survey, rather than the prior year survey. The proposed season length and bag limit will be updated per the Black Brant Harvest Strategy pending results of the January 2022 survey. See the Summary of Proposed Waterfowl Hunting Regulations for 2022-23 table, below.

Lastly, Federal regulations require that California’s hunting regulations conform to those of Arizona in the Colorado River Zone and those of Oregon in the North Coast Special Management Area. The Department recommended changes to Section 502 are:

- 1) Increase the duck season length to 102 days in subsection 502(d)(2)(B) for the Southern San Joaquin Valley Zone, in subsection 502(d)(3)(B) for the Southern California Zone, and in subsection 502(d)(5)(B) for the Balance of State Zone.
- 2) Increase the goose season length to 102 days in subsection 502(d)(2)(B) for the Southern San Joaquin Valley Zone and in subsection 502(d)(3)(B) for the Southern California Zone.
- 3) Shift two days from the Early Season for Canada goose to the Late Season in subsection 502(d)(5)(B) for the Balance of State Zone. This reduces the Early Season for Canada geese to three days and allows two days of hunting for Canada geese during the Late Season.
- 4) Allow up to two days of falconry-only season in subsection 502(g)(1)(B)2. for the Balance of State Zone, in subsection 502(g)(1)(B)3. for the Southern San Joaquin Valley Zone and in subsection 502(g)(1)(B)4. for the Southern California Zone.

Minor editorial changes are also proposed to clarify and simplify the regulations and to comply with existing federal Frameworks.

BENEFITS OF THE REGULATIONS

The benefits of the proposed regulations are consistency with federal law and the sustainable management of the state's waterfowl resources. Continued benefits to jobs and/or businesses that provide services to waterfowl hunters will be realized with the continued adoption of waterfowl hunting seasons in 2022–23.

EVALUATION OF INCOMPATIBILITY WITH EXISTING REGULATIONS

The Commission has reviewed its regulations in Title 14, CCR, and conducted a search of other regulations on this topic and has concluded that the proposed amendments to Section 502 are neither inconsistent nor incompatible with existing State regulations. No other State agency has the authority to promulgate waterfowl hunting regulations.

PUBLIC PARTICIPATION

NOTICE IS GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a webinar/teleconference meeting to be held on **Thursday, February 17, 2022**, at 8:30 a.m., or as soon thereafter as the matter may be heard. Instructions for participation in the webinar/teleconference meeting will be posted at www.fgc.ca.gov in advance of the meeting or may be obtained by calling 916–653–4899.

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held in the Monterey/Santa Cruz area of California, on **Thursday, April 21, 2022**, at 8:30 a.m., or as soon thereafter as the matter may be heard. The exact location of this meeting has not yet been determined. As soon as this information is available but not less than ten days before the hearing, a continuation notice will be sent to interested parties providing the exact location. The continuation notice will also be published on the Commission's website.

It is requested, but not required, that written comments be submitted by 5:00 p.m. on April 7, 2022 at the address given below, or by email to FGC@fgc.ca.gov. **Written comments mailed, or emailed to the Commission office, must be received before 12:00 noon on April 15, 2022.** All comments must be received no later than April 21, 2022, at the hearing in the Monterey/Santa Cruz area of California. If you would like copies of any modifications to this proposal, please include your name and mailing address. Mailed comments should be addressed to Fish and

Game Commission, P.O. Box 944209, Sacramento, CA 94244–2090.

AVAILABILITY OF DOCUMENTS

Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulation in underline and strikeout format can be accessed through the Commission website at www.fgc.ca.gov. The regulations as well as all related documents upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, Melissa Miller–Henson, Executive Director, Fish and Game Commission, 715 P Street, Box 944209, Sacramento, California 94244–2090, phone (916) 653–4899. Please direct requests for the above–mentioned documents and inquiries concerning the regulatory process to Melissa Miller–Henson or Maurene Trotter at FGC@fgc.ca.gov or at the preceding address or phone number. **Senior Environmental Scientist, Melanie Weaver, Department of Fish and Wildlife, (via email to melanie.weaver@wildlife.ca.gov or (916) 502–1139), has been designated to respond to questions on the substance of the proposed regulations.**

AVAILABILITY OF MODIFIED TEXT

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Circumstances beyond the control of the Commission (e.g., timing of Federal regulation adoption, timing of resource data collection, timelines do not allow, etc.) or changes made to be responsive to public recommendation and comments during the regulatory process may preclude full compliance with the 15–day comment period, and the Commission will exercise its powers under Section 265 of the Fish and Game Code. Regulations adopted pursuant to this section are not subject to the time periods for adoption, amendment or repeal of regulations prescribed in sections 11343.4, 11346.4, 11346.8 and 11347.1 of the Government Code. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from the agency program staff.

**IMPACT OF REGULATORY ACTION/
RESULTS OF THE ECONOMIC
IMPACT ASSESSMENT**

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The proposed regulations are expected to maintain a similar level of recreational waterfowl hunting opportunity for the public, due to the shifting of 1–2 season days between early and late–season (e.g., Canada goose in Balance of State zone). Shifting of 1–2 days for general duck season affects available days for falconry seasons, which must also be adjusted annually so total season does not exceed 107 days.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California; Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State’s Environment:

The Commission does not anticipate any impacts on the creation or elimination of jobs, the creation of new business, the elimination of existing businesses, or the expansion of businesses in California. The proposed waterfowl regulations will set the 2022–23 waterfowl hunting season dates and bag limits within the federal Frameworks. A consistent total hunting season length of 107 days and shifts in days amongst the season types suggest that the number of hunter–days remains similar to that in previous years, with little to no impacts to jobs and/or businesses that provide services to waterfowl hunters. The Commission anticipates that the proposed 2022–23 waterfowl hunting regulations provide benefit for the health and welfare of California residents by providing opportunity for outdoor activity. The Commission expects no benefits to work safety, but does expect benefit to the environment in that setting these regulations facilitates maintenance of sufficient waterfowl populations and their habitats while providing

for the public’s beneficial use and enjoyment. The most recent Service National Survey of Fishing, Hunting, and Wildlife–Associated Recreation for California estimated that migratory bird hunters contributed about \$169 million to the state economy during the 2011 migratory bird hunting season. However, minor variations in hunting regulations such as the ones proposed for waterfowl are, by themselves, unlikely to provide notable economic stimulus to the state. Businesses that support waterfowl hunting are generally small businesses employing a few individuals and, like all small businesses, are subject to failure for a variety of causes. Additionally, the long–term intent of the proposed regulations is to sustainably manage waterfowl populations, and consequently, the long–term viability of the same small businesses.

- (c) Cost Impacts on a Representative Private Person or Business:
The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.
- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:
None.
- (e) Nondiscretionary Costs/Savings to Local Agencies:
None.
- (f) Programs Mandated on Local Agencies or School Districts:
None.
- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code:
None.
- (h) Effect on Housing Costs:
None.

EFFECT ON SMALL BUSINESS

It has been determined that the adoption of these regulations may affect small business. The Commission has drafted the regulations in Plain English pursuant to Government Code Sections 11342.580 and 11346.2(a)(1).

CONSIDERATION OF ALTERNATIVES

The Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention

of the Commission, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

TITLE 16. BOARD OF VOCATIONAL NURSING AND PSYCHIATRIC TECHNICIANS

NOTICE IS HEREBY GIVEN that the Board of Vocational Nursing and Psychiatric Technicians (Board) is proposing to amend California Code of Regulations (CCR), Title 16, Division 25, Chapters 1 and 2, as described in the Informative Digest below, after considering all comments, objections, and recommendations regarding the proposed action.

PUBLIC HEARING

Any interested person may present statements or arguments orally or in writing relevant to the action proposed at a hearing to be held on March 16, 2022, at 10:00 a.m. via WebEx at:

To participate via Computer/Tablet/Smartphone:

<https://dca-meetings.webex.com/dca-meetings/j.php?MTID=mc629d2fea6a2ce632d11f53977ce435e>

If joining using the link above

Event number: 2487 003 3680
Event password: BVNPT03162022

If joining by phone

+1-415-655-0001 US Toll
Access code: 2487 003 3680
Passcode: 28678031

Representatives of the Board will preside at the hearing. The Board requests, but does not require, persons who wish to speak to please register before the hearing. Prehearing registration may be completed by providing your name and contact information by e-mail to BVNPT.Rulemaking@dca.ca.gov from 8:00 a.m. until the hearing commences. Registered persons will be heard in the order of their registration.

WRITTEN COMMENT PERIOD

Written comments relevant to the action proposed, including those sent by mail, facsimile, or e-mail to the addresses listed under "Contact Person" in this Notice, must be *received* by the Board at its office no later than Tuesday, March 15, 2022, by 5:00 p.m.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

The Board may, after considering all timely and relevant comments, adopt the proposed regulations substantially as described in this Notice, or may modify the proposed regulations if such modifications are sufficiently related to the original text. With the exception of technical or grammatical changes, the full text of any modified proposal will be available for 15 days prior to its adoption from the person designated in this Notice as the Contact Person and will be mailed to those persons who submit written or oral testimony related to this proposal or who have requested notification of any changes to the proposal.

Authority and Reference: Section 2854 of the Business and Professions Code (BPC) authorizes the Board to adopt regulations pertaining to Vocational Nursing. The proposed regulations implement, interpret, and make specific sections 2892.6, 2892.7, and 2895 of the BPC.

Section 4504 of the BPC authorizes the Board to adopt regulations pertaining to Psychiatric Technicians. The proposed regulations implement, interpret, and make specific sections 4510, 4518, 4518.1, 4544, 4545, and 4548 of the BPC.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

The Board is a self-supporting, special fund agency that obtains its revenues from the licensing fees of Licensed Vocational Nurses (LVNs) and Psychiatric Technicians (PTs), and Continuing Education (CE) provider fees. The Board serves and regulates approximately 133,200 Vocational Nurses and 11,700 Psychiatric Technicians. The Board protects consumers from unprofessional and unsafe licensed LVNs and PTs; public protection is the Board's highest priority in its licensing, regulatory and disciplinary functions.

Under existing law, the Board is specifically authorized to collect fees to support its functions. The fees are intended to be sufficient to cover the cost of the Board's regulatory services. BPC sections 2892-2892.7, 2895, 2895.5, 4518, 4518.1, 4544-4545.3, and 4548 establish the Board's fee collection authority and the statutory minimum and maximum fee schedule for applications for the initial license types, applications for renewal and other fees for Board applicants, licensees, and education providers.

In April of 2020, the Department of Consumer Affairs (DCA) completed an analysis of the Board's fund condition and fee structure. This analysis, initiated at the request of Board staff, was to determine the sustainability of the fund and to ensure that the Board was collecting sufficient revenue to fully recover its

cost of regulating individuals and businesses within its jurisdiction.

The analysis found that the current level of fees was not adequate to keep the Board’s fund solvent and that fees needed to be adjusted to reflect the actual cost to the Board to process and service each license type. An analysis was once again conducted by DCA’s Budget Office in August of 2020, concluding that although legislatively authorized fee increases were implemented on January 1, 2019, the reserve funds are not adequate to sustain Board budget expenditures beyond the 2022–23 Budget Year.

In October 2021, the Board staff completed an analysis of the Board’s fee structure. This analysis was initiated to ensure that the Board was collecting sufficient revenue to fully reimburse the Board for the actual cost of processing VN and PT license applications, renewals, CE provider applications and renewals, and all other services authorized by statute. The goal of the analysis was to identify the Board’s actual budgetary need to process each initial and renewal application the Board is required to process. The Board’s only sources of revenues are fees charged for each of the licenses and education provider approvals it issues. The Board also has a mandate to be fully self-supporting, so it is vital that the fees charged to licensees and education providers fully represent the Board’s administrative costs. The data indicated that the full cost of fee-based services the Board provides is not adequately represented in the current fee structure, and without exception, the costs exceed the maximum fee authorized by statute. It is estimated that by the end of Fiscal Year (FY) 2022–23, the Board’s reserve fund will be negative.

