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# Chapter 567: Paving the Road to Extinction with Good Intentions

Gregory L. Maxim

## Code Sections Affected

Fish and Game Code §§ 2052.1, 2081.1 (new); § 2081 (amended).  
SB 879 (Johnston and Machado); 1997 STAT. Ch. 567

*And at that very moment, we heard a loud whack!  
From outside in the fields came a sickening smack  
of an axe on a tree. Then we heard the tree fall.  
The very last Truffula Tree of them all!*<sup>1</sup>

## I. INTRODUCTION

After five years of gestation in the legislature, the state has given birth to Chapter 567, new legislation that significantly impacts the California Endangered Species Act (CESA).<sup>2</sup> Prior to Chapter 567, California's law did not authorize the taking<sup>3</sup> of endangered<sup>4</sup> and threatened species<sup>5</sup> that was incidental to lawful activities. However, Chapter 567 now permits these takings, provided that full mitigation occurs in rough proportion to the impacts of the takings and that the species are not placed in jeopardy of extinction.<sup>6</sup>

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1. Dr. Seuss, *THE LORAX* (1971).

2. James P. Sweeney, *Lawmakers Send Governor Sweeping Overhaul of Endangered Species Act*, COPLEYS NEWS SERV., Sept. 12, 1997.

3. See CAL. FISH & GAME CODE § 86 (West 1984) (defining "take" as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill"); see also *Department of Fish & Game v. Anderson-Cottonwood Irr. Dist.*, 8 Cal. App. 4th 1554, 1562-63, 11 Cal. Rptr. 2d 222, 227 (1992) (clarifying that "take" does not proscribe only hunting and fishing related activities).

4. See CAL. FISH & GAME CODE § 2062 (West Supp. 1997) (defining "endangered species" as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease").

5. See *id.* § 2067 (West Supp. 1997) (defining "threatened species" as "a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by this chapter").

6. See *infra* notes 37-38 and 42-45 and accompanying text (discussing the mitigation and jeopardy provisions of Chapter 567).

This law will impact the future of hundreds of endangered and threatened species in California.<sup>7</sup> Nearly one in three vertebrate species and one in ten native plants are in serious danger of extinction.<sup>8</sup> California species are especially imperiled.<sup>9</sup> Most species on the California list have been declining for years, despite the efforts of the government and environmentalists.<sup>10</sup> These vanishing species face a daunting struggle in overcoming extinction, ranging from habitat encroachment, disease, competition from rival species, predators and shortage of a food supply.<sup>11</sup> Chapter 567 can now be added to this list.<sup>12</sup>

## II. BEFORE THE WALL FELL: HISTORY LEADING UP TO CHAPTER 567

Over the years, the Department of Fish and Game (Department) has issued about 140 permits covering over 582,000 acres of land for the taking of species.<sup>13</sup> Recently, the Department's ability to issue such permits was challenged by thirteen environmental organizations after the issuance of a "Permit for Emergency Management Measures" following the winter floods of 1995.<sup>14</sup> This permit would have allowed all persons and public agencies to kill endangered species in the process of preventing or mitigating any flood, emergency, national disaster or fire and/or to restore private or public property where any local state of emergency had

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7. See Sweeney, *supra* note 2 (noting that California's endangered species law protects 75 animals and 217 plants, and similar federal law covers 88 animal and 66 plants species within California's borders); see also Marianne Lavelle, *Feds Settle to Save Act and Species*, NAT'L L.J., Dec. 16, 1996, at A1 (observing that more than half of the nation's threatened animal and plant species depend on private land); *Many Species Imperiled in State—Shrinking Habitats Endanger Plants, Animals, Report Says*, SACRAMENTO BEE, Oct. 8, 1997, at A4 [hereinafter *Species Imperiled*] (declaring that a quarter of all plant and animal species will become extinct within the next fifty years if habitat decline continues).

8. See Tom Hayden & Tara Mueller, *Wreaking Havoc, Calling it Help; Environment: Two Bills Before the State Senate Would Do Irreparable Harm to Endangered Species in California*, L.A. TIMES, Sept. 12, 1997, at B9 (citing a 1993 University of California study); see also Fraser Shilling, *Do Habitat Conservation Plans Protect Endangered Species?*, SCIENCE, June 13, 1997, at 1662 (noting that one-fourth of all mammalian species are in danger of extinction).

9. See *Species Imperiled*, *supra* note 7, at A4 (observing that California has 46 extinct species, 54 imperiled vertebrate species and 784 imperiled plants, more than any other state).

10. See Sweeney, *supra* note 2; see also *Species Imperiled*, *supra* note 7, at A4 (noting that of 21 "most-endangered ecosystems" in the United States, at least seven are in California).

11. Frana M. Powell, *Defining Harm Under the Endangered Species Act: Implications of Babbitt v. Sweet Home*, AM. BUS. L.J., Sept. 22, 1995, at 131.

12. See *infra* notes 52-93 and accompanying text (describing the deleterious effects of Chapter 567).

13. SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 4 (June 17, 1997); Jake Henshaw, GANNETT NEWS SERV. (Virginia), June 26, 1997; see Ann Bancroft, *Compromise Bills Sent to Governor*, ASSOCIATED PRESS, Sept. 12, 1997 (observing that most of the permits have been issued to golf courses and oil, mining and timber companies); see also Dan Bernstein, *Endangered-Species Fight Gets New Urgency*, SACRAMENTO BEE, May 3, 1997 (noting that these permits have been issued for a variety of projects including water pipelines, gas pipelines, shopping centers and dams); Greg Mitchell, *State High Court to Mull Species Act Exemptions*, THE RECORDER, June 19, 1997, at 3, available in LEXIS, News Library, Cumw's File (stating that the Department has issued incidental take permits for such projects as pipelines, mines, reservoirs, a business park and other commercial developments).

14. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 879, at 3 (Sept. 9, 1997).

existed.<sup>15</sup> This permit would have lasted for five years without requiring any mitigation to affected species.<sup>16</sup>

In *Planning & Conservation League v. Department of Fish & Game*,<sup>17</sup> the court held that the Department does not have the authority to exempt building and development projects from California's prohibition against killing endangered or threatened species.<sup>18</sup> As a consequence of this decision, many development proposals were halted.<sup>19</sup> In addition to holding that the Department lacked authority to issue incidental take permits, the *Planning & Conservation League* court held that, "it is for the Legislature rather than the judicial branch to provide an appropriate remedy."<sup>20</sup> The legislature's remedy and response was Chapter 567.<sup>21</sup>

Chapter 567 thus was enacted to overrule the *Planning & Conservation League* decision, to grant the Department the authority to issue incidental take permits, and to ratify those permits issued before this court decision.<sup>22</sup> These permits, proponents of Chapter 567 contend, are integral to balancing private property interests with the preservation of endangered and threatened species and their habitats.<sup>23</sup>

### III. THE VEIL OF INNOCENCE—THE ADOPTION OF CHAPTER 567

The federal government's Endangered Species Act allows the issuance of taking permits to otherwise lawful activities.<sup>24</sup> Similarly, several other states have adopted provisions authorizing take permits in a variety of circumstances,<sup>25</sup> ranging from

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15. Dan Walters, *Species Battle Nearing Climax*, SACRAMENTO BEE, May 25, 1997, at A3.

16. ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 3 (Sept. 4, 1997).

17. 55 Cal. App. 4th 479 (1997).

18. *Planning & Conservation League v. Department of Fish & Game*, 55 Cal. App. 4th 479, 490 (1997); see *San Bernardino Valley Audubon Soc'y v. City of Moreno Valley*, 44 Cal. App. 4th 593, 603-04, 51 Cal. Rptr. 2d 897, 904 (1996) (holding that Department of Fish and Game may not, under the guise of its rulemaking power, attempt to enlarge its authority through issuance of incidental take permits); see also Walters, *supra* note 15, at A3 (declaring that the court decision, in effect, declared what the Wilson administration had been doing in issuing permits was illegal).

