



CDFW Permitting under Fish and Game Code Section 1600

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Stated Purposes of 1600

- Conservation of Fish and Wildlife for economic and food supply reasons
- Not about protecting water features except as F&W resource
- “Fish and Wildlife” does not include plants (CDFW forms distinguish fish and wildlife from plants)

Regulated Activities

- **Substantially** divert or obstruct natural flow of River Stream or Lake (RSL) (Siskiyou)
- **Substantially** change or use any material from RSL
- Deposit/dispose of debris, waste, pavement where it *may pass into* an RSL (only basis for non-RSL physical jurisdiction)

Notification Process

- Submit notification
- CDFW deems complete (30 days)
- CDFW determines that activity may **substantially affect existing fish and wildlife resource**
- Issues LSAA to applicant
- LSAA includes **reasonable measures** to protect the resource

Random but Important Notes

- CDFW typically wants **construction-level detail**
- CDFW **may not condition** LSAA on receipt of other local, state or federal permit
- LSAA's are subject to CEQA; CDFW open to addendum process
- Master and programmatic agreements possible but problematic to date

Mitigation under 1600

- Requires “Reasonable Measures to Protect” Fish and Wildlife (i.e., minimization)
- Compensatory mitigation not specifically required by statute (but typically imposed at 3:1)
- No “fully mitigate” standard of “ensured funding” requirement (cf 2081)

Permit Life

- 5 years except for protective measures which survive
- Long-term agreement possible
- One extension (max 5 years) permitted
- CDFW must approve extension except where measures “no longer protect” F&W resource

Note on Process

- No formal “technical assistance”
- CDFW requires submission of notification prior to formal response
- Then CDFW determines jurisdiction and whether activity will substantially affect existing fish and wildlife resource
- Draft LSAA good for 90 days

Permit Streamlining

- Application complete in 30 days
- Draft agreement in 60 days following completion
- If no agreement in 60, applicant may proceed **as described in the notification** including protective measures
- Consider getting an Opps Law letter

Dispute Resolution

- 30 days: Applicant responds whether measures are “acceptable”
- 14 days: Meeting to resolve
- 14 days: Arbitration panel appointed
- 3 panelists, one by each party and third panelist with expertise
- Limited to “objectionable” measures
- Final and binding agreement 14 days from appointment of panel

Enforcement

- NOV from CDFW
- \$25,000 civil penalty “each violation”
- Brought by DA or AG
- Court considers all relevant facts and mitigating circumstances
- Relaxed standard for injunction
- Criminal prosecution possible but rare
- CDFW due process problem under 1614

Note on Arbitration and Enforcement

- CDFW asserts that arbitration is not available where landowner has received NOV from CDFW (F&G Code § 1614)
- This position probably not supportable in statutory context but not challenged to date
- Obvious due process problem

Determining Stream Jurisdiction

- No such thing as “waters of the State” under 1600
- Bed, Channel or Bank (relevant only to “substantial change” or “use of material from”)
- Notification instructions include edge of riparian
- What about flood plain references?

Ca Code Regs § 1.72

- Body of water that ...
- Flows at least periodically or intermittently
- Bed or channel that has banks
- Supports fish or other aquatic life
- Includes surface/subsurface flow that supports or has supported riparian vegetation

Office of Counsel Position

- Adopted by Fish and Game Commission in 1986
- Commission only authorized to regulate take
- 1.72 was intended to apply only to sportfishing

Rutherford Decision

188 Cal.App.3d 1267

- Common understanding
- Has source and terminus
- Has banks and channel
- Waters flow at least periodically
- Ordinary high water mark relevant to determination of bed

CDFW Position

- 2010 Dryland Watershed Report
- 2014 MESA Field Guide
- MESA provides “uniform delineation protocol”
- Intended to “facilitate permitting”
- Land use and CEQA review
- Underground regulation never submitted for public review/comment

What does MESA say?

- Disclaims Section 1.72
- Flows periodically or episodically
- Area where water has flowed during the historical hydrologic period (since year 1800)
- Width “reasonably” identifiable by physical or biological indicators

More MESA Guidance

- Not defined by flow *per se* (eg OHWM)
- Maximum expression of stream on landscape
- Floodplains define the outermost bounds of a watercourse
- Overland/sheet flow only where it coalesces and begins to form swales

Status of Debate

- Legal debates in 2015-2016
- Strong opposition from regulated community (CBIA letter)
- HQ: Let the regions do their thing
- CDFW Strategy? Avoid controversial rulemaking and let courts decision
- Legislative push now beginning

In the meantime ...

- Notices of violation swarming like Alfred Hitchcock's birds
- Landowners must decide about proceeding without notifying CDFW
- Failure to notify is itself a violation
- Keep in mind third prong of 1600: Waste disposal where it "may pass into" RSL

What about CEQA?

- Jurisdiction is a **RED HERRING** notwithstanding debate
- Focus on effects to F&W resources (regardless of “jurisdiction”)
- Riparian habitat (Appendix G IV)
- Movement of F&W (Appendix G IV)
- Other biological impacts under Appendix G IV

Appendix G IX on Streams

- Substantial alternations to drainage patterns or stream leading to ...
- On-site or off-site erosion or siltation
- Increased flooding Appendix G IX
- Despite definitional problem under 1600, MESA might be helpful in evaluating impacts under CEQA

Quick word on 404 jurisdiction

- WOTUS rule is dead
- Rulemaking to shift to Scalia position (Kennedy notwithstanding)
- In the meantime, significant nexus remains in place
- Unclear effects on AJD process through EPA
- Keep an eye on Congress

That's all folks!