The Board proposes to amend Section 2537 and 2537.1 of Article 6 of Chapter 1 of Division 25 of Title 16, and Section 2590 and 2590.1 of Chapter 2 of Article 6 of Division 25 of Title 16 of the CCR to increase license application, license renewal, and CE or education course provider application and renewal fees to address a structural imbalance within the Board’s budget and to pursue a reserve in the Board’s fund consistent with its mission that “Protection of the public shall be the highest priority for the Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”

The objective of this proposed regulation is to increase the Board’s fees enough to meet its projected expenditures beginning in FY 2022–23 in order to maintain the Board’s mission of protection of the public. The Department of Consumer Affairs (DCA) provides budgetary and fiscal administrative support to the Board. According to the DCA, current Board expenditures necessary to administer its regulatory

functions exceed the amount of funds collected from applicant, licensees, and CE program providers. This proposal will increase the Board’s application, renewal, and other fees to ensure that the Board will be able to continue to meet its consumer protection mandate by allowing the Board to continue its licensing and enforcement responsibilities. This regulatory proposal seeks to make amendments to the Board’s fee schedules, which will help to reduce the Board’s structural budget imbalance and to maintain a sufficient fund balance reserve until the Board can increase statutory fee levels to completely eliminate the structural imbalance.

The Board is proposing the following changes:

Amend 16 CCR section 2537 (LVN applicant and licensee fees)

The Board proposes to amend 16 CCR 2537 to increase the fees charged to LVN applicants, and licensees in an amount necessary to help recover costs that have negatively impacted the Board’s operating budget. The proposed amendments to section 2537 would increase the Board’s fees, as follows:

- (a) For application for licensure by examination by applicants who have successfully completed the prescribed course of study in a California approved vocational nursing program, the fee would increase from \$220 to \$300.
- (b) For application for licensure by examination by applicants who are qualified to take the examination by methods other than that specified in section 2537 (a), the fee would increase from \$250 to \$330.
- (c) For application for licensure by endorsement, the fee would increase from \$220 to \$300.
- (d) For re-examination for licensure after the first exam attempt, the fee would increase from \$220 to \$300.
- (e) The biennial renewal fee would increase from \$220 to \$300.
- (f) The delinquency fee for failure to pay the biennial renewal fee would increase from \$110 to \$150.
- (g) The initial license fee would be increased to an amount equal to the biennial renewal fee (from \$220 to \$300).
- (h) The fee to be paid for an interim permit would increase from \$20 to \$50.

Amend 16 CCR section 2537.1 (LVN CE program provider fees)

The Board proposes to amend 16 CCR 2537.1 to increase the fees charged to LVN CE or educational course providers in an amount necessary to help recover costs that have negatively impacted the Board’s operating budget. The proposed amendments to section 2537.1 would increase the Board’s fees, as follows:

- (a) The application fee for any provider of a course in continuing education would increase from \$150 to \$250.
- (b) The biennial renewal fee for any provider of a course in continuing education would increase from \$150 to \$250.
- (c) The fee to be paid upon filing of an application from any provider of a course in Intravenous Therapy would increase from \$150 to \$250.
- (d) The biennial renewal fee for any provider of a course in Intravenous Therapy would increase from \$150 to \$250.
- (e) The fee to be paid upon filing of an application from any provider of a course in Blood Withdrawal would increase from \$150 to \$250.
- (f) The biennial renewal fee for any provider of a course in Blood Withdrawal would increase from \$150 to \$250.
- (g) The fee to be paid upon filing of an application from any provider of a course in Intravenous Therapy with Blood Withdrawal would increase from \$150 to \$250.
- (h) The biennial renewal fee for any provider of a course in Intravenous Therapy with Blood Withdrawal would increase from \$150 to \$250.

Amend 16 CCR section 2590 (PT applicant and licensee fees)

The purpose of amending 16 CCR 2590 is to increase the fees charged to PT applicants, and licensees in an amount necessary to help recover costs that have negatively impacted the Board's operating budget. The proposed amendments to section 2590 would increase the Board's fees, as follows:

- (a) The fee to be paid upon the filing of an application for licensure by examination by applicants who have successfully completed the prescribed course of study in a California approved school for preparation of psychiatric technicians would increase from \$265 to \$345.
- (b) The fee to be paid upon the filing of an application for licensure by examination by applicants qualified to take the examination by methods other than that specified in Section 2590 (a) would increase from \$295 to \$375.
- (c) The fee to be paid upon the filing of an application for licensure by endorsement would increase from \$220 to \$300.
- (d) The fee to be paid for any re-examination for licensure after the first attempt would increase from \$265 to \$345.
- (e) The biennial renewal fee to be paid upon the filing of an application for renewal would increase from \$220 to \$300.

- (f) The delinquency fee for failure to pay the biennial renewal fee within the prescribed time would increase from \$110 to \$150.
- (g) The initial license fee would be increased to an amount equal to the biennial renewal fee (from \$220 to \$300).
- (h) The fee to be paid for an interim permit would increase from \$20 to \$50.
- (i) The fee to be paid for a duplicate license or wall certificate would increase from \$20 to \$50.
- (j) The fee to be paid for processing endorsement verification of licensure papers to other states would increase from \$20 to \$50.
- (k) The fee to be paid for post-licensure certification in blood withdrawal would increase from \$20 to \$50.

Amend 16 CCR section 2590.1 (PT CE program provider fees)

The purpose of amending 16 CCR 2590.1 is to increase the fees charged to CE or educational course program providers in an amount necessary to help recover costs that have negatively impacted the Board's operating budget. The proposed amendments to section 2590.1 would increase the Board's fees, as follows:

- (a) The fee to be paid upon filing of an application for any provider of a course in continuing education would increase from \$150 to \$250.
- (b) The biennial renewal fee for any provider of a course in continuing education would increase from \$150 to \$250.
- (c) The fee to be paid upon filing of an application from any provider of a course in Blood Withdrawal would increase from \$150 to \$250.
- (d) The biennial renewal fee for any provider of a course in Blood Withdrawal would increase from \$150 to \$250.

Other amendments to the proposed text:

Subdivision (e) of sections 2537 and 2590 is amended to add "re" so it reads "re-examination" and "attempt" after the word "first" to clarify that that this fee applies to the re-taking of the same examination type, and for the reason of a failed examination.

This regulatory proposal also adds BPC section 2895 to the reference section cited in the Note at the end of the proposed text for section 2537, to more accurately reflect the statutory provisions being implemented and to more properly identify the source of the fee schedule authority for the Vocational Nursing Practice Act.

ANTICIPATED BENEFITS OF PROPOSAL

California residents would benefit from the proposed regulation because the fee increases will enable

the Board to continue regulating the practice of LVNs, PTs, and precicensure and CE providers; the fees will support the Board's daily functions, including the enforcement program. The Board protects consumers by investigating complaints against LVNs and PTs and by disciplining licensees for violations of the Vocational Nursing Practice Act and Psychiatric Technicians Law through its enforcement program. The enforcement program also monitors licensees who have been placed on probation. The Board's highest priority is consumer protection, and the proposed revisions to Title 16 CCR sections 2537, 2537.1, 2590, and 2590.1 will allow the Board to continue its important consumer-focused functions.

CONSISTENCY AND COMPATIBILITY WITH EXISTING STATE REGULATIONS

During the process of developing these regulations and amendments, the Board conducted a search of similar regulations on this topic and concluded that these regulations are neither inconsistent nor incompatible with existing state regulations.

FISCAL IMPACT AND RELATED ESTIMATES

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

The proposed regulations are anticipated to increase the Board's revenues by approximately \$6.5 million per year and up to \$64,908,950 million over a ten-year period. Since the Board already performs the workload associated with these programs and fees, the Board does not anticipate any additional workload or costs to implement the proposed regulations.

Nondiscretionary Costs/Savings to Local Agencies: None.

Local Mandate: None.

Cost to Any Local Agency or School District for Which Government Code Sections 17500–17630 Require Reimbursement: None.

Business Impact: This regulation may have an economic impact on businesses, specifically, the Board's licensees and applicants. This determination is based upon the following facts. The regulation would increase fees for increase the fees charged to LVN and PT license applicants, LVN and PT licensees, and LVN and PT, CE and educational course or continuing education program (CE) providers. To the extent these applicants apply for licensure or licensees opt to renew their licenses and provider approvals, the proposed regulations will impact them.

However, the proposed regulations will not have a significant statewide adverse economic impact on

businesses, including the ability to compete with other businesses in California, because the fee increases are considered to be very minor compared to the income of most applicants and licensees in these professions. This proposal represents a \$25–80 increase for licensing, permit, renewal, verification, and delinquency fees and an additional \$100 increase for application and renewal for CE or educational course or program providers. Further, as the regulations do not materially increase the amount of fees charged to CE program providers, any financial impact on the businesses should be minor and offset by CE course fees. Please see the Initial Statement of Reasons for further detail.

Cost Impact on Representative Private Person or Business: The regulation would increase fees for increase the fees charged to LVN and PT license applicants, LVN and PT licensees, and LVN and PT, CE and educational course or continuing education program (CE) providers. To the extent these applicants apply for licensure or licensees opt to renew their licenses and provider approvals, the proposed regulations will impact them. Initial costs for an individual are estimated between \$25–100.

The proposed regulations are anticipated to result in an economic impact to applicants and licensees ranging from approximately \$25 to \$100 per year over a ten-year period. The total cost for the regulation over its lifetime is estimated to be \$64,908,950.

Please see the Initial Statement of Reasons for further detail.

RESULTS OF THE ECONOMIC IMPACT ASSESSMENT:

Impact on Jobs/Businesses

The Board has determined that this regulatory proposal will not have a significant impact on the creation of jobs or new businesses or the elimination of jobs or existing businesses or the expansion of businesses in the State of California because these costs are considered minor compared to the income of most applicants and licensees in these professions and for the businesses who offer CE programs approved by the Board.

Benefits of the Proposed Action: Protection of the public is the Board’s highest priority in exercising its licensing, regulatory and disciplinary functions. The Board ensures that only qualified persons are licensed vocational nurses and psychiatric technicians by enforcing education requirements, standards of practice, and by educating consumers of their rights. This regulatory proposal will benefit the health and welfare of California residents because the proposal will increase the Board’s revenue and funding available to continue the Board’s enforcement, investigative, licensing, examination, and public outreach operations. The proposal is not anticipated to benefit worker safety or the state’s environment.

BUSINESS REPORTING REQUIREMENTS

The regulatory action does not require businesses to file a report with the Board.

EFFECT ON SMALL BUSINESS

While the Board does not have nor does it maintain data to define if any of its licensees are a “small business” as defined in Government Code section 11342.610, the Board has made an initial determination that any adverse economic impact will not be significant for small businesses, because the increased expense to any business, small or otherwise, is not more than \$100 per year.

EFFECT ON HOUSING COSTS

The Board has determined that the proposed regulations will not affect housing costs in the State of California.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Board must determine that no reasonable alternative it considered to the regulation or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed; as effective and less burdensome to affected private persons than the proposal described in this Notice; or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Any interested person may submit comments to the Board in writing relevant to the above determinations at 2535 Capitol Oaks Drive, Suite 205, Sacramento, California 95833.

AVAILABILITY OF STATEMENT OF REASONS AND RULEMAKING FILE

The Board has prepared an Initial Statement of Reasons for the proposed action and has available all the information upon which the proposal is based.

TEXT OF PROPOSAL

Copies of the exact language of the proposed regulations, and any document incorporated by reference, and of the Initial Statement of Reasons, and all the information upon which the proposal is based, may be obtained upon request from the person designated in the Notice under “Contact Person,” with the Board of Vocational Nursing and Psychiatric Technicians, at 2535 Capitol Oaks Drive, Suite 205, Sacramento, California 95833.