19. Bernstein, *supra* note 13, at A3; see Walters, *supra* note 15, at A3 (stating the court decision created chaos among land owners who feared that a strict interpretation of the endangered species act would put a halt to any major project).

20. *Planning & Conservation League*, 55 Cal. App. 4th at 494.

21. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 879, at 5 (Sept. 9, 1997).

22. *Id.*

23. See *infra* notes 49-50 and accompanying text (detailing the arguments for the promotion of Chapter 567).

24. See 16 U.S.C.A. § 1539(a)(1)(B) (West 1985) (authorizing the issuance of a permit that allows the taking of endangered species "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity").

25. See generally *id.* § 1535(f) (West 1985) (permitting states to adopt laws or regulations that are more restrictive than those of the federal government).

from emergency situations<sup>26</sup> and the protection of human health<sup>27</sup> and property,<sup>28</sup> to the promotion of zoological, scientific, and educational endeavors.<sup>29</sup>

Prior to the adoption of Chapter 567, a person<sup>30</sup> was prohibited from importing, exporting, taking, possessing, purchasing or selling any endangered or threatened species as was classified by the Department of Fish & Game.<sup>31</sup> However, the Department could authorize the importation, exportation, take or possession of any endangered or threatened species for scientific, educational or management purposes.<sup>32</sup>

Chapter 567 increases the authority of the Department by allowing the issuance of a permit for the taking of endangered, threatened or candidate species under specified conditions.<sup>33</sup> Chapter 567 requires the permit system to be subject to the California Environmental Quality Act, and thus, the Department must provide opportunities for public commentary on a developer's plan before issuing an incidental taking permit.<sup>34</sup> For the Department to issue the permit, four specific

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26. See, e.g., MICH. COMP. LAWS ANN. § 324.36505(5) (West Supp. 1997) (allowing the removal, capture or destruction of a carnivorous animal in an emergency situation involving immediate threat to human life).

27. See *id.* § 324.36505(5) (West Supp. 1997) (allowing a permit to be issued for the removal, capture or destruction of an endangered or threatened species upon good cause for the protection of human health); MONT. CODE ANN. § 87-5-109(2) (1997) (same); N.M. STAT. ANN. § 17-2-42(D) (Michie 1995) (same); N.Y. ENVTL. CONSERV. LAW § 11-0521 (McKinney 1997) (same).

28. See MICH. COMP. LAWS ANN. § 324.36505(5) (West Supp. 1997) (allowing a permit to be issued for the removal, capture or destruction of an endangered or threatened species upon good cause to alleviate damage to property); MONT. CODE ANN. § 87-5-109(2) (1997) (same); N.M. STAT. ANN. § 17-2-42(D) (Michie 1995) (allowing the issuance of a permit for the removal, capture or destruction of an endangered species to alleviate or prevent damage to property); N.Y. ENVTL. CONSERV. LAW § 11-0521 (McKinney 1997) (declaring that a take permit may be issued upon presentation of proof of damage to public or private property).

29. See ALASKA STAT. § 16.20.195 (Michie 1992) (permitting the harvesting, capturing or propagation of an endangered species or subspecies only by grant of a specific permit for scientific or educational purposes or for propagation for the purposes of preservation); 520 ILL. COMP. STAT. ANN. 10/4-4 (West 1993) (authorizing the issue of a permit to take endangered or threatened species of animals that will enhance the survival of the species by zoological, botanical, educational or scientific purposes); MICH. COMP. LAWS ANN. § 324.36505(4) (West Supp. 1997) (specifying a take permit may be issued to promote the survival of the endangered or threatened species or for educational, scientific or zoological purposes); MISS. CODE ANN. § 49-1-41 (1990) (providing that taking permits may only be issued to a duly accredited representative of an educational facility, scientific institute or governmental agency); OR. REV. STAT. § 496.172(4) (Supp. 1996) (enabling a take permit to be issued to scientific purposes); S.C. CODE ANN. § 50-11-1180(b) (Law Co-op. Supp. 1996) (mandating that permits will be granted for strictly scientific or propagating purposes only); WIS. STAT. ANN. § 29.415(6)(a) (West Supp. 1996) (allowing the issuance of a permit to take, export, transport or possess any endangered or threatened wild animal or wild plant for zoological, educational or scientific purposes or for the propagation of such animals or plants in captivity for preservation purposes).

30. See CAL. FISH & GAME CODE § 67 (West Supp. 1997) (defining "person" as "any natural person or any partnership, corporation, limited liability company, trust, or other type of association").

31. ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 1 (Sept. 4, 1997).

32. *Id.*

33. CAL. FISH & GAME CODE § 2081(b) (amended by Chapter 567).

34. See Sweeney, *supra* note 2 (noting that all actions are subject to public notice with an opportunity for comment and response); see also Jenifer Warren, *State Poised to Revise Endangered Species Law*, L.A. TIMES, Sept. 11, 1997, at A1 (commenting that reviews were previously held in secret without any chance for public

criteria must be met.<sup>35</sup> Foremost, the taking must be incidental to an otherwise lawful activity.<sup>36</sup> Second, the impacts of the taking must be minimized and fully mitigated<sup>37</sup> to be roughly proportional to the impact on the affected species.<sup>38</sup> Third, the permit must be consistent with the regulations of Sections 2112<sup>39</sup> and 2114<sup>40</sup> of the Fish and Game Code.<sup>41</sup> Finally, the permit applicant must ensure adequate funding for the minimization and mitigation of the impact on affected species and for monitoring compliance and effectiveness of those efforts.<sup>42</sup>

Additionally, the Department may not issue a taking permit if it would jeopardize the continued existence of the species.<sup>43</sup> In reaching this decision, the Department must look to the best available scientific and other reasonably available information in determining whether the species will be able to survive and reproduce.<sup>44</sup> Adverse impacts of the taking in light of known population trends, threats to the species and reasonably foreseeable impacts to the species from other related activities and projects must also be considered in determining whether a species is put in jeopardy.<sup>45</sup>

Chapter 567 also ratifies and authorizes any permits issued by the Department on or before April 10, 1997,<sup>46</sup> or between April 10, 1997 and January 1, 1998.<sup>47</sup> The legislature intended this grandfathering section to give all previously issued permits the full force and effect of law.<sup>48</sup>

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comment).

35. CAL. FISH & GAME CODE § 2081(b) (amended by Chapter 567).

36. *Id.* § 2081(b)(1) (amended by Chapter 567).

37. *See* Warren, *supra* note 34, at A1 (reflecting that such measures may include restoring a degraded area or purchasing of land of equal value for preservation); *see also* ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 4 (Sept. 4, 1997) (arguing that a nexus between the activity and the taking must exist to require mitigation efforts); *see generally* Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987) (requiring that an "essential nexus" exist between a governmental condition attached to property and "the end advanced as the justification" for the condition to be valid).

38. CAL. FISH & GAME CODE § 2081(b)(2) (amended by Chapter 567).

39. *Id.* § 2112 (West Supp. 1997) (requiring the Department to implement rules and guidelines for recovery strategies based upon the best available scientific evidence, and additionally permitting the Department to deny the issuance of permits if guidelines and rules are adopted to that effect).

40. *Id.* § 2114 (West Supp. 1997) (permitting the Department to include any added endangered species into a recovery strategy providing the Department adheres to all policies, rules and guidelines pursuant to rulemaking proceedings).

41. *Id.* § 2081(b)(3) (amended by Chapter 567).