AVAILABILITY AND LOCATION OF THE FINAL STATEMENT OF REASONS AND RULEMAKING FILE

All the information upon which the proposed regulations is based is contained in the rulemaking file, which is available for public inspection by contacting the person named below.

You may obtain a copy of the Final Statement of Reasons, once it has been prepared, by making a written request to the contact person, named below, or by accessing the Board’s website at www.bvnpt.ca.gov.

CONTACT PERSONS

Inquiries or comments concerning the proposed rulemaking action may be addressed to:

Name: Doris Pires
Board of Vocational Nursing and
Psychiatric Technicians
Address: 2535 Capitol Oaks Drive, Suite 205
Sacramento, CA 95833
Telephone: (916) 263-7864
E-Mail
Address: BVNPT.Rulemaking@dca.ca.gov

The backup contact person is:

Name: Candace Raney
Board of Vocational Nursing and
Psychiatric Technicians
Address: 2535 Capitol Oaks Drive, Suite 205
Sacramento, CA 95833
E-Mail
Address: BVNPT.Rulemaking@dca.ca.gov

E-Mail: Please submit any comments by e-mail to: BVNPT.Rulemaking@dca.ca.gov.

Website Access: Materials regarding this proposal can be found at https://www.bvnpt.ca.gov/about_us/bvnpt_regulations.shtml.

GENERAL PUBLIC INTEREST

DEPARTMENT OF FISH AND WILDLIFE

CESA CONSISTENCY DETERMINATION
REQUEST FOR
ELK RIVER SEDIMENT REMEDIATION AND
HABITAT REHABILITATION PROJECT
2080-2022-001-01
HUMBOLDT COUNTY

The California Department of Fish and Wildlife (CDFW) received a notice on January 11, 2022, that California Trout (CalTrout) proposes to rely on a consultation between federal agencies to carry out a project that may adversely affect a species protected by the California Endangered Species Act (CESA). The proposed project involves testing sediment remediation approaches as well as integrating large wood to the North Fork Elk River. Proposed activities will include, but are not limited to, minor dredging (removal of in-channel sediment deposits), vegetation management (removal of brushy vegetation, targeting willows and blackberry), and creation of inset floodplains (lowering terraces and benches along banks) to provide winter high-flow refugia, and integration of large wood habitat features. The proposed project will occur on the lower North Fork Elk River in unincorporated Humboldt County near the City of Eureka, California. The Project area extends from the mainstem Elk River just below the confluence of the North and South Forks approximately one mile up the North Fork.

The National Marine Fisheries Service (Service) issued a federal biological opinion (BO) (NMFS Number WCRO-2019-01665) in a memorandum to the U.S. Army Corps of Engineers on January 22, 2020, which considered the effects of the proposed project on state and federally threatened Southern Oregon/Northern California Coast coho salmon (*Oncorhynchus kisutch*), and federally threatened Northern California steelhead (*O. mykiss*), a subset of which, Northern California summer-run steelhead, is a candidate for listing under CESA.

Pursuant to California Fish and Game Code section 2080.1, CalTrout is requesting a determination that the BO and its associated Incidental Take Statement (ITS) are consistent with CESA for purposes of the proposed project. If CDFW determines the BO and its associated ITS are consistent with CESA for the pro-

posed project, CalTrout will not be required to obtain an incidental take permit under Fish and Game Code section 2081 subdivision (b) for the proposed project.

DEPARTMENT OF FISH AND WILDLIFE

CALIFORNIA ENDANGERED SPECIES ACT
CONSISTENCY DETERMINATION NO. 2080-
2021-015-03

Project: Colgan Village Residential
Housing Project
Location: Sonoma County
Applicant: Colgan Village, LLC
Notifier: Huffman-Broadway Group, Inc.

Background

Colgan Village, LLC (Applicant) proposes to develop a 65-lot residential subdivision on 4.61 acres. The Colgan Village Residential Housing Project (Project) will include the use of heavy equipment to grade and prepare the Project site for building pads, access roads, utility infrastructure, sidewalks and landscaped areas. The Project site will be accessed from Dutton Meadow Drive. Equipment to be used in the grading will include front-end loaders, dump trucks, and an excavator back-hoe. Equipment and materials storage and staging will be established in an area close to Dutton Meadow Drive. The Project is located at 3011 Dutton Meadow Drive in the City of Santa Rosa, Sonoma County. It is on Assessor's Parcel Number (APN) 043-121-015 at Latitude 38.40274, Longitude -122.73076.

The Project also includes the enhancement of a mitigation site, including the creation of a 0.16 acre 30- to 36-inch-deep California tiger salamander (CTS, *Ambystoma californiense*) breeding pool, a temporary 0.14 acre access route that will be used to access the breeding pool construction area, and a 0.36 acre temporary work area. The mitigation site is located at 260 Horn Avenue in the City of Santa Rosa, Sonoma County. It is on APN 045-041-026 at Latitude 38.375615, Longitude -122.706035.

The Project activities described above are expected to incidentally take CTS¹, where those activities take place within the Project site. In particular, CTS could be incidentally taken as a result of crushing or entombing of individuals during construction; cut and

¹ Pursuant to Fish and Game Code section 86, "Take" means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." See also *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 507 (for purposes of incidental take permitting under Fish and Game Code section 2081, subdivision (b), "take"...means to catch, capture or kill").

fill grading; vehicular access; collapsing of burrows; and entrapment in excavated pits, trenches, or within construction materials. Incidental take may also occur in the form of pursue, catch, capture, or attempt to do so from CTS surveying and relocating operations. CTS is designated as an endangered species pursuant to the federal Endangered Species Act (ESA) (16 U.S.C. § 1531 et seq.) and a threatened species pursuant to the California Endangered Species Act (CESA) (Fish & Game Code, § 2050 et seq.). (See Cal. Code Regs., title 14, § 670.5, subdivision (b)(3)(G).)

CTS individuals are documented as present at the Project site and approximately 950 feet to the north, and there is suitable CTS habitat within and adjacent to the Project site. Because of the documented presence of CTS at the Project site, proximity of the nearest documented CTS, dispersal patterns of CTS, and the presence of suitable CTS habitat within the Project site, the United States Fish and Wildlife Service (Service) determined that CTS is reasonably certain to occur within the Project site and that Project activities are expected to result in the incidental take of CTS.

According to the Service, the Project will result in the temporary loss of 0.36 acre of CTS upland habitat, and the permanent loss of 4.21 acres of CTS upland habitat. A 0.29-acre portion of the Project was already exempted under ESA for the Southwest Estates Residential Project and permitted under CESA Incidental Take Permit Number 2081-2015-030-03.

Because the Project is expected to result in take of a species designated as endangered under the federal ESA, the U.S. Army Corps of Engineers (Corps) consulted with the Service as required by the ESA. On December 17, 2021, the Service issued a biological opinion (Service file Number 08ESMF00-2018-F-339) (BO) to the Corps. The BO describes the Project, requires the Applicant to comply with terms of the BO and its incidental take statement (ITS), and incorporates additional measures.

The ITS also requires the Applicant to implement and adhere to measures contained within the Project Biological Assessment (BA).

The project will also impact 0.22 acre of wetland habitat suitable for Sonoma sunshine (*Blennosperma bakeri*), Burke's goldfields (*Lasthenia burkei*) and Sebastopol meadowfoam (*Limnanthes vinculans*), species designated as endangered under ESA, and endangered under CESA, as further described below. The Applicant provided survey reports to CDFW documenting negative findings for the above plant species and take of these species is not expected to occur.

On December 21, 2021, the Director of the Department of Fish and Wildlife (CDFW) received a notice from Huffman-Broadway Group, Inc. on behalf of the Applicant requesting a determination pursuant to Fish and Game Code section 2080.1 that the ITS and its ac-

companying BO are consistent with CESA for purposes of the Project and CTS. (Cal. Reg. Notice Register 2021, Number 53-Z, page 1806.)

Determination

CDFW has determined that the ITS, along with its accompanying BO, is consistent with CESA as to the Project and CTS because the mitigation measures contained in the BO and ITS, as well as the conditions in the BA, meet the conditions set forth in Fish and Game Code section 2081, subdivisions (b) and (c), for authorizing incidental take of CESA-listed species. Specifically, CDFW finds that: (1) take of CTS will be incidental to an otherwise lawful activity; (2) the mitigation measures identified in the ITS and BO, and BA, will minimize and fully mitigate the impacts of the authorized take; (3) adequate funding is ensured to implement the required avoidance minimization and mitigation measures and to monitor compliance with, and effectiveness of those measures; and (4) the Project will not jeopardize the continued existence of CTS. The mitigation measures in the ITS, BO, and BA include, but are not limited to, the following:

Avoidance, Minimization, and Mitigation Measures

- 1) Compensation for approximately 4.21 acres of impacts to CTS habitat will be provided consistent with requirements of the Santa Rosa Plain Conservation Strategy and the Programmatic Biological Opinion (Service file number 81420-2008-F-0261). The CTS compensation proposed by the Applicant will total 8.42 acres. The CTS compensation will be provided at an off-site location (an 8.42-acre portion of the Meadowfoam site adjacent to the Horn Avenue Wetland Mitigation Bank). The CTS compensation will be implemented prior to initiation of site preparation for the project. Mitigation for 0.36 acre of temporary impacts to CTS upland habitat resulting from breeding pond construction will include placement of three 6-foot-long by 4-foot-wide by 3-foot-high wood piles on the Permittee responsible mitigation/Habitat Management (PRM/HM) lands to provide refugia for the CTS. The wood piles will be placed in areas devoid of small mammal burrows
- 2) A qualified biological monitor will conduct a training session for all construction workers before work is started on the project. The training program is for all construction personnel including contractors and subcontractors. The training will include, at a minimum, a description of CTS, and the applicable listed plant(s) and their habitat within the Project area; an explanation of the species' status and protection under state and federal laws; the avoidance and minimization measures to be implemented to reduce loss of these

- species; and communication and work stoppage procedures in case a listed species is observed within the Project area. A fact sheet conveying this information will be prepared and distributed to all construction personnel. The Applicant shall provide interpretation for non-English speaking workers.
- 3) Access routes, number and size of staging areas, and work areas, will be limited to the minimum necessary to achieve the project goals. Routes and boundaries of the roadwork will be clearly marked prior to initiating construction/grading. Environmentally Sensitive Areas (ESAs) containing sensitive habitats adjacent to or within construction work areas for which physical disturbance is not allowed will be clearly delineated using high visibility orange fencing. The final project plans will depict all locations where ESA fencing will be installed and will provide installation specifications. The bid solicitation package will include special provisions and clearly describe acceptable fencing material and prohibited construction-related activities including vehicle operation, material and equipment storage, access roads and other surface-disturbing activities within ESAs. The ESA fencing will remain in place throughout the duration of the proposed action, while construction activities are ongoing, and will be regularly inspected and fully maintained at all times.
 - 4) The access route to the CTS breeding pond construction area on the mitigation site will avoid small mammal burrows or other suitable CTS refugia, and wetlands. A biological monitor will flag a 10-foot buffer around small mammal burrows or other suitable CTS refugia and other Project personnel will avoid the buffer area. Rubber-tired equipment and vehicles driving across temporarily placed wood or steel mats shall be used to minimize access route impacts unless otherwise approved in writing by the Service and CDFW based on the condition of habitat within the route.
 - 5) Prior to the start of construction, Wildlife Exclusion Fencing (WEF) will be installed at the edge of the project footprint in all areas where CTS could enter the construction area. WEF with exit ramps may be required to allow any CTS onsite to move into an adjacent habitat offsite. The location of the fencing shall be determined by the onsite project manager and the Service-approved biologist in cooperation with the Service prior to the start of staging or surface disturbing activities. A conceptual fencing plan shall be submitted to the Service for review and approval prior to WEF installation. The location, fencing materials, installation specifications, and monitoring and repair criteria shall be approved by the Service prior to start of construction. The Applicant shall include the WEF specifications on the final project plans. The Applicant shall include the WEF specifications including installation and maintenance criteria in the bid solicitation package special provisions. The WEF shall remain in place throughout the duration of the project and shall be inspected weekly and fully maintained. Repairs to the WEF shall be made within 24 hours of discovery. Upon project completion the WEF shall be completely removed, the area cleaned of debris and trash, and returned to natural conditions.
 - 6) The Corps through its Applicant shall prepare and submit a Relocation Plan for the Service's written approval. The Relocation Plan shall contain the name(s) of the Service-approved biologist(s) to relocate CTS, method of relocation, a map, and description of the proposed release site(s) and burrow(s), and written permission from the landowner to use their land as a relocation site. At various times, a conservation bank may be a desired location to relocate CTS from a salvage site; however, no conservation bank may receive relocated CTS until all the bank's credits have been sold to prevent interfering with their performance criteria and credit release schedule.
 - 7) Ground disturbance will commence between April 15 and October 15 of any given year, depending on the level of rainfall and/or site conditions. However, grading and other disturbance in pools and ponds, if unavoidable, shall be conducted only when dry, typically between July 15 and October 15. Work within a pool or wetland may begin prior to July 15 if the pool or wetland has been dry for a minimum of 30 days prior to initiating work. Any work in pools and wetlands that are holding water shall be subject to approval of the Service. Work will be limited to periods of low rainfall (less than 0.08 inch per 24-hour period and less than 40 percent chance of rain). Construction activities shall cease 24 hours prior to a 40 percent or greater forecast of rain from the National Weather Service. Construction may continue 24 hours after the rain ceases if no precipitation is in the 24-hour forecast. Any work in pools and wetlands that are holding water shall be subject to approval of the Service. If work must continue when rain is forecast (greater than 40 percent chance of rain), a Service-approved biologist(s) shall survey the Project site before construction begins each day rain is forecast. If rain exceeds 0.5 inch during a 24-hour period, work shall cease until National Weather Service

forecasts no further rain. This restriction is not applicable for areas within 1.3 miles of potential or known CTS breeding sites once the Applicant encircles the site with WEF.

- 8) An erosion and sediment control plan will be implemented to prevent impacts of wetland restoration and construction on habitat outside the work areas. A Stormwater Pollution Prevention Plan (SWPPP) shall be prepared in full accordance with the State Water Resources Control Board, National Pollutant Discharge Elimination System Construction General Permit. The SWPPP will include Best Management Practices (BMPs) for controlling sediment, turbidity and the release of other pollutants into water courses during construction. The SWPPP will also include a rainy season erosion prevention and monitoring plan to ensure that surface runoff from the construction site meets Regional Water Quality Control Board (RWQCB) water quality standards and objectives for the Hydrologic Unit and Hydrologic Subunit in which the Project is located. The SWPPP will be subject to the approval of the RWQCB prior to the start of work.

For CTS pool construction at the PRM/HM land site, BMPs shall be used for controlling sediment, turbidity, and the release of other pollutants into wetland areas during construction. All excavated soils shall be hauled and disposed of off-site at a location which is not suitable habitat for federal- or state-listed species.

Monitoring and Reporting Measures

- 1) Qualified biological monitor(s) will be on site each day during initial grading and trenching. The biological monitor(s) shall conduct clearance surveys at the beginning of each day and regularly throughout the workday when construction activities are occurring that may result in take of CTS. All suitable aquatic and upland habitat including refugia habitat such as small woody debris, refuse, burrow entries, etc., shall be duly inspected.

Before the start of work each day, the biological monitor will check for animals under all equipment such as vehicles and stored pipes. The biological monitor will check all excavated steep-walled holes or trenches greater than one foot deep for any CTS. CTS will be removed by the biological monitor and relocated according to the Relocation Plan. To prevent inadvertent entrapment of animals during construction, all excavated, steep-walled holes or trenches more than 6 inches deep will be covered with plywood (or similar materials) that leave no entry gaps at the close of each working day or provided with one

or more escape ramps constructed of earth fill or wooden planks. The Service-approved biologist shall inspect all holes and trenches at the beginning of each workday and before such holes or trenches are filled. All replacement pipes, culverts, or similar structures stored in the project footprint overnight will be inspected before they are subsequently moved, capped, and/or buried.

- 2) A Service-approved biologist will be present during all vegetation clearing and grubbing activities. Grasses and weedy vegetation should be mowed to a height no greater than 6 inches prior to ground-disturbing activities. All cleared vegetation will be removed from the project footprint to prevent attracting animals to the project site. Prior to vegetation removal, the Service-approved biologist shall thoroughly survey the area for CTS. Once the qualified biologist has thoroughly surveyed the area, clearing and grubbing may continue without further restrictions on equipment; however, the qualified biologist shall remain onsite to monitor for CTS until all clearing and grubbing activities are complete.
- 3) Only Service-approved biologists shall participate in activities associated with the capture, handling, relocation, and monitoring of CTS. If a CTS is encountered, work activities within 50 feet of the individual shall cease immediately and the Onsite Project Manager and Service-approved biologist shall be notified. Based on the professional judgment of the Service-approved biologist, if project activities can be conducted without harming or injuring the individual(s), it may be left at the location of discovery and monitored by the Service-approved biologist. All project personnel shall be notified of the finding and at no time shall work occur within 50 feet of the CTS without a Service-approved biologist present. If relocation of the species to another site has been approved by the Service and CDFW prior to the start of the Project, the following steps shall be followed:

- a. Prior to handling and relocation, the Service-approved biologist will take precautions to prevent introduction of amphibian diseases in accordance with the Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander (Service 2003). Disinfecting equipment and clothing is especially important when biologists are coming to the Project area to handle amphibians after working in other aquatic habitats. CTS shall also be handled and assessed according to the Restraint and

Handling of Live Amphibians (U.S. Geological Survey National Wildlife Health Center 2001).

- b. CTS shall be captured by hand, dipnet, or other Service–approved methodology, transported, relocated and released as soon as practicable the same day of capture. Individuals should be relocated to areas with one or more potential breeding pools and an active burrow system (unless otherwise approved in writing by the Service). The Service shall be notified within 24 hours of all capture, handling, and relocation efforts.
- c. If an injured CTS is encountered and the Service–approved biologist determines the injury is minor or healing and the CTS is likely to survive, the CTS shall be released as soon as possible, in accordance with the Regulatory Division Chief 9 Service–approved Relocation Plan. The relocated CTS shall be monitored until it is determined that it is not imperiled by predators or other dangers.
- d. If the Service–approved biologist determines that the CTS has major or serious injuries as a result of Project–related activities the Service–approved biologist shall immediately take it to a licensed veterinarian, the Sonoma County Wildlife Rescue, or another Service–approved facility. If taken into captivity the individual shall remain in captivity and not be released into the wild unless it has been kept in quarantine and the release is authorized by the Service. The Applicant shall bear any costs associated with the care or treatment of such injured individuals. The circumstances of the injury, the procedure followed, and the final disposition of the injured animal shall be documented in a written incident report.
- e. The Permittee shall notify the Service of an injured or dead CTS in the action area within 2 calendar days of the finding. Written notification to the Service shall include the following information: the species, number of animals taken or injured, sex (if known), date, time, location of the incident or of the finding of a dead or injured animal, how the individual was taken, photographs of the specific animal, the names of the persons who observe the take and/or found the animal, and any other pertinent information. Dead specimens will be preserved, as appropriate, and held in a secure location until

instructions are received from the Service regarding the disposition of the specimen.

- 4) The biological monitor(s) shall maintain monitoring records that include: (1) the beginning and ending time of each day’s monitoring effort; (2) a statement identifying the listed species encountered, including the time and location of the observation; (3) the time the specimen was identified and by whom and its condition; (4) the capture and release locations of each individual; (5) photographs and measurements (snout to vent and total length) of each individual; and (6) a description of any actions taken. The biological monitor(s) shall maintain complete records in their possession while conducting monitoring activities and shall immediately provide records to the Service upon request. All monitoring records shall be provided to the Service within 30 days of the completion of monitoring work.
- 5) Qualified biological monitor(s) will possess a working wireless/mobile phone whose number will be provided to the Service prior to the start of construction and ground disturbance. The biological monitor(s) shall keep a copy of the biological opinion in his/her possession when onsite. Through the Onsite Project Manager or his/her designee, the biological monitor(s) shall be given the authority to communicate verbally, by telephone, email, or hardcopy with the Applicant, project personnel, and any other person(s) at the project site or otherwise associated with the project to ensure that the terms and conditions of the biological opinion and appendage are met. The biological monitor(s) shall have oversight over implementation of the terms and conditions in the biological opinion and shall have the authority to stop project activities if they determine any of the associated requirements are not being fulfilled. If the biological monitor exercises this authority, the Service shall be notified by telephone and email within 24 hours. The Service contact is the Coast Bay Division Supervisor of the Endangered Species Program, Sacramento Fish and Wildlife Office at telephone number (916) 414–6623.
- 6) If verbally requested before, during, or upon completion of ground disturbance and construction activities, the Applicant will ensure the Service can immediately and without delay, access and inspect the project site for compliance with the project description, Conservation Measures, and reasonable and prudent measures of the programmatic biological opinion and appendage, and to evaluate project effects to the CTS and its habitat.

The BO requires the Applicant to submit monitoring reports to the Service within 30 days of completion of

the monitoring work. Although not a condition of the BO, CDFW requests a copy of the monitoring reports as well. The reports should include dates construction occurred.

Mitigation Measures and Security

- 1) The Applicant shall either purchase 8.42 acres of CTS credits from a CDFW-approved mitigation or conservation bank OR shall provide for both the permanent protection and management of 8.42 acres of PRM/HM lands pursuant to below and the calculation and deposit of the management funds. Permanent protection and funding for perpetual management of compensatory habitat must be complete before starting Covered Activities, or within 18 months of the effective date of a CDFW Consistency Determination for the subject Project if Security is provided for all uncompleted obligations. The funding estimates are based on mitigation proposed for CDFW approval of 8.42 acres of PRM/HM lands at 260 Horn Avenue, Santa Rosa, California.
 - a. Land acquisition costs for HM lands estimated at \$105,878/acre for 8.42 acres: **\$891,493**. Land acquisition costs are estimated using local fair market current value for lands within habitat values meeting mitigation requirements.
 - b. Start-up costs for HM lands, including initial site protection and enhancement costs estimated at **\$107,752**.
 - c. Contingency security funding estimated at **\$10,775**.
 - d. Interim management period funding estimated at **\$57,698**.
 - e. Long-term management funding estimated at \$62,542/acre for 8.42 acres: **\$526,602**. Long-term management funding is estimated initially for the purpose of providing Security to ensure implementation of HM lands management.
 - f. Restoration of on-site temporary impacts to CTS habitat, calculated at \$4,880/acre for 0.36 acre: **\$1,757**.
 - g. Related transaction fees including but not limited to account set-up fees, administrative fees, title and documentation review and related title transactions, expenses incurred from other state agency review, and overhead related to transfer of HM lands to CDFW as estimated at **\$3,000**.
- 2) The Applicant may proceed with Covered Activities only after the Applicant has ensured funding (Security) to complete any activity required that has not been completed before Covered Activi-

ties begin. Permittee shall provide Security as follows:

- a. The Security shall be in the amount of **\$1,599,077**. This amount is estimated based on the cost estimates identified above.
 - b. The Security shall be in the form of an irrevocable letter of credit.
 - c. The Security shall allow CDFW to draw on the principal sum if CDFW, in its sole discretion, determines that the Permittee has failed to comply with the Conditions of Approval of this Consistency Determination.
- 3) The Security (or any portion of the Security then remaining) shall be released to the Applicant after CDFW has conducted an onsite inspection and received confirmation that all the secured requirements have been satisfied, as evidenced by:
 - a. Written documentation of the acquisition of HM lands;
 - b. Copies of all executed and recorded conservation easements;
 - c. Written confirmation from the approved Endowment Manager of its receipt of the full Endowment; and
 - d. Timely submission of all required reports.
 Or if CTS credits are purchased:
 - e. Receipt of executed copies of Bill(s) of Sale; Receipt of executed copies of Payment Receipt(s).