42. *Id.* § 2081(b)(4) (amended by Chapter 567).

43. *Id.* § 2081(c) (amended by Chapter 567).

44. *Id.*

45. *Id.*

46. *Id.* § 2081.1(b)(A) (enacted by Chapter 567).

47. *See id.* § 2081.1(b)(B) (enacted by Chapter 567) (explaining that the Department must certify that the permit meets the four-pronged criteria).

48. *Id.* § 2081.1(b) (enacted by Chapter 567); *see id.* (noting that the "Emergency Management Measures Permit" issued on March 15, 1995 is not given effect by Chapter 567); *see also* ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 4 (Sept. 4, 1997) (clarifying that the Fire Protection Management Measures permit of 1994 will be grandfathered by Chapter 567); *see generally* Bancroft, *supra* note 13 (observing that a 50-year permit issued to the Metropolitan Water Company in Riverside County will affect 65

At first blush, Chapter 567 seems like a very strong environmental measure designed to ensure impact mitigation and protection of endangered and threatened species. Indeed, proponents maintain that Chapter 567 contains sufficient safeguards to protect endangered species through such requirements as minimizing and fully mitigating impacts, ensuring funding for mitigation efforts and allowing public commentary on the issuance of take permits.<sup>49</sup> Additionally, advocates contend that Chapter 567 removes the ambiguity that existed previous to its adoption in determining what is required of permit applicants.<sup>50</sup> Undeniably, many of these benefits do aid in furthering the goals of environmental protection. However, several portions of this law not only serve to undermine these benefits and the goals of preserving species, but also heralds in a new wave of species extinction in California.<sup>51</sup>

#### IV. THE PATHWAY TO EXTINCTION: CHAPTER 567'S LONG-TERM IMPACTS

##### A. *Loosening the Jeopardy Standard*

Chapter 567 grossly deviates from and undermines the Federal standard<sup>52</sup> which permits a taking if there is *no jeopardy to the likelihood of species recovery in the wild*.<sup>53</sup> Also, Chapter 567 departs from the Department of Fish and Game's assessment that *jeopardy is reached if the continued existence of the species is threatened, or if the destruction or adverse modification of the essential habitat threatens the continued existence of the species*.<sup>54</sup> In comparison, Chapter 567 now allows the issuance of a taking permit if there is *no jeopardy to the continued existence of the species' ability to survive and reproduce*.<sup>55</sup> Thus, Chapter 567 would allow the granting of a permit provided that the species may still be able to reproduce and survive even if the adverse impacts of the taking would imperil the species' very existence and ability to survive under either the federal provision or

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threatened and endangered species).

49. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 879, at 5 (Sept. 9, 1997).

50. Warren, *supra* note 34, at A1; see SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF SB 879, at 5 (Sept. 9, 1997) (observing that the adoption of Chapter 567 was necessary to remove the legal jeopardy surrounding previously issued take permits by the Department); see also Mary Lynne Vellinga, *Updates to Species Act Approved*, SACRAMENTO BEE, Sept. 10, 1997, at A1 (arguing that Chapter 567 puts a consistent standard of permit review into law).

51. See *infra* notes 52-93 and accompanying text (detailing the long-term impacts of Chapter 567 on endangered and threatened species).

52. Warren, *supra* note 34, at A1; see *id.* (explaining that the Chapter 567's jeopardy standard undermines efforts in Washington to reform the Endangered Species Act).

53. See 50 C.F.R. § 402.02 (1996) (specifying that an action would "jeopardize" a species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species").

54. CAL. FISH & GAME CODE § 2053 (West Supp. 1997); *id.* § 2090(b) (West Supp. 1997); *id.* § 2091 (West Supp. 1997).

55. *Id.* § 2081(c) (amended by Chapter 567).

previously applicable California requirements.<sup>56</sup> Likewise, Chapter 567 does not require the species to survive in the wild so long as it survives somewhere.<sup>57</sup> California's legislative departure from requiring the conservation and preservation of a species is the mechanism that allows for the imperilment of species survival; the Department is no longer required to consider the impact of the taking on the recovery of the species.<sup>58</sup>

Besides belying the credibility of the federal and California standards, Chapter 567's jeopardy standard imposes an insurmountable obstacle of proof on those who would dispute the issuance of a permit.<sup>59</sup> If a permit holder were to challenge the Department for failing to issue a permit because the Department believes the species would be in jeopardy, the Department must meet a virtually impossible standard of proving that a project would absolutely jeopardize a species' continued existence.<sup>60</sup> Consequently, Chapter 567's jeopardy provision only furthers the likelihood of species extinction instead of preventing it through legislative protection.

### B. How Much is Required to "Fully Mitigate"?

Proponents of Chapter 567 maintain that a permit holder is now required to fully mitigate the damages caused by the activities of her take. Yet, Chapter 567 makes no mention of avoiding the take in the first place.<sup>61</sup> Additionally, Chapter 567 makes no requirement that recovery be initiated by the applicant.<sup>62</sup> Furthermore, it does not place a cap on how many species may be killed in the furtherance of the take.<sup>63</sup> Such omissions represent a deviation and disregard for the principles of conservation and preservation that the Department is statutorily obligated to uphold.<sup>64</sup> Chapter 567 only requires that this "full mitigation" be in "rough pro-

56. SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 4-5 (Sept. 11, 1997); see Hayden & Mueller, *supra* note 8, at B9; see also *id.* (arguing that the "no jeopardy" prong would allow the taking and extinction of wild-running Chinook salmon by "mitigating" the impacts by releasing hatchery-raised fish).

57. SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 5 (Sept. 11, 1997).

58. *Id.*

59. See Sweeney, *supra* note 2 (emphasizing that Chapter 567's jeopardy standard represents a much higher legal threshold of proof than the federal standard).

60. Warren, *supra* note 34, at A1; see *id.* (warning that Chapter 567's jeopardy standard makes it impossible for anyone to sue or legally challenge development under Chapter 567).

61. ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 3-4 (Sept. 4, 1997).

62. *Id.* at 4.

63. Jake Henshaw, GANNETT NEWS SERV., Sept. 5, 1997, available in LEXIS, News Library, Cumws File.

64. See CAL. FISH & GAME CODE § 2052 (West Supp. 1997) (declaring that the intent of California's endangered species act is "to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat").



portion"<sup>65</sup> to the damage that will be done.<sup>66</sup> Thus, in looking to mitigation and minimization requirements, the permittee's obligations to protect and preserve the taken species are minimal because the cumulative impacts of the destruction are inconsequential to the roughly proportional mitigation required.<sup>67</sup>

Although Chapter 567 requires the permit holder to minimize and fully mitigate the impacts of her activities, little effort need be exerted to meet this criterion.<sup>68</sup> Foremost, under Chapter 567, the permittee's mitigation obligations would be met if they fail to fully meet the permit holder's project objectives.<sup>69</sup> However, Chapter 567's requirement of looking to the applicant's project objectives is inconsistent with Section 2053 of the Fish and Game Code, which requires the Department to develop reasonable and prudent alternatives to maintain the project's purpose and to conserve the species.<sup>70</sup> Inconsistencies such as these are likely to be interpreted by the courts as intentional deviations from previous statutory language.<sup>71</sup> The courts will conclude that the legislature was aware of the differing statutory conditions and will be presumed to have deliberately deviated from such provisions.<sup>72</sup> Chapter 567 then will likely take precedence over former statutory requirements. Consequently, Chapter 567 will allow the virtual extinction of a species as long as the impact mitigation would interfere with the project objectives of the permit

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65. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (providing that in determining "rough proportionality," "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1429-30 (9th Cir. 1996) (declaring that "rough proportionality" is generally a question for the trier of fact); see also *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (proclaiming that restricting governmental control over private property serves "to bar Government from forcing some people to bear public burdens which, in all fairness and justice, should be borne by the public as a whole").