Even if Security is provided, the Applicant must complete the required acquisition, protection and transfer of all HM lands and record any required conservation easements no later than 18 months from the effective date of this Consistency Determination.

Pursuant to Fish and Game Code section 2080.1, take authorization under CESA is not required for the Project for incidental take of CTS, provided the Applicant implements the Project as described in the BO, including adherence to all measures contained therein, and complies with the mitigation measures and other conditions described in the ITS and BO and BA. If there are any substantive changes to the Project, including changes to the mitigation measures, or if the Service amends or replaces the ITS and BO or the BA, the Applicant shall be required to obtain a new consistency determination or a CESA incidental take permit for the Project from CDFW. (See generally Fish & Game Code, §§ 2080.1, 2081, subdivisions (b) and (c)).

In making this determination, CDFW acknowledges that the BO addresses Sonoma sunshine, Burke's

goldfields, and Sebastopol meadowfoam, species designated as endangered under ESA, and endangered under CESA. (See Cal. Code Regs., title 14, § 670.2, subdivisions (a)(2)(B), (a)(2)(M) & (a)(18)(D)). Habitat for these species is known to occur within the Project site, as described above. The Applicant is aware that, for purposes of CESA, take of Sonoma sunshine, Burke's goldfields and Sebastopol meadowfoam as defined by state law is prohibited, except as authorized by the Fish and Game Code. (See generally Fish & Game Code, §§ 86, 2080.)

CDFW's determination that the Service BO and ITS are consistent with CESA is limited to CTS.

**DEPARTMENT OF
FISH AND WILDLIFE**

**CALIFORNIA ENDANGERED SPECIES ACT
CONSISTENCY DETERMINATION NO.
2080-2021-014-05**

Project: 9500 Batchelder Road,
Los Alamos, CA, 93440
(Assessor's Parcel Number (APN)
099-010-060)

Location: Santa Barbara County

Applicant: Farming First, LLC

Notifier: Morgan Krapes-Kiah, Flowers and
Associates, Inc

Background

Farming First, LLC (Applicant) proposes to develop a cannabis cultivation project (Project) on 93 acres of a 746.88-acre parcel (APN 099-010-060) located at 9500 Batchelder Road, Los Alamos, County of Santa Barbara, California, 93440 (Property). The Project includes the conversion and use of an active, historically cultivated farm and related support facilities including access roads, ancillary structures, and existing utilities present on site.

Cultivation Areas

Development of the cultivation areas will be broken into three phases to manage fees associated with the purchase of mitigation credits from the La Purisima Conservation Bank. The phases are as follows: Phase 1 includes installation of 21.6 acres of hoop houses located between the farm road and the creek buffer, in the center of the Project. Phase 1 development also includes the structures and parking for the Project; Phase 2 includes installation of 25 acres of hoop houses located at the south end of the Project. This cultivation area will be installed after Phase 1 is producing revenue. Phase 3 includes installation of 46.2 acres of hoop houses located at the north end of the Property.

This cultivation area will be installed after Phase 2 is producing revenue. The Project will be serviced by utilities that are currently in place, including electricity and water.

Streams and Stream Setbacks

The Project site consists of one unnamed intermittent drainage that runs southeast to the northwest and is formed from three smaller drainages upslope of the Project. The intermittent drainage is deeply incised and the vegetation on the banks consists of coast live oak woodland and coastal scrub interspersed with nonnative grassland. The Project will be set back a minimum of 100 feet from the top of bank.

Agricultural Support Facilities/Structures

An existing 2,020 square-foot residence exists on the site and will be demolished and replaced with a 1,120 square-foot office/security building and a 1,110 square-foot restroom/breakroom to serve the cannabis operation. The Project does not include hardscaping except for the parking areas. In addition to site development, existing structures will be removed, including: two trailers, one shed, one storage building, six barns, one pole barn, and two temporary structures.

Fencing and Lighting

All sites will include security lighting surrounding the facilities, at the entrance gates, and at the access points (several hundred feet from the entrance gates). Light fixtures will be on 10-foot poles, motion-activated, and directed downward with a maximum light coverage of an area 40 feet in diameter.

Access and Roadways

Access for the Project will occur from Highway 135 via Batchelder Road.

Federal Permit History

In September 2019, the United States Fish and Wildlife Service (Service) approved a General Conservation Plan for Cultivation Activities in Santa Barbara County, California (GCP). The GCP is a conservation plan as required in Endangered Species Act (ESA; 16 U.S.C. § 1531 et seq.) section 10(a)(2)(A) for issuance of an incidental take permit (ITP) pursuant to ESA section 10(a)(1)(B) for take of California tiger salamander (*Ambystoma californiense*; CTS). These ESA provisions allow the Service to develop a 10(a)(1)(B) conservation plan suitable for the needs of a local area, and then to issue individual permits to landowners who apply for an ITP and demonstrate compliance with the terms and conditions of the plan. The GCP therefore provides a federal ESA permitting mechanism for incidental take of CTS by private landowners engaged in horticulture activities. The Project is located in the Purisima CTS metapopulation identified in the GCP.

Anticipated Take of California Tiger Salamander

The Project activities described above are expected to incidentally take¹ CTS where those activities take place within the 93-acre Project site. In particular, CTS could be incidentally taken as a result of the development-related and long-term activities that include equipment access, staging, material storage, earth moving activities, active agricultural activities, operation and maintenance of structures, agricultural fields, infrastructure, irrigation and water management, vehicular traffic, security fencing and lighting, and increased human activities. CTS is designated as an endangered species pursuant to the federal ESA and a threatened species pursuant to the California Endangered Species Act (CESA) (Fish & Game Code, § 2050 et seq.). (See Cal. Code Regs., title 14, § 670.5, subd. (b)(3)(G).)

CTS is assumed to be present because the Project is within its range and suitable breeding habitat is present in the migratory distance of the species. Burrows, which are suitable upland habitat for the species, were found within the cultivation area. The cultivation area is generally disturbed by existing agricultural activities, including ripping, planting, and harvesting crops. There is potential to destroy burrows containing CTS during these existing activities. Impacts could include disturbances or crushing when burrows are destroyed by equipment preparing the sites. In addition, for the purposes of this Project, the Applicant is assuming that once installed, the cultivation area will no longer be suitable for CTS upland habitat and that the Project area will be a complete barrier to movement of CTS from other areas. While it is possible that CTS could migrate through these areas, the Applicant will assume the Project will be a total barrier. For this reason, permitting and mitigation associated with CTS includes mitigation credits as if these areas could no longer be used by the species.

On November 23, 2021, the Service issued an ITP (Permit No. ESPER0026639) to the Applicant pursuant to the GCP. The ITP describes the Project, requires the Applicant to comply with terms of the ITP and GCP, and incorporates additional measures.

The federal ITP authorizes the take of CTS in the form of capture for up to twenty individuals and injury or mortality for up to four individuals during Project implementation.

U.S. Fish and Wildlife Service (USFWS) calculated the value of the impacted habitat using the method

¹ Pursuant to Fish and Game Code section 86, “‘Take’ means hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” See also *Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 507 (for purposes of incidental take permitting under Fish and Game Code section 2081, subdivision (b), “‘take’...means to catch, capture or kill”).

outlined in Searcy and Shaffer (2008)² that included incorporating the amount of CTS aquatic breeding habitat and upland habitat on the Project site that will be impacted. The method described in Searcy and Shaffer (2008) attaches a value to habitat that scales with the reproductive value of the individuals estimated to be occupying an area. According to Searcy and Shaffer (2008), the reproductive value of a site is a function of: (1) distance from each known or potential breeding pond within dispersal distance of the site; and (2) land-use in the surrounding areas.

The Service determined that the Project would consequently result in the loss of a reproductive value of up to 24,751 units as calculated in accordance with Searcy and Shaffer (2008). Compensatory mitigation is based on the loss of this reproductive value for CTS. By Project phasing, the loss of reproductive value is 267 units for Phase 1, 3,844 for Phase 2 and 20,640 units for Phase 3.

On December 14, 2021, the Director of the California Department of Fish and Wildlife (CDFW) received a notice from Morgan Krapes-Kiah requesting a determination pursuant to Fish and Game Code section 2080.1 that the federal ITP is consistent with CESA for purposes of the Project and CTS. (Cal. Reg. Notice Register 2021, No. 53-Z, page 1801).

Determination

CDFW has determined that the ITP is consistent with CESA as to the Project and CTS because the mitigation measures contained in the ITP, and the GCP insofar as the ITP references and requires compliance with mitigation measures in the GCP, meet the conditions set forth in Fish and Game Code section 2081, subdivisions (b) and (c), for authorizing incidental take of CESA-listed species. Specifically, CDFW finds that: (1) take of CTS will be incidental to an otherwise lawful activity; (2) the mitigation measures identified in the ITP and the GCP, insofar as the ITP references and requires compliance with mitigation measures in the GCP, will minimize and fully mitigate the impacts of the authorized take; (3) adequate funding is ensured to implement the required avoidance, minimization and mitigation measures and to monitor compliance with, and effectiveness of, those measures; and (4) the Project will not jeopardize the continued existence of CTS. The mitigation measures in the ITP, and the GCP insofar as the ITP references and requires compliance with the GCP, include, but are not limited to, the following:

Avoidance, Minimization, and Mitigation Measures

1. The Applicant has proposed a phased mitigation approach and commits to “stay ahead” provisions

² Searcy, C. A. and H. B. Shaffer. 2008 Calculating biologically accurate mitigation credits: insights from the California tiger salamander. *Conservation Biology* 22: 997–1005.

by committing to fulfill mitigation requirements for each phase prior to the commencement of any activity that could result in take of CTS in that respective phase. Using the method described in Searcy and Shaffer (2008), the loss in reproductive value resulting from each phase was calculated. Using the same calculations, one credit at the La Purisima Conservation Bank has a reproductive value of approximately 850 units. The loss in reproductive value resulting from each Project phase, and the associated mitigation required to offset that loss is as follows: Phase 1 results in a loss in reproductive value of 267 units and requires the purchase of 0.3 mitigation credits; Phase 2 results in a loss in reproductive value of 3,844 units and requires the purchase of 4.6 mitigation credits; and Phase 3 results in a loss in reproductive value of 20,640 units and requires the purchase of 24 mitigation credits. Therefore, prior to the commencement of any activity that could result in take of CTS during Phase 1 of the Project, the Applicant will demonstrate that 0.3 mitigation credits have been purchased from the La Purisima Conservation Bank. Prior to the commencement of any activity that could result in take of CTS during Phase 2 of the Project, the Applicant will demonstrate that 4.6 mitigation credits have been purchased from the La Purisima Conservation Bank. Prior to the commencement of any activity that could result in take of CTS during Phase 3 of the Project the Applicant will demonstrate that 24 mitigation credits have been purchased from the La Purisima Conservation Bank.

1.1 Although not a condition of the ITP, CDFW requests a copy of the documentation of the credit purchase at La Purisima Conservation Bank.

2. During the Project planning phase, the Applicants worked with the Service to site all impacts as far away from known and potential CTS breeding habitats and to avoid high quality upland and dispersal habitat as possible.
3. At least 15 days prior to ground-disturbing activities, the Applicant will submit the names and credentials of biologists and monitors to the Service for approval to conduct the minimization measures outlined below. Excluding an emergency activity, no Project activities will begin until the Applicant has received notice from the Service that the biologists and monitors are approved to do the work. The Service-approved biologist(s) will notify the Ventura Fish and Wildlife Office of their intent to conduct any monitoring events within 48 hours of commencing the activity.

3.1 Although not a condition of the ITP, CDFW requests that Applicant submit the names and credentials of proposed biologists and monitors to CDFW at least 15 days prior to ground-disturbing activities.

4. A Service-approved biologist will conduct a biological resources training program for all construction workers and their contractors to minimize potential impacts to the CTS and sensitive habitats. Training will occur prior to initial ground-disturbing activities and be repeated, annually and as needed for new workers for the duration of each Project covered by the permit. The training program will be reviewed and approved by the Service and will include a description of: (1) important biological resources within their Project site, specifically CTS that have potential to occur within or adjacent to work areas; (2) the applicable avoidance and minimization measures; (3) the roles and responsibilities of personnel; and (4) communication protocols if CTS are detected.
5. A Service-approved biologist will periodically review and monitor ground-disturbing activities and restoration efforts and will be responsible for ensuring that conditions of approval are being enforced and that success criteria are being met. Except for emergency situations, a Service-approved biologist will have the authority to temporarily halt activities if permit requirements and conditions are not being met.
6. Prior to ground-disturbing activities, all grading limits and construction boundaries, including staging areas, parking, and stockpile areas, will be delineated, and clearly marked in the field. All suitable CTS habitat located within 10 feet of ground-disturbing activities will be delineated with specific sensitive species labeling (e.g., permanent signage stating, "No Entry — Sensitive Habitat"). A service-approved biologist(s) will work with the Service to identify these areas.
7. All proposed linear routes (i.e., roads and pipelines) will be reviewed and modified, if necessary, in the field to minimize impacts to the CTS with assistance by the on-site biologist or environmental monitor.
8. Personnel will limit their vehicle use to existing routes of travel. Travelling off designated roads will be prohibited unless access is determined critical for a particular activity and the route has been flagged to avoid or minimize adverse effects. To minimize the potential for road mortality of CTS and their habitat, nighttime traffic will be minimized during the ground-disturbing phase to the extent feasible; all hauling activities within habitat for covered wildlife will be restricted to

daylight hours, defined as the hours after sunrise and before sunset.

9. Except in areas with posted speed limits greater than 10 miles-per-hour, Project-related vehicle speeds will not exceed 10 miles-per-hour when driving within CTS habitat.
10. Prior to moving vehicles or equipment, personnel will look under the vehicles or equipment for the presence of CTS. If a CTS or any other wildlife species is observed, the vehicle will not be moved until the animal has vacated the area on its own accord or has been relocated out of harm's way in accordance with Measure 12.
11. A Service-approved biologist will conduct pre-activity surveys of CTS habitat within Project disturbance boundaries immediately prior to the onset of any ground disturbance associated with the Project to determine if any CTS individuals are present, and to refine the final habitat mitigation acreages. The Service-approved biologist will monitor ground-disturbing activities in the vicinity of habitats to be avoided. Upon completion of initial ground disturbance, the biologist or monitor will periodically (minimum twice per week) visit the Project site throughout the ground-disturbing period to ensure that impacts to the Project site are in compliance with the permit. After periods of rain, a Service-approved biologist will conduct daily pre-activity surveys to ensure no CTS have migrated into the work area prior to ground-disturbing activities resuming. No construction work will be initiated until a Service-approved biologist determines that the work area is clear of CTS. Should any CTS be observed within harm's way, the animal will be allowed to vacate the area on its own accord or be relocated in accordance with Measure 12.
12. Any CTS or individual of other wildlife species will be allowed to vacate the Project areas on its own accord under the observation of a Service-approved biologist. If any CTS or individual of other wildlife species does not relocate on its own, or if it is in harm's way, it will be relocated out of harm's way to nearby suitable habitat, similar to that in which it was found, and outside the Project area. Only a Service-approved biologist will relocate CTS.

The biologists conducting relocation activities will follow the Declining Amphibian Task Force Fieldwork Code of Practice: https://www.fws.gov/southwest/es/NewMexico/documents/SP/Declining_Amphibian_Task_Force_Fieldwork_Code_of_Practice.pdf. A Service-approved biologist will relocate any CTS found within the Project footprint to an active rodent burrow system

located no more than 300 feet outside of the Project area unless otherwise approved by the Service. The individuals will be handled with clean and wet hands. During relocation they will be placed in a clean, covered plastic container with a wet non-cellulose sponge. Captured individuals will be relocated immediately; individuals will not be stored for lengthy periods or in heated areas. The relocation container will be kept out of direct sunlight. A Service-approved biologist will monitor relocated CTS until they enter a burrow and are concealed underground or otherwise deemed safe in the relocation area by the biologist. Relocation areas will be identified by the Service-approved biologist based on the best suitable habitat available. The Service-approved biologist will document both the capture site and the relocation site by photographs and GPS positions. The CTS will be photographed and measured (snout-vent) for identification purposes prior to relocation. All documentation will be provided to the Service within 24 hours of relocation.

12.1 Although not a condition of the ITP, CDFW requests that the Applicant provide copies of the translocation and monitoring reports to CDFW.

13. Rodent burrows within the Project areas that overlap CTS habitat will be excavated by a Service-approved biologist using hand tools until it is certain that the burrows are unoccupied. In lieu of burrow excavation, steel plates or plywood may also be utilized to protect small mammal burrows from ground disturbance. Plates and plywood will be removed nightly and will be removed if work is scheduled to cease for consecutive days. Any individual CTS that are encountered will be allowed to vacate the area on their own accord or be relocated out of harm's way in accordance with Measure 12.
14. Exclusionary silt fencing (or other suitable fencing material) will be installed at the discretion of a Service-approved biologist to minimize the potential for CTS to enter the worksite. Exclusionary fencing will be maintained for the duration of the Project. If a CTS or other wildlife species is observed within an enclosed worksite, a portion of the fencing will be removed to allow the individual to vacate the area on its own. Alternatively, the animal may be relocated out of harm's way in accordance with Measure 12.
15. All construction and sediment-control fencing will be inspected each workday during construction activities to ensure they are functioning properly.

16. Steep-walled excavations (e.g., trenches) that may act as pitfall traps will be inspected for wildlife at least once per day and immediately before backfilling. In lieu of daily inspections (weekends, etc.), exclusionary fencing, covers, ramps, or similar measures will be taken to prevent wildlife entrapment.
17. Open pipe segments will be capped or sealed with tape (or equivalent material) nightly, or otherwise stored at least three feet above ground. Should a pipe segment become occupied by a CTS or any other wildlife species, the animal will be allowed to vacate the pipe on its own or will be removed and relocated in accordance with Measure 12.
18. If covered activities must occur during the rainy season, the Applicant will not work during rain events, 48 hours prior to significant rain events (>0.5 inch), or during the 48 hours after these events, to the extent practicable. If work must occur 48 hours prior to significant rain events (>0.5 inch), or during the 48 hours after these events, a Service-approved biologist will conduct a pre-activity survey to ensure that the work area is clear (refer to Measure 10 above).
19. The Applicant will ensure that all staging areas, equipment storage areas, stockpile sites, and refueling areas are located at least 100 feet from surface water bodies and wetland habitats to minimize the potential for releases into surface water or wetland habitat. In lieu of the 100-foot buffer, secondary containment measures may be employed to prevent contamination of soil and water.
20. When working in areas with a predominance of native plants, the upper layer of topsoil material (6 inches) will be segregated during excavations to preserve the seed bank. The preserved topsoil will be covered to protect it from erosion and invasion of non-native plants until completion of the activity, when the topsoil will be replaced in the affected area. Existing access roads are not subject to this measure.
21. Disturbed areas will be restored and stabilized to reflect pre-existing contours and gradients to the extent practicable. Erosion and sediment controls (e.g., silt fences, fiber rolls, sandbags) will be installed, where necessary, using weed-free materials in areas with a predominance of native plants. Where necessary, restored areas will be maintained and monitored, including weed removal focused on noxious weeds and excluding nonnative annual grasses. All planting and seeding will occur the first year after construction is complete, after the first significant rain event of

the year (i.e., more than 0.25 inch of precipitation).

22. Upon locating CTS individuals that may be dead or injured as a result of Project related activities, notification will be made within 72 hours to the Service's Ventura Field Office at (805) 644-1766.

Monitoring and Reporting Measures

Annual Reports: By March 31 following each year of ITP issuance and Project implementation, the Applicant will submit a report to the Ventura Fish and Wildlife Office to document the status of the Project. The reports will be sent to the Ventura Fish and Wildlife Office by email at sbc-cultivationgcp@fws.gov. Section 5 of the GCP details the information that is required in the annual reports.

Project Completion Report: Once the Applicant completes activities covered by the ITP, the Applicant will notify the Ventura Fish and Wildlife Office that they have completed all covered activities and mitigation measures and provide a final report to the Ventura Fish and Wildlife Office; subsequent annual compliance reports will not be necessary thereafter unless take of a listed species occurs or a changed or unforeseen circumstance occurs.

Although not a condition of the ITP, CDFW requests copies of the annual reports and Project completion report.

Financial Assurances

As set forth in Avoidance, Minimization and Monitoring Measure Number 1 above, prior to the commencement of any activity that could result in take of CTS during Phase 1 of the Project, the Applicant will demonstrate that 0.3 mitigation credit has been purchased from the La Purisima Conservation Bank. Prior to the commencement of any activity that could result in take of CTS during Phase 2 of the Project, the Applicant will demonstrate that 4.6 mitigation credits have been purchased from the La Purisima Conservation Bank. Prior to the commencement of any activity that could result in take of CTS during Phase 3 of the Project the Applicant will demonstrate that 24 mitigation credits have been purchased from the La Purisima Conservation Bank.

Although not a condition of the ITP, CDFW requests a copy of the documentation of the credit purchases at the La Purisima Conservation Bank.

Pursuant to Fish and Game Code section 2080.1, take authorization under CESA is not required for the Project for incidental take of CTS, provided the Applicant implements the Project as described in the ITP and associated GCP, including adherence to all measures contained therein, and complies with the mitigation measures and other conditions described in the ITP and GCP, insofar as the ITP references and

requires compliance with mitigation measures in the GCP. If there are any substantive changes to the Project, including changes to the mitigation measures, or if the Service amends or replaces the ITP and GCP, the Applicant shall be required to obtain a new consistency determination or a CESA incidental take permit for the Project from CDFW. (See generally Fish & Game Code, §§ 2080.1, 2081, subs. (b) and (c).)

CDFW's determination that the Service ITP is consistent with CESA is limited to CTS.

**DEPARTMENT OF
FISH AND WILDLIFE**

FISH AND GAME CODE SECTION 1653
CONSISTENCY DETERMINATION
REQUEST FOR
East Weaver Dam Removal and
Intake Relocation Project
(Tracking Number: 1653-2022-088-001-R1)
Trinity County

California Department of Fish and Wildlife (CDFW) received a Request to Approve on 1/12/2022, that Northwest California Resource Conservation and Development Council proposes to carry out a habitat restoration or enhancement project pursuant to Fish and Game Code section 1653. The proposed project involves removing East Weaver Dam and installing a screened intake. The proposed project will be carried out on Weaver Creek, at the Weaverville Community Services District's East Weaver Creek Treatment Facility, Weaverville, Trinity, California.

On 9/29/2021, the North Coast Regional Water Quality Control Board (Regional Water Board) received a Notice of Intent (NOI) to comply with the terms of, and obtain coverage under, the General 401 Water Quality Certification Order for Small Habitat Restoration Projects (General 401 Order) for the East Weaver Dam Removal and Intake Relocation Project. The Regional Water Board determined that the Project, as described in the NOI, was categorically exempt from California Environmental Quality Act (CEQA) review (section 15333 — Small Habitat Restoration Projects) and met the eligibility requirements for coverage under the General 401 Order. The Regional Water Board issued a Notice of Applicability (WDID Number 1A21217WNTR; ECM PIN Number CW-876650) for coverage under the General 401 Order on 11/8/2021.