66. CAL. FISH & GAME CODE § 2081(b)(2) (amended by Chapter 567); see *id.* § 2052.1 (enacted by Chapter 567) (requiring that mitigation measures "be roughly proportional in extent to any impact on those species that is caused by that person").

67. Hayden & Mueller, *supra* note 8, at B9; see SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 3 (Sept. 11, 1997) (arguing that requiring an offset of the impacts that are "roughly proportional" instead of "fully proportional" will lead to less protection of endangered species); see also Michael Casey, *War Over Meadowlands*, THE RECORD (N.J.), Oct. 16, 1996, at L01 (documenting that mitigation efforts often fail to produce land of equal value to those that are destroyed and often provides less diversity than the original site).

68. CAL. FISH & GAME CODE § 2081(b) (amended by Chapter 567); see Bancroft, *supra* note 13 (arguing that Chapter 567 would permit the destruction of a bald eagle habitat if similar trees are planted elsewhere regardless of whether the eagles adapt to the change).

69. See CAL. FISH & GAME CODE § 2081(b)(2) (amended by Chapter 567) (requiring that, "where various measures are available to meet this obligation, the measures required shall maintain the applicant's objectives to the greatest extent possible.").

70. *Id.* § 2053 (West Supp. 1997); ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 3 (Sept. 4, 1997).

71. See cases cited *infra* note 90 (holding that deviation from previous statutory language will be interpreted as deliberate).

72. *San Bernardino Valley Audubon Soc'y*, 44 Cal. App. 4th at 604, 51 Cal. Rptr. 2d at 904.

holder.<sup>73</sup> Undoubtedly, the permit holder may be able to claim project objectives ranging from profit maximization to ensuring her development is finished by a given day to avoid these obligations. Unfortunately the language of Chapter 567 would permit this.<sup>74</sup> Likewise, under Chapter 567, the permit holder is relieved of mitigation efforts if the mitigation is not likely to succeed.<sup>75</sup> Additionally, it would seem that if the elements of upholding a project's objectives and demanding successful mitigation measures conflict, the permit holder's project objectives would win over successful implementation of mitigation efforts.<sup>76</sup>

### C. *The Mootness of Recovery Funds*

The third criterion that must be met for a taking permit to be issued requires the permit holder to meet the obligations of Sections 2112 and 2114 of the California Fish and Game Code.<sup>77</sup> With the passage of Chapter 567, this prong will not likely impact the issuance of these permits. This provision places the responsibility on the state, not the permit holder, for future recovery efforts of the targeted species.<sup>78</sup> Thus, the Department would be unable to point toward recovery measures of endangered or threatened species that would disrupt a developer from being issued a permit, because the state has not directed any funding to specifically aid in the recovery measures of Sections 2112 and 2114.<sup>79</sup> Similarly, one only needs to look to the government's failure at species recovery efforts to speculate on the dismal fate of California's endangered and threatened species.<sup>80</sup> Now, since the five years

73. Provided that the permit holder meets the three additional prongs, the Department may say the species is not put in jeopardy because it is still able to reproduce and survive. *See generally supra* notes 36, 39-42 (discussing the statutory requirements for these three prongs).

74. SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 4 (Sept. 11, 1997).

75. *See* CAL. FISH & GAME CODE § 2081(b)(2) (amended by Chapter 567) (specifying that, "All required measures shall be capable of successful implementation.").

76. Take, for instance, a permit holder who is faced with only two successful mitigation alternatives: one that would mitigate 100% of the species damage and one that would mitigate 10% of the permit holder's impacts. She may choose the 10% mitigation strategy provided that the 100% mitigation alternative would not maintain her project objectives to the greatest extent possible. Thus, because the 100% mitigation strategy may cost more and delay the opening of her business, Chapter 567 allows her to opt for the 10% mitigation strategy so her objectives may be maintained.

77. *See supra* notes 39-40 and accompanying text (describing the requirements for meeting these statutes).

78. Mary Lynne Vellinga, *Compromise Reached on Species Act*, SACRAMENTO BEE, Sept. 6, 1997, at A3.

79. Hayden & Mueller, *supra* note 8, at B9; *see* Vellinga, *supra* note 50, at A1 (arguing that Chapter 567 shifts responsibility from developers in mitigating damages to the state, which is unable to fund such recovery efforts); Robert J. Vincze, FED. DOCUMENT CLEARING HOUSE CONGRESSIONAL TESTIMONY, Mar. 20, 1996 (noting that only 53% of the U.S. endangered species are covered by recovery plans); *see also id.* (observing that billions of dollars will be needed to attain recovery goals for most of the endangered species in the U.S.).

80. *See* FED. NEWS SERV., Sept. 17, 1996 (testimony of Nancie G. Marzulla, President and Chief Legal Counsel Defenders of Property Rights, before the House Committee on Resources, are specifying that in 1990 the Department of the Interior estimated that the recovery costs for all endangered species are over \$4.6 billion); *see also* Vincze, *supra* note 79 (stating that of 16 species delisted from the Department of the Interior's endangered species classification in 1991, seven were from extinction, five through data errors and only four from recovery

of concessions to the developers and to government administration have coalesced in the passage of Chapter 567, no incentive or leverage exists to insure the passage of such a recovery fund in the future.<sup>81</sup> Unfortunately, future legislatures will be unable to bring back those species pushed into extinction by Chapter 567.<sup>82</sup>

#### D. *Painting the Roses Red—Covering Up Habitat Preservation*

A further area of contention regarding Chapter 567 lies in whether a taking includes the destruction of habitat that does not directly kill a protected plant or animal species, yet nevertheless, indirectly affects the species.<sup>83</sup> In determining whether indirect protection should extend to the preservation of the species' habitats, the courts will be required to look to the whole system of law of which Chapter 567 is a part.<sup>84</sup> Chapter 567 will be construed, if possible, to harmonize with other laws in this subject.<sup>85</sup>

Opponents of Chapter 567 should be quick to point out that the habitat of a threatened or endangered species is so intertwined with a species' "ability to survive and reproduce" that an individual should be required to procure a permit to take such an animal's habitat.<sup>86</sup> Indeed, in California, this loss of habitat has been responsible for the threatening and extinction of many of the state's species.<sup>87</sup> Yet the courts may interpret the departure that Chapter 567 takes from Sections 2052 and 2053 of the Fish and Game Code,<sup>88</sup> and from Federal statutory regulation<sup>89</sup> as

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efforts).

81. Hayden & Mueller, *supra* note 8, at B9; *see, e.g.*, FED. NEWS SERV., *supra* note 30 (noting that in 1992, the U.S. Army Corp. of Engineers and the Department of the Navy spent a combined \$5.7 million in protecting the California least-tern).

82. *See* Sweeney, *supra* note 2 (remarking that, "we are numbing ourselves to the death and destruction of eagles, hawks, foxes, [and] salmon by choosing K-marts, golf courses and gravel pits.").

83. James P. Sweeney, *Endangered Species Act Overhauled by Senate*, SAN DIEGO UNION-TRIB., Sept. 13, 1997, at A1.

84. *People v. Comingore*, 20 Cal. 3d 142, 147, 570 P.2d 723, 726, 141 Cal. Rptr. 542, 545 (1977).

85. *Isobe v. Unemployment Ins. Appeals Bd.*, 12 Cal. 3d 584, 590-91, 526 P.2d 528, 532, 116 Cal. Rptr. 376, 380 (1974).

86. *See* Vincze, *supra* note 79 (arguing that, "species diversity is positively correlated with habitat area. A corollary of this relationship is that if habitat is substantially reduced in area or degraded, species occurring in the wild will be lost.").

87. *See* *Species Imperiled*, *supra* note 7, at A4 (noting that, "California has lost 99 percent of its native grasslands, 85 percent of its coastal redwoods and 80 percent of its coastal wetlands. . . . The result: 46 California species have vanished and 205 more are listed as threatened or endangered.").

88. *See* CAL. FISH & GAME CODE § 2052 (West Supp. 1997) (specifying that the policy of the state is to conserve, protect, restore and enhance any endangered or threatened species' habitat); *id.* § 2053 (West Supp. 1997) (requiring state agencies not to approve projects that would result in the destruction or adverse modification of habitat that is essential to the continued existence of the species if reasonable and prudent alternatives are available).

89. *See* 50 C.F.R. § 17.3 (1996) (providing that, "[h]arm in the definition of 'take' in the Act means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.").

deliberate.<sup>90</sup> Case law that supports the position that taking includes habitat destruction is further undermined by this deliberate departure.<sup>91</sup> The general rule of statutory construction requires that, "[w]here a statute, with reference to one subject contains a given provision, the omission of such a provision from a similar statute concerning a related subject . . . is significant to show that different intention existed."<sup>92</sup> These provisions may therefore be harmonized with the underlying intent of CESA by requiring the state to implement recovery efforts aimed at the *indirect* harms to the habitat while placing the burden of *direct* mitigation for these harms on the permit holders.<sup>93</sup> Therefore, the courts should determine that the intent and scope of Chapter 567's mitigation requirements do not cover the indirect preservation of a species' habitat because of the deliberate legislative departure.

## V. CONCLUSION

Under the guise of environmental protection, the legislature has betrayed its declining populations of wildlife and fauna through Chapter 567's virtual abandonment of take permit requirements.<sup>94</sup> Few of its requirements enhance the protections reserved for endangered and threatened species,<sup>95</sup> and those that do are drastically undermined by the almost unlimited power and discretion afforded to take permit holders.<sup>96</sup> The mitigation and minimization obligations that Chapter 567 requires may be avoided if they do not coincide with the project objectives of the permit holder.<sup>97</sup> The Gordian knot of Chapter 567 additionally binds the hands of

90. See *California Ass'n of Psychology Providers v. Rank*, 51 Cal. 3d 1, 17, 793 P.2d 2, 10, 270 Cal. Rptr. 796, 805 (1990) (commenting that the Legislature is presumed to be aware of its deviation from its previous legislative actions); *City of Santa Cruz v. Municipal Court (Kennedy)*, 49 Cal. 3d 74, 88-89, 776 P.2d 222, 230-31, 260 Cal. Rptr. 520, 528-29 (1989) (noting that the Legislature is presumed to act with knowledge of its deviations from current case law); see also *supra* note 69 and accompanying text (discussing required mitigation efforts and permittee's objectives).

91. Sweeney, *supra* note 83, at A1; see, e.g., *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (specifying that Congress had intended to protect endangered species at "whatever the cost").

92. *People v. Drake*, 19 Cal. 3d 749, 755, 566 P.2d 622, 624, 139 Cal. Rptr. 720, 722 (1976); see *San Bernardino Valley Audubon Soc'y*, 44 Cal. App. 4th at 604, 51 Cal. Rptr. 2d at 904 (holding that a statutory omission is to be considered deliberate by the legislature but noting that this omission does not grant incidental take authority to Department of Fish and Game).

93. See *supra* notes 55-60 and accompanying text (speculating that a takings project must directly impact the survivability of the species to be questioned as jeopardizing a species); *supra* notes 61-76 and accompanying text (noting the direct mitigation efforts required by developers); *supra* notes 77-82 and accompanying text (arguing that Chapter 567 shifts species and habitat recovery efforts from developers to the state); see also 78 Op. Att'y Gen. 137 (1995) (advising that habitat modification that indirectly harms species is not prohibited by state law).

94. See *supra* notes 59-60, 65-69 and 73-76 and accompanying text (observing how Chapter 567 minimizes protections afforded to endangered and threatened species).

95. See *supra* notes 34 and 49-50 and accompanying text (noting the beneficial impacts of Chapter 567 on species protection).

96. See *supra* notes 52-58, 61-64, 70-72 and 79-82 and accompanying text (arguing how Chapter 567 decreases the protections of threatened and endangered species).

97. See *supra* notes 61-76 and accompanying text (commenting on the minimal requirements that are necessary for a permit holder to meet her mitigation requirements).

the Department and potential permit challengers because of the impossibility of demonstrating "jeopardy to continued existence of the species."<sup>98</sup> Through its permit criteria, Chapter 567 likewise undercuts species recovery efforts by the Department.<sup>99</sup> Finally, the legislative intent of Chapter 567 is likely to be interpreted by the courts as not extending to the preservation and conservation of indirect harms to a species' habitat.<sup>100</sup>

The future of California's endangered and threatened species have been severely jeopardized by allowing permit holders carte blanche discretion for wholesale species destruction under the auspice of "incidental take." One can hope next year's legislature remedies this tragedy before these plants and animals become distant memories of California's past.

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98. See *supra* notes 52-60 and accompanying text (documenting how Chapter 567 deviates from federal and state assessments of jeopardy).

99. See *supra* notes 77-82 and accompanying text (discussing the absence of recovery requirements on the permit holder).

100. See *supra* notes 83-93 and accompanying text (arguing that the courts will not extend protection to species that are indirectly taken as a result of habitat destruction).

## Regulating California's Squid Fishing Industry—Heeding the Lessons of Cannery Row

Gregory L. Maxim

### Code Sections Affected

Fish and Game Code §§ 8420, 8420.5, 8421, 8421.5, 8422, 8423, 8423.5, 8424, 8425, 8426, 8427, 8428, 8429, 8429.5, 8429.7 (enacted).  
SB 364 (Sher and Karnette); 1997 STAT. Ch. 785

*The whole street rumbles and groans and screams and rattles while the silver rivers of fish pour in out of the boats and the boats rise higher and higher in the water until they are empty.*<sup>1</sup>

### I. INTRODUCTION

From 1910 to 1945, California's sardine industry was one of the most predominant in the country.<sup>2</sup> Each year the catch hauled into Cannery Row would rival the previous year's bounty.<sup>3</sup> Then, however, the catch began to decline.<sup>4</sup> By 1948, the sardine stocks were virtually nonexistent.<sup>5</sup> The California sardine industry was forced to shut down.<sup>6</sup> Boats were sold, fishermen and cannery workers lost their jobs, and unemployment soared.<sup>7</sup> Now, 60 years later, the sardine population is barely making a comeback from its plummet to near extinction.<sup>8</sup> However, scientists, fishermen

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1. JOHN STEINBECK, *CANNERY ROW* 2 (Viking Penguin, 1986) (1945).

2. Paul Rogers, *Squid Demand Soars but Catch Limits Lacking, Critics Fear Overfishing Disaster*, THE TIMES-PICAYUNE, Jan. 19, 1997, at A16 [hereinafter Rogers, *Squid Demand*]; see Paul Rogers, *Fishing Fleets Feast on Squid, But How Long Can Boom Last?* SEATTLE TIMES, Jan. 5, 1997, at A12 [hereinafter Rogers, *Fishing Fleets*] (documenting that billions of sardines were harvested from 1910 to 1945).

3. Glen Martin, *Calamari—Endangered Delicacy? Fisheries Fear Squid is Too Tasty For its Own Good*, S.F. CHRON., Dec. 11, 1996, at A1.

4. Rogers, *Squid Demand*, *supra* note 2, at A16.

5. See *id.* (noting that sardine boats that previously hauled in several million tons now came ashore with nothing).

6. *Id.*

7. Martin, *supra* note 3, at A1.

8. Tom Knudson & Nancy Vogel, *Depleting the Sea*, SACRAMENTO BEE, Dec. 23, 1996, at A1; see *id.* (describing that the sardine catch in 1936 was 663,859 metric tons, and in 1995, 40,676 metric tons were caught); see also Daniel P. Puzo, *The State of the Seafood*, L.A. TIMES, Sept. 7, 1995, at H19 (stating that California has raised the commercial taking quota on sardines because the sardine population is the healthiest it's been in decades).

and politicians now fear the return of a new cycle of depletion in the commercial fishing of squid.<sup>9</sup>

## II. PREVIOUS AND EXISTING LEGISLATION

Squid fishing is now the largest commercial fishing industry in California.<sup>10</sup> The lure of this vast fishery has drawn fishing boats from other states who now frequent California waters to fish for squid.<sup>11</sup> For most varieties of fish, the state, federal and international governments limit the number of permits issued to fishermen or the amount of fish they are permitted to catch.<sup>12</sup> However, prior to the adoption of

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9. See Rogers, *Squid Demand*, *supra* note 2, at A16 (arguing that the lessons learned from the collapse of sardine fishing are being overlooked when dealing with squid management); see also Carlos V. Lozano, *Board Delays Action on Squid Harvesting*, L.A. TIMES, Feb. 26, 1997, at B3 (raising concern that squid overfishing has reached a crisis level); Martin, *supra* note 3, at A1 (stating that current squid landings have already started going down when compared to the amount of squid caught in previous years); Glen Martin, *Defender of the Fish*, S.F. CHRON., May 4, 1997, at 3 (explaining that fishermen are now having to fish harder and explore new areas to maintain their current squid catch levels); *Squid Fishing Limits Sought*, SACRAMENTO BEE, Feb. 22, 1997, at A4 (expressing concern that squid are being overfished); *Talk of the Nation: Fishing Industry* (National Public Radio, Feb. 24, 1997) (recognizing that boats and nets are getting bigger, vessels are ranging farther away from their port of origin, and equipment and gear are becoming more advanced to compete with other fishermen). But see Martin, *supra* note 3, at A1 (stating that squid are unlikely to suffer the same fate as the sardine because squid mature and spawn much quicker than sardines); Puzo, *supra* note 8, at H19 (explaining that squid are highly resilient, reproduce rapidly and their supplies are strong); Rogers, *Fishing Fleets*, *supra* note 2, at A12 (arguing that biologists are not seeing anything indicative of a stressed squid population); Tracy Wilson, *A Run for Their Money; Fishermen, Struggling Harbors Cash In on Bumper Crop of Squid*, L.A. TIMES, Jan. 21, 1996, at B1 (declaring that there is no imminent risk to the coastline's squid population; the squid stocks are far from depleted).

10. See CNN Today: *Natural Resources Experts Are Worried About the Squid Stocks as the Fish Becomes Popular in Restaurants* (CNN television broadcast, Feb. 17, 1997) [hereinafter *CNN Today*] (stating that demand for squid has risen five-fold in the United States over the past 10 years); see also Lozano, *supra* note 9, at B3 (declaring that in 1995, 155 million pounds of squid were caught in California waters and the industry was valued at \$21 million); Martin, *supra* note 9, at 3 (describing how the squid market has expanded within the last four years, particularly because of demand from overseas); Tony Perry, *Angling to Keep Share of Squid Market*, L.A. TIMES, June 1, 1997, at A1 (explaining that 175 million pounds of squid were caught last year worth \$33.5 million to fishermen); see also ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF AB 1204, at 2 (Apr. 22, 1997) (noting that California is now the leading producer of squid in the United States).

11. See ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 364, at 3 (July 15, 1997) (stating that out-of-state fishermen generally are able to haul in more squid than Californians because they use bigger and better-equipped boats); see also Rogers, *Fishing Fleets*, *supra* note 2, at A12 (commenting that about 40% of the squid boats operating in California waters are from Washington); Rogers, *Squid Demand*, *supra* note 2, at A16 (asserting that vessels ranging from Alaska to Hawaii are coming to California to fish for squid); see generally *id.* (stating that California fishermen desire a moratorium to keep fishing vessels from Oregon and Washington out of California waters).

12. Perry, *supra* note 10, at 1; see Jane Kay, *Scientists Sounding Alarm Over Excessive Commercial Catches*, NEWS AND OBSERVER (Raleigh, N.C.), Jan. 5, 1997, at C16 (stating that California has regulated the take of chinook salmon, yellowtail, rockfish, sablefish, thornyheads and Dover sole); Daniel P. Puzo, *What Happened to California's Seafood?*, L.A. TIMES, Sept. 7, 1995, at H1 (documenting that the 1990 Proposition 132 effectively closed coastal fishing to gill-nets); *Talk of the Nation: Fishing Industry*, *supra* note 9 (noting that the UN strongly regulates highly migratory fish).

Chapter 785, California virtually did not regulate the commercial fishing of squid.<sup>13</sup> Instead, market forces primarily controlled the harvest and demand for squid.<sup>14</sup>

Under the provisions of Chapter 785, the state requires a valid commercial market squid<sup>15</sup> vessel permit for anyone possessing or taking squid.<sup>16</sup> Those who harvest less than two tons of squid per day or take squid for live bait purposes are exempt from the permit requirement.<sup>17</sup> Additionally, the state will only issue permits to vessel owners<sup>18</sup> using purse seine,<sup>19</sup> lampara,<sup>20</sup> or dip nets.<sup>21</sup> Those vessels employing other nets may not take market squid for commercial purposes unless taken incidentally to other fisheries.<sup>22</sup>

Chapter 785 prohibits the transfer, trade or sale of commercial squid vessel permits.<sup>23</sup> However, these permits may be transferred to another vessel owned by the permit holder if the permitted vessel was lost, stolen, destroyed or suffered a major mechanical breakdown, and if the vessel is of comparable capacity.<sup>24</sup>

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13. See Perry, *supra* note 10, at 1 (describing how anyone who buys a fishing permit can take as much squid as one wishes); see also Rogers, *Squid Demand*, *supra* note 2, at A16 (comparing the lack of squid regulations to an "angler's Wild West"); see *infra* notes 30, 31 and accompanying text (detailing California's squid regulations prior to the adoption of Chapter 785).

14. ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 364, at 3 (July 15, 1997).

15. CAL. FISH & GAME CODE § 8420 (enacted by Chapter 785) (referring to "squid" as the species *Loligo opalescens*, which is also known as market squid).

16. *Id.* § 8421(a) (enacted by Chapter 785); see *id.* § 8422(a) (enacted by Chapter 785) (stating that the fee for the commercial market squid permit will be "an amount not to exceed the reasonable costs incurred by the department in administering this article, including any necessary biological assessments of the market squid resource, or two thousand five hundred dollars (\$2,500), whichever is less").

17. *Id.* § 8421(b) (enacted by Chapter 785).

18. See *id.* § 8421(d) (enacted by Chapter 785) (defining "owner" as including "any person who has a lease-purchase agreement for the purchase of a vessel"); see also *id.* § 8421(c) (enacted by Chapter 785) (requiring the vessel to be registered with the department pursuant to § 7881).

19. See ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF AB 1204, at 2 (Apr. 22, 1997) (defining "purse seine" as "a net, that is placed in a circle, with a drawstring on the bottom of the net, creating a purse that traps fish").

20. See SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF SB 879, at 1 (Apr. 15, 1997) (stating that seine and lampara nets encircle schools of squid and land them onto the fishing vessel).

21. CAL. FISH & GAME CODE § 8421(a) (enacted by Chapter 785); see *id.* (specifying that dip nets are commonly referred to as scoop nets).

22. *Id.* § 8421(b) (enacted by Chapter 785); see *id.* (noting that incidental takings of squid in excess of two tons are prohibited).

23. *Id.* § 8421(e) (enacted by Chapter 785).

24. *Id.* § 8427(a) (enacted by Chapter 785); see *id.* § 8427 (enacted by Chapter 785) (requiring the applicant to submit documentation and proof to the United States Coast Guard for a permit transfer).



Chapter 785 also requires all squid light boats<sup>25</sup> to register for and possess a squid light boat permit.<sup>26</sup> A permit will only be issued to the registered owner of the light boat.<sup>27</sup>

Chapter 785 additionally prohibits the purchase of squid from a vessel unless the purchaser possesses a license,<sup>28</sup> employs a certified weighmaster, and the purchaser's facilities are located on a permanent, fixed location.<sup>29</sup>

Under prior law, the Fish and Game Commission could limit the days and times when squid could be taken north of Point Conception.<sup>30</sup> Additionally, prior law prohibited certain activities relating to commercial squid fishing in Fish and Game District 10.<sup>31</sup> Chapter 785 likewise prohibits the taking of squid north of Point Conception from noon on Sunday to noon on Friday of each week.<sup>32</sup>

The provisions of Chapter 785 will become inoperative on April 1, 2001, and repealed on January 1, 2002 unless these provisions are deleted or extended by a later enacted statute.<sup>33</sup>

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25. See ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 364, at 3 (July 15, 1997) (defining a "light boat" as "any type of boat fixed with lights. The lights are used to attract the squid . . . . The light boats do not catch squid, rather they aid the squid fishermen by helping to attract squid").

26. CAL. FISH & GAME CODE § 8423(a) (enacted by Chapter 785); see *id.* § 8423(d) (enacted by Chapter 785) (requiring the permit cost to be similar to that of a commercial squid vessel's permit); see also *supra* note 16 and accompanying text (explaining how the cost of a commercial squid vessel's permit is calculated).

27. CAL. FISH & GAME CODE § 8423(f) (enacted by Chapter 785); see *id.* (requiring vessel registration pursuant to § 7881).

28. See *id.* § 8032 (West Supp. 1997) (permitting the issuance of a commercial fish business license or specialty license to individuals engaged in commercial aspects of fishing); see also *id.* § 8033 (West Supp. 1997) (requiring a fish receiver's license to be possessed by anyone who removes fish for processing or sale or any person who purchases or receives fish for commercial purposes from a fisherman).

29. *Id.* § 8424(a) (enacted by Chapter 785).

30. ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF AB 1204, at 2 (Apr. 22, 1997); see David D. Rathgeber, *Outer Continental Shelf Leasing Policy Prevails Over the California Coastal Commission*, 24 NAT. RESOURCES J. 1133, 1136 (1984) (stating that Point Conception is located in Santa Barbara County).

31. See CAL. FISH & GAME CODE § 8399.1 (West Supp. 1997) (prohibiting the attraction of squid with lights unless the vessel's primary purpose is the deployment or assisting in the deployment of nets for the taking of squid and prohibiting any vessel, except a seine skiff, from encircling any vessel that is attempting to take squid); Fish and Game District 10 is defined as,

the ocean waters and the tidelands of the State to highwater mark lying between the southern boundary of Mendocino County and a line extending west from the Pigeon Point lighthouse in San Mateo County, including the waters of Tomales Bay to a line drawn from the mouth of the unnamed creek approximately 1500 feet north of Tomasini Point southwesterly 218° magnetic north to the mouth of the unnamed creek at Shell Beach, and excluding Bodega Lagoon and all that portion of Bolinas Beach lying inside of Bolinas bar, that portion of San Francisco Bay lying east of a line drawn from point Ponita to Point Lobos and all river, streams, and lagoons.

*Id.* § 11018 (West 1984).

32. *Id.* § 8420.5 (enacted by Chapter 785); see generally Carlos V. Lozano, *Squid Fishing Limits to be Considered*, L.A. TIMES, Mar. 11, 1997, at B2 (stating that currently two-thirds of all California squid are caught off the coasts along Ventura and Santa Barbara counties).

33. CAL. FISH & GAME CODE § 8429.7 (enacted by Chapter 785).

## III. ENVIRONMENTAL SIGNIFICANCE

The scientific community's lack of knowledge about squid augments the necessity for these regulations.<sup>34</sup> Without increased scientific knowledge, management efforts will be futile.<sup>35</sup> Addressing this lack of knowledge, Chapter 785 additionally allows for the creation of a Squid Research Scientific Committee<sup>36</sup> which shall assist in the developing of research and management recommendations for the conservation of the squid fishery.<sup>37</sup> The Director of Fish and Game may also form a Squid Fishery Advisory Committee<sup>38</sup> to aid in consulting the Director.<sup>39</sup> The Director will submit his findings, following public hearings, to the Legislature with his recommendations for a market squid conservation and management plan.<sup>40</sup> This research will be funded through the collection of permit fees.<sup>41</sup> Additionally, the commission is required to adopt regulations to protect and to manage the squid fishery at a sustainable level.<sup>42</sup> These additional regulations are imperative to protecting and preserving the squid stocks; Chapter 785 alone is insufficient to

34. See Perry, *supra* note 10, at 1 (stating that the last study done by the Department of Fish and Game was completed in 1974); see also Rogers, *Squid Demand*, *supra* note 2, at A16 (noting that details of the squid's breeding habits are incomplete, and that state officials can only guess at the size of the squid population); see generally Kirk Moore, *Squid*, ASHBURY PARK PRESS, June 7, 1995, at F1 (citing to a study that states squid live for approximately one year).

35. SENATE COMMITTEE ON RULES, COMMITTEE ANALYSIS OF SB 364, at 4 (Sept. 5, 1997); see Martin, *supra* note 3, at A1 (arguing that the lack of scientific information is hindering effective management); see also Wilson, *supra* note 9, at B1 (opining that management of squid populations without adequate studies is like wandering through a minefield).

36. See CAL. FISH & GAME CODE § 8426(a) (enacted by Chapter 785) (dictating that this committee shall be composed of people with "scientific knowledge or expertise on the squid resource or fishery, who may be employed by academic institutions, public or private research institutions, or the private sector").

37. *Id.*

38. See *id.* § 8426(b) (enacted by Chapter 785) (allowing the Director to appoint the members of the committee representing licensed squid fishermen, squid processors, the recreational fishing industry, squid light boat owners, marine conservation organizations, and the Sea Grant Marine Advisory Program).

39. *Id.* § 8426(c) (enacted by Chapter 785); ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 364, at 2 (July 15, 1997).

40. CAL. FISH & GAME CODE § 8426(c) (enacted by Chapter 785); see *id.* (requiring that the plan include information on the necessity of a limited access plan, who may participate in such a plan, the overall fleet capacity of the industry, whether squid fishing should be reduced in specified areas to protect squid stocks, if specific areas are to be declared as harvest replenishment areas where squid may not be taken, recommendations on a monitoring program to promote sustainable annual harvest, regulations of squid light boats and recommendations, whether coordination is necessary with a federal coastal pelagic species management plan, and if necessary, modifying the take regulations of fishing gear); see also *id.* (stating that the squid conservation and management plan are to be submitted on or before April 1, 2001).

41. *Id.* § 8428 (enacted by Chapter 785); see SENATE COMMITTEE ON RULES, COMMITTEE ANALYSIS OF SB 364, at 5 (June 3, 1997) (anticipating that the implementation of Chapter 785 will cost \$50,000 annually for administration and \$650,000 for research).

42. CAL. FISH & GAME CODE § 8425 (enacted by Chapter 785) (requiring annual regulations upon the recommendation of the Director and following a public hearing taking into account the fishing levels and ecological factors).

guarantee the survival of the California squid fishery.<sup>43</sup> The legislature intends to allow the squid populations to rebound from the devastating effects of overfishing with the adoption of these research and management regulations.<sup>44</sup>

Environmental protections such as these are necessary to protect dangerously depleted animal populations.<sup>45</sup> The protection and preservation of the squid population is not only crucial to the survival of marine ecosystems,<sup>46</sup> but also guarantees the economic sustainability of this fishing industry.<sup>47</sup> However, for these provisions to be taken seriously, they must be strictly enforced against violators.<sup>48</sup>

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43. See ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 364, at 4 (July 15, 1997) (raising concern that Chapter 785 allows for recommendations to be made on the management of the squid fishery, but does not limit the number of fishermen in the industry); compare CAL. FISH & GAME CODE § 8420 (enacted by Chapter 785) (declaring that overfishing will "cause economic devastation to the individuals or corporations engaged in the market squid fishery"), and SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF AB 1204, at 4 (July 8, 1997) (estimating that between 80 and 160 boats are currently active in the squid fishery), with CAL. FISH & GAME CODE § 8421(b) (enacted by Chapter 785) (providing that an unlimited number of persons may take market squid provided each does not take more than 2 tons per calendar day), and SENATE COMMITTEE ON NATURAL RESOURCES AND WILDLIFE, COMMITTEE ANALYSIS OF SB 364, at 3 (April 15, 1997) (arguing that unless a moratorium is placed on the number of squid fishing boats off of the California Coast, dissolution of the squid fishery is likely to occur).

44. See CAL. FISH & GAME CODE § 8420 (enacted by Chapter 785) (declaring that the intent of Chapter 785's research and management regulations are to prevent the overfishing and damaging of the squid resource); see also ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF SB 364, at 3 (July 15, 1997) (citing to evidence that 75% of all female squid landed have not yet had an opportunity to spawn); Martin, *supra* note 3, at A1 (expressing concern that squid are not given enough opportunity to spawn); Rogers, *Squid Demand*, *supra* note 2, at A16 (arguing that vessels are currently overfishing the few specific areas where squid spawn); Dick Russell, *Vacuuming the Seas*, E, July 1996, at 28, available in LEXIS, News Library (arguing that "limited entry" has proven effective at reviving the Maryland blue crab industry).

45. See Russell, *supra* note 44, at 28 (indicating that nearly all of the depleted fish populations could bounce back through strict fishing regulations); see generally Kay, *supra* note 12, at C16 (describing that in 1993, of the 157 commercially valuable fish species in the United States, 44 percent were fished to the maximum level and 36 percent were overfished); Knudson & Vogel, *supra* note 8, at A1 (commenting that "California's commercial fishing catch has plunged 76 percent from 1.8 billion pounds in 1935 to 425.9 million pounds in 1995"); Puzo, *supra* note 12, at H1 (stating that 9 out of 10 commercially fished species in California are in decline).

46. See CNN Today, *supra* note 10 (arguing that extracting large quantities of squid may impact other marine species that depend on the squid for food); see also Rogers, *Squid Demand*, *supra* note 2, at A16 (warning that, "If the squid population ever crashed, the loss would be more than economic. Because it is a food source of nearly every major predator in the ocean—sharks, whales, sea lions and birds—the effects would be felt across the food chain."); Russell, *supra* note 44, at 28 (stating that, as a food source, squid are crucial for the survival of tuna, sharks, billfish, marine mammals and smaller fish).

47. See Lozano, *supra* note 9, at B3 (ascertaining that if squid fisheries are not regulated, all commercial fisherman will be economically hurt); see also *Talk of the Nation: Fishing Industry*, *supra* note 9 (asserting that the economic basis of fishing communities begins to disappear when fisheries are overfished); Wilson, *supra* note 9, at B1 (discussing how fishermen elevate the local economy through slip fees and spending money on living expenses).

48. See *Talk of the Nation: Fishing Industry*, *supra* note 9 (arguing for the need for sanctions if fishing regulations are violated); see generally Puzo, *supra* note 12, at H1 (comparing California fishermen to 19th century Great Plains hunters who virtually eliminated the American buffalo); *Talk of the Nation: Fishing Industry*, *supra* note 9 (indicating that fishermen are reluctant to follow regulations because of the amount of money they have tied into boat payments and mortgages, and because of the need to provide for their families).

#### IV. CONSTITUTIONAL ISSUES

##### A. Commerce Clause

Chapter 785 may be subject to attack on the ground that it violates the Constitution's Commerce Clause.<sup>49</sup> While a state is free to regulate its wildlife, it may not do so in a manner that significantly impedes interstate commerce.<sup>50</sup> Thus, legislation that discriminates against nonresident fishermen could be impermissible.<sup>51</sup> Courts have deemed economic protectionism of this sort to be unconstitutional.<sup>52</sup> However, because nonresident fisherman were among the strongest supporters of Chapter 785, such attacks are unlikely.<sup>53</sup> Similarly, incidental burdens may be imposed against nonresidents in a State's promotion of safety and general welfare.<sup>54</sup> Any incidental burdens imposed by Chapter 785 are not clearly excessive in relation to Chapter 785's legitimate concerns and environmental benefits of preserving squid stocks.<sup>55</sup> Thus, Chapter 785 would not violate the Commerce Clause.

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49. See U.S. CONST. art. I, § 8, cl. 3 (declaring that Congress possesses the power "to regulate Commerce . . . among the several states . . ."); see also *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 359 (1992) (clarifying that by negative implication of the Commerce Clause, the States shall not interfere with interstate commerce).

50. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 385-86 (1978).

51. See *Camps Newfound/Owatonna, Inc. v. Harrison*, \_\_\_ U.S. \_\_\_, \_\_\_, 117 S. Ct. 1590, 1604 (1997) (mandating that protectionistic actions are forbidden under the Commerce Clause); see also *Philadelphia v. New Jersey*, 437 U.S. 617, 627 (1978) (noting that "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders"); *Baldwin*, 436 U.S. at 386 (deciding that a State may not regulate wildlife if it unreasonably interferes with a nonresident's pursuit of livelihood in that wildlife); *Atlantic Prince, Ltd. v. Jorling*, 710 F. Supp. 893, 902 (E.D.N.Y. 1989) (observing that a regulation limiting squid fishing to vessels below 90-feet in length violates the Commerce Clause when regulation is targeted at fishermen from out-of-state).

52. See *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) (declaring that a state's attempt to convey an economic advantage to local merchants is unconstitutional); see also *Atlantic Prince, Ltd.*, 710 F. Supp. at 897 (noting that, for regulation to be valid, environmental protection and not economic protectionism is permissible motivation behind the enactment).

53. See ASSEMBLY COMMITTEE ON WATER, PARKS AND WILDLIFE, COMMITTEE ANALYSIS OF AB 1204, at 2 (May. 28, 1997) (arguing that limiting entry to California's squid fishery would discriminate against Washington fishermen); see also *id.* at 2-3 (Apr. 22, 1997) (inferring that squid permit requirements do not discriminate against out-of-state fishermen).

54. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 511 U.S. 93, 99 (1994); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-444 (1960) (holding that regulations which incidentally effect interstate commerce will be upheld if statute pursues matter of legitimate local public interest, and burdens to commerce are not clearly excessive in relation to local benefits).

55. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (deciding that the protection of the environment and of all natural resources are legitimate local concerns); see also *New York State Trawlers Ass'n v. Jorling*, 16 F.3d 1303, 1309 (2d Cir. 1994) (specifying that a statute prohibiting lobster trawling