Northwest California Resource Conservation and Development Council is requesting a determination that the project and associated documents are complete pursuant to Fish and Game Code section 1653 subdivision (d). If CDFW determines the project is

complete, the Council will not be required to obtain an incidental take permit under Fish and Game Code section 2081 subdivision (b) or a Lake or Streambed Alteration Agreement under Fish and Game Code section 1605 for the proposed project.

In accordance with Fish and Game Code section 1653 subdivision (e), if CDFW determines during the review, based on substantial evidence, that the request is not complete, Northwest California Resource Conservation and Development Council will have the opportunity to submit under Fish and Game Code section 1652.

**OCCUPATIONAL SAFETY AND
HEALTH STANDARDS BOARD**

NOTICE OF PUBLIC MEETING
AND BUSINESS MEETING OF THE
OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD

Pursuant to Government Code Section 11346.4 and the provisions of Labor Code Sections 142.1, 142.2, 142.3, 142.4, and 144.6, the Occupational Safety and Health Standards Board of the State of California has set the time and place for a Public Meeting and Business Meeting:

PUBLIC MEETING:

On **March 17, 2022**, at 10:00 a.m. via the following:

- Video-conference at www.webex.com (meeting ID 268 984 996)
- Teleconference at (844) 992-4726 (Access code 268 984 996)
- Live video stream and audio stream (English and Spanish) at <https://videobookcase.com/california/oshsb/>

At the Public Meeting, the Board will make time available to receive comments or proposals from interested persons on any item concerning occupational safety and health.

BUSINESS MEETING:

On **March 17, 2022**, at 10:00 a.m. via the following:

- Video-conference at www.webex.com (meeting ID 268 984 996)
- Teleconference at (844) 992-4726 (Access code 268 984 996)
- Live video stream and audio stream (English and Spanish) at <https://videobookcase.com/california/oshsb/>

At the Business Meeting, the Board will conduct its monthly business.

DISABILITY ACCOMMODATION NOTICE:

Disability accommodation is available upon request. Any person with a disability requiring an accommodation, auxiliary aid or service, or a modification of policies or procedures to ensure effective communication and access to the public hearings/meetings of the Occupational Safety and Health Standards Board should contact the Disability Accommodation Coordinator at (916) 274-5721 or the state-wide Disability Accommodation Coordinator at 1-866-326-1616 (toll free). The state-wide Coordinator can also be reached through the California Relay Service, by dialing 711 or 1-800-735-2929 (TTY) or 1-800-855-3000 (TTY-Spanish).

Accommodations can include modifications of policies or procedures or provision of auxiliary aids or services. Accommodations include, but are not limited to, an Assistive Listening System (ALS), a Computer-Aided Transcription System or Communication Access Realtime Translation (CART), a sign-language interpreter, documents in Braille, large print or on computer disk, and audio cassette recording. Accommodation requests should be made as soon as possible. Requests for an ALS or CART should be made no later than five (5) days before the hearing.

PROPOSITION 65

**OFFICE OF ENVIRONMENTAL
HEALTH HAZARD ASSESSMENT**

SAFE DRINKING WATER AND TOXIC
ENFORCEMENT ACT OF 1986
(PROPOSITION 65)
REQUEST FOR RELEVANT INFORMATION
ON THE CARCINOGENICITY OF
BISPHENOL A (BPA)

Request for Information

The California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) has selected bisphenol A (BPA) for the Carcinogen Identification Committee (CIC)'s review for possible listing under Proposition 65 and is soliciting information relevant to the assessment of its carcinogenicity. BPA was selected from chemicals prioritized¹ by the CIC in 2020.

Relevant information on BPA includes but is not limited to:

¹ <https://oehha.ca.gov/proposition-65/agenda/november-17-2020-virtual-meeting-carcinogen-identification-committee>

- Cancer bioassays
- Cancer epidemiological studies
- Studies related to cancer mechanisms and the key characteristics of carcinogens
- Other pertinent studies on:
 - Pharmacokinetics
 - Effects on biochemical and physiological processes, including findings in humans

Interested parties wishing to provide such information should submit it in accordance with the instructions given below.

The publication of this notice marks the start of a 45-day data call-in period, ending on **Monday, March 14, 2022**. The information received during this period will be reviewed and considered by OEHHA as it prepares the cancer hazard identification materials on BPA.

Background

OEHHA is the lead agency for the implementation of Proposition 65². The CIC of OEHHA's Science Advisory Board serves as the state's qualified experts and renders an opinion about whether a chemical has been clearly shown to cause cancer³. Chemicals identified as carcinogens by the CIC are added to the Proposition 65 list.

Hazard identification materials will be made available to the public for comment prior to the CIC's consideration of the chemical for possible listing. The availability of hazard identification materials will be announced in the *California Regulatory Notice Register* and on OEHHA's website.

Comment Submittal

OEHHA strongly recommends that relevant information responsive to this request be submitted electronically through our website at <https://oehha.ca.gov/comments>, rather than in paper form. Comments submitted in paper form can be mailed or delivered in person to the address below.

All non-electronic submissions should be directed to:

Tyler Saechao
Office of Environmental Health Hazard
Assessment
1001 I Street
P.O. Box 4010, MS-12B
Sacramento, California 95812-4010
Telephone: 916-445-6900

² The Safe Drinking Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code section 25249.5 *et seq.*

³ Title 27, Cal. Code of Regs., section 25302 *et seq.*

**OAL REGULATORY
DETERMINATION**

**DEPARTMENT OF CORRECTIONS AND
REHABILITATION**

OFFICE OF ADMINISTRATIVE LAW

**DETERMINATION OF ALLEGED
UNDERGROUND REGULATIONS**

(Pursuant to Government Code
Section 11340.5 and Title 1, section 270, of the
California Code of Regulations)

The attachments are not being printed for practical reasons or space considerations. However, if you would like to view the attachments please contact Margaret Molina at (916) 324-6044 or margaret.molina@oal.ca.gov.

2022 OAL DETERMINATION NUMBER 1
(OAL MATTER NUMBER CTU2021-0706-01)

REQUESTED BY: Christopher Harbridge
CONCERNING: Memorandum dated
October 4, 2017; Granting
of Favorable Points for no
Serious Disciplinary(s),
issued by the California
Department of Corrections
and Rehabilitation

DETERMINATION
ISSUED PURSUANT TO
GOVERNMENT CODE
SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL's review is limited to the sole issue of whether the challenged rule meets the definition of "regulation" as defined in Government Code section 11342.600 and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of "reg-

ulation," but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.¹

CHALLENGED RULE

The challenged rule is contained in an October 4, 2017, memorandum issued by the Department of Corrections and Rehabilitation (Department), then Director of the Division of Adult Institutions, Kathleen Allison, to Associate Directors, Division of Adult Institutions, Wardens, Classification Staff Representatives, and Classification and Parole Representatives relating to changes in favorable points for no serious disciplinary(s) on classification scoresheets (Memorandum). This Memorandum is attached hereto as Exhibit A. Included in the Memorandum is a paragraph titled, "Reclassification Scoresheets Finalized On or After October 30, 2017," which states, "[f]or each six-month period since the last review with no serious disciplinary(s), four favorable points shall be granted."

DETERMINATION

OAL determines that the Memorandum stating, "[f]or each six-month period since the last review with no serious disciplinary(s), four favorable points shall be granted" meets the definition of a "regulation" that should have been adopted pursuant to the APA.

FACTUAL BACKGROUND

On July 6, 2021, OAL received a petition from Christopher Harbridge challenging the Memorandum as an underground regulation (Petition). The Petition specifically challenges the paragraph titled, "Reclassification Scoresheets Finalized On or After October 30, 2017," which states, "[f]or each six-month period since the last review with no serious disciplinary(s), four favorable points shall be granted."

On September 7, 2021, OAL accepted the Petition. A summary of the Petition was published in the California Regulatory Notice Register on September 17, 2021, and solicited comments from the public until October 18, 2021. OAL did not receive any comments from the public. A response from the Department, if

¹ As defined by title 1, section 250(a), an

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

desired, was due no later than November 1, 2021. No response was received from the Department.

The Memorandum was sent by then Director of the Division of Adult Institutions, Kathleen Allison, to Associate Directors, Division of Adult Institutions, Wardens, Classification Staff Representatives, and Classification and Parole Representatives. The subject line of the Memorandum reads as follows:

GRANTING OF FAVORABLE POINTS FOR NO SERIOUS DISCIPLINARY(S) ON CLASSIFICATION SCORESHEETS

The Purpose of this memorandum is to announce changes to the amount of favorable points that shall be granted for no serious disciplinary(s) during qualifying review periods on Classification Scoresheets. These changes are being made to further incentivize positive programming amongst the inmate population and increase inmate access to rehabilitative programming. Coding changes to the Strategic Offender Management System shall be implemented to automate the granting of favorable points on the Classification Scoresheet as follows:

...

Reclassification Scoresheets Finalized On or After October 30, 2017

For each six-month period since the last review with no serious disciplinary(s), four favorable points shall be granted.

Please note the exception to this direction is for Reclassification Scoresheets finalized to document correction(s) to Initial Classification Scoresheets, Reclassification Scoresheets, or Readmission Scoresheets that were originally finalized prior to October 30, 2017.

California Code of Regulations, title 15, section 3375.4 provides, in relevant part:

This section incorporates by reference CDCR Form 840 (Rev. 07/12), Reclassification Score Sheet.

The factors and their related numerical weights used to recalculate an inmate's preliminary score or new preliminary score are listed below. Box numbers appear to the right but refer to the first box on the left of each field.

(a) Favorable behavior since last review (Boxes 46–51). The categories below provide favorable points for six-month intervals. For an annual reclassification review, two six-month periods may be counted. When an inmate's status is interrupted during the period without inmate fault, the period shall be considered continuous.

(1) For each six-month period of continuous minimum custody, four points shall be entered in Boxes 46–47.

(2) For each six-month period since the last review with no serious disciplinary(s), two points shall be entered in Boxes 48–49.

(3) For each six-month period with an average or above performance in work or a Rehabilitative Program managed by the Division of Rehabilitative Programs, as defined in section 3000, two points shall be entered in Boxes 50–51.

(A) Part-time assignments which, when work/program hours are added together, are equivalent to a full-time assignment shall be combined.

(B) Favorable points shall not be granted for average or above average performance for inmates who are not assigned to a program, unless the inmate is diagnosed as totally disabled as defined in section 3000.

(C) Time that an inmate spends during a six-month review period with a diagnosis of being totally disabled as defined in section 3000 shall count for the purpose of granting favorable points for average or above average performance. (Cal. Code Regs., title 15, sec. 3375.4(a) [emphasis added].)

The above section 3375.4, subdivision (a)(2), constitutes existing regulation governing the calculation of an inmate's reclassification score and provides that "(2) [f]or each six-month period since the last review with no serious disciplinary(s), **two points** shall be entered in Boxes 48–49." (Emphasis added.)

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of Government Code section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether an agency has issued, utilized, enforced, or attempted to

enforce a rule that meets the definition of “regulation” as defined in Government Code section 11342.600 and should have been adopted pursuant to the APA (Gov. Code, sec. 11340(b)). An OAL determination is not enforceable against the agency through any formal administrative means, but it is entitled to “due deference” in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

ANALYSIS

OAL’s authority to issue a determination extends only to the limited question of whether the challenged rule is a “regulation” subject to the APA. This analysis will determine (1) whether the challenged rule is a “regulation” within the meaning of Government Code section 11342.600, and (2) whether the challenged rule falls within any recognized exemption from APA requirements.

A regulation is defined in Government Code section 11342.600 as:

... every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency’s procedure (Gov. Code, §11342, subd. (g)).²

As stated in *Tidewater*, the first element used to identify a “regulation” is whether the rule applies generally. As *Tidewater* points out, a rule need not apply to all persons in the state of California. It is sufficient if the rule applies to a clearly defined class of persons or situations.³

By the terms of the Memorandum itself, the challenged rule is intended to apply to the inmate popu-

lation generally. As set forth in the subject line of the Memorandum, “[f]hese changes are being made to further incentivize positive programming amongst the inmate population and increase inmate access to rehabilitative programming.” The Memorandum was sent by then Director of the Division of Adult Institutions, Kathleen Allison, to Associate Directors, Division of Adult Institutions, Wardens, Classification Staff Representatives, and Classification and Parole Representatives. The Memorandum applies to all inmates subject to the reclassification process, therefore the first element of *Tidewater* is met.

The second element used to identify a “regulation” as stated in *Tidewater* is that the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency’s procedure.

Penal Code section 5054 provides that the care and custody of inmates, as well as the management and control of state prisons, is vested in the Secretary of the Department. Section 5054 states:

Commencing July 1, 2005, the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Secretary of the Department of Corrections and Rehabilitation.

Penal Code section 5068 requires that the Secretary of the Department classify and assign inmates, and states, in relevant part:

...the Director of Corrections shall classify prisoners; and when reasonable, the director shall assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner’s home, unless other classification factors make such a placement unreasonable.

The Department’s policy, as stated in the Memorandum, that, for reclassification scoresheets finalized on or after October 30, 2017, four favorable points shall be granted for each six-month period since the last review with no serious disciplinary(s) further implementations, interprets, and makes more specific policies relating to the “care, custody, treatment, training, discipline and employments of persons” as required by Penal Code section 5054. The Memorandum also implements, interprets, and makes specific the Department’s procedures for classification of prisoners as required by Penal Code section 5068.

Existing California Code of Regulations, title 15, section 3375.4, subdivision (a)(2), which implements Penal Code sections 5054 and 5068 provides that “[f] or each six-month period since the last review with no serious disciplinary(s), **two points** shall be entered in Boxes 48–49.” (Emphasis added.) The Memorandum

² Section 11342(g) was re-numbered in 2000 to section 11342.600 without substantive change.

³ See also *Roth v. Department of Veterans Affairs*, (1980) 110 Cal.App.3d 14, 19; 167 Cal.Rptr. 552, 557.

attempts to alter this regulation by changing the number of points awarded from two to four and therefore further implements, interprets, and makes specific the above-referenced Penal Code provisions. Thus, the second element of *Tidewater* is met.

Because both elements of *Tidewater* are met, the challenged Memorandum meets the definition of “regulation” pursuant to Government Code section 11342.600.

The final issue to examine is whether the challenged rule falls within an express statutory exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to Government Code section 11346, the procedural requirements established in the APA “shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*” (Emphasis added.)

The Department has not identified any express statutory exemption from the APA that would apply to the challenged Memorandum, nor did OAL find such an exemption.

CONCLUSION

In accordance with the above analysis, OAL determines that the challenged rule providing that “[f]or each six-month period since the last review with no serious disciplinary(s), four favorable points shall be granted” contained in the Memorandum meets the definition of a “regulation” that should have been adopted pursuant to the APA but was not. The rule is therefore an underground regulation.

Date: January 10, 2022 /s/
Kevin D. Hull
Senior Attorney

Copy: Kathleen Allison, Secretary
Renee Rodriguez, Correctional Counselor II

SUMMARY OF REGULATORY ACTIONS

REGULATIONS FILED WITH THE SECRETARY OF STATE

This Summary of Regulatory Actions lists regulations filed with the Secretary of State on the dates indicated. Copies of the regulations may be obtained by contacting the agency or from the Secretary of State, Archives, 1020 O Street, Sacramento, CA 95814, (916) 653-7715. Please have the agency name and the date filed (see below) when making a request.

CalSavers Retirement Savings Board
File # 2021-1202-01
CalSavers Retirement Savings Program

This certificate of compliance action makes permanent the regulations adopted in OAL file numbers 2020-0424-02E, 2020-0821-06E, and 2021-0115-02E, regarding the CalSavers Retirement Savings Program.

Title 10
Adopt: 10008
Amend: 10000, 10001, 10002, 10003, 10004, 10005, 10006, 10007
Filed 01/13/2022
Effective 01/13/2022
Agency Contact: Eric Lawyer (916) 653-1748

Division of Workers’ Compensation
File # 2022-0105-02
QME Regulation in Response to COVID-19

In this emergency action, the Division of Workers’ Compensation (DWC) adopts an emergency regulation regarding medical-legal evaluations in response to continued COVID-19 pandemic. Due to the omicron variant of COVID-19, the DWC adopts this emergency regulation, which is similar to section 46.2. This emergency regulation allows Qualified Medical Evaluators (QME), Agreed Medical Evaluators (AME), or other medical-legal evaluations to be performed via telehealth.

Title 08
Adopt: 46.3
Filed 01/18/2022
Effective 01/18/2022
Agency Contact:
Nicole Richardson (510) 286-0656

Fish and Game Commission
File # 2022-0107-01
Low-flow Inland Sport Fishing Restrictions Due to Drought

This emergency action extends the low-flow closure periods in the current low-flow inland sport fishing restrictions for the north coast and central coast streams to remove angling as an additional stress on steelhead and salmon populations.

Title 14
Amend: 7.40, 8.00
Filed 01/14/2022
Effective 01/31/2022
Agency Contact: David Thesell (916) 653-4899

CALIFORNIA REGULATORY NOTICE REGISTER 2022, VOLUME NUMBER 4-Z

State Water Resources Control Board
File # 2022-0105-03
Drought Conservation Emergency Regulation

This emergency rulemaking by the State Water Resources Control Board adopts emergency regulations pursuant to Water Code section 1058.5 intended to promote conservation of water in response to the Governor's October 19, 2021, proclamation of a drought state of emergency.

Title 23
Adopt: 995
Filed 01/18/2022
Effective 01/18/2022
Agency Contact: Garrett Lenahan (916) 341-5179

Bureau for Private Postsecondary Education
File # 2021-1207-01
Student Tuition Recovery Fund

This action amends the Student Tuition Recovery Fund (STRF) assessment rate that each student at Bureau-approved institutions pays from \$0.50 per \$1000.00 of institutional charges to \$2.50 per \$1000.00 of institutional charges. This action is exempt from the Administrative Procedure Act under the rates exemption in Government Code section 11340.9(g).

Title 05
Amend: 76120
Filed 01/12/2022
Effective 04/01/2022
Agency Contact: David Dumble (916) 574-8924

California State University
File # 2021-1206-02
Credit for Prior Learning

The Board of Trustees of the California State University submitted this action to OAL for courtesy filing with the Secretary of State and for printing in the California Code of Regulations to amend credit for prior learning requirements. This action is exempt from the Administrative Procedure Act and takes effect upon filing with the Secretary of State pursuant to Education Code sections 89030 and 89030.1, respectively.

Title 05
Amend: 40408
Filed 01/12/2022
Effective 01/12/2022
Agency Contact: Jason Taylor (562) 951-4500

Department of Corrections and Rehabilitation
File # 2021-1201-02
Alternative Rehabilitative Achievement Credit Earning Inmate Activity Group Programs Pilot Program

This action by the Department of Corrections and Rehabilitation adopts section 3999.29 as a pilot program for the alternative rehabilitative achievement credit earning inmate activity group program. This filing is exempt from chapter 3.5 of part 1 of division 3 of title 2 of the Government Code pursuant to Penal Code section 5058.1 and is not subject to review by the Office of Administrative Law. This action is effective on filing with the Secretary of State pursuant to Penal Code section 5058.1 and remains in effect for two years.

Title 15
Adopt: 3999.29
Filed 01/12/2022
Effective 01/12/2022
Agency Contact:
Renee Rodriguez (916) 446-2244

California Gambling Control Commission
File # 2021-1224-01
Correction for Expiring Emergency Regulations

This change without regulatory effect concerns three forms that were amended in a series of emergency actions (numbers 2020-0811-03E, 2020-1224-02EE, and 2021-0604-02EE) that will expire by operation of law on January 12, 2022. Each of the three forms was further modified in a separate, regular rulemaking action (no. 2021-0830-03S). The purpose of this action is to maintain the integrity of the forms as published in the California Code of Regulations by clearly removing the expired emergency content, retaining the subsequent amendments, and updating the revision date of each form to eliminate confusion.

Title 04
Amend: 12112
Filed 01/12/2022
Agency Contact: Josh Rosenstein (916) 274-5823

Air Resources Board
File # 2021-1129-03
Mobile Source Certification and Compliance Fee

In this regular rulemaking action, the Air Resources Board adopts and repeals definitions, requirements, and schedules related to the mobile source certification and compliance program fees.

Title 13
Adopt: 2900, 2901, 2902, 2903, 2904, 2905, 2906,
2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914
Repeal: 1990, 1991, 1992, 1993, 1994
Filed 01/18/2022
Effective 04/01/2022
Agency Contact: Chris Hopkins (916) 445-9564

Board of Pharmacy
File # 2021-1206-01
Address Change Notification

In this regular rulemaking action, the Board of Pharmacy adopts requirements for providing and maintaining accurate email addresses with the Board.

Title 16
Amend: 1704
Filed 01/18/2022
Effective 04/01/2022
Agency Contact: Lori Martinez (916) 518-3078

California Prison Industry Authority
File # 2021-0813-01
Severability

This action adds a severability clause to chapter 1 of division 8 of title 15 of the California Code of Regulations.

Title 15
Adopt: 8003
Filed 01/14/2022
Effective 04/01/2022
Agency Contact: Moira Doherty (916) 413-1140

Commission on Peace Officer Standards and Training
File # 2021-1202-02
Definitions; Requirements Course Certification;
Self-Paced Training Requirements

In this regular rulemaking action, the Commission on Peace Officer Standards and Training amends requirements related to certification of webinars and distance learning courses and related definitions.

Title 11
Amend: 1001, 1052, 1053
Filed 01/13/2022
Effective 04/01/2022
Agency Contact: Michelle Weiler (916) 227-4870

Commission on Teacher Credentialing
File # 2021-0820-03
Pupil Personnel Services Standards

This action repeals six regulations containing the standards for educator preparation programs as well as for the candidates for the various Pupil Personnel Services (PPS) credentials. To replace these regulations, the Commission adopts three documents incor-

porated by reference which specify the preconditions, program standards, and performance expectations for these PPS credential programs and credential candidates. The action also adopts a number of definitions related to these credential programs.

Title 05
Adopt: 80605, 80614
Amend: 80049
Repeal: 80632, 80632.1, 80632.2, 80632.3, 8632.4,
80632.5
Filed 01/18/2022
Effective 04/01/2022
Agency Contact: Joshua Speaks (916) 327-5339

Department of Managed Health Care
File # 2021-0802-01
Timely Access to Non-Emergency HCS

Health plans are required to report to the Department of Managed Health Care (the "Department"), on an annual basis, compliance with timely access to care standards and the adequacy of the health plan's provider network. In this regular rulemaking, the Department is standardizing reporting methodologies for the health plans' annual timely access reporting and annual network adequacy reporting.

Title 28
Amend: 1300.67.2.2
Filed 01/12/2022
Effective 04/01/2022
Agency Contact: Jennifer Willis (916) 324-9014

**PRIOR REGULATORY
DECISIONS AND CCR
CHANGES FILED WITH THE
SECRETARY OF STATE**

A quarterly index of regulatory decisions by the Office of Administrative Law (OAL) is provided in the California Regulatory Notice Register in the volume published by the second Friday in January, April, July, and October following the end of the preceding quarter. For additional information on actions taken by OAL, please visit www.oal.ca.gov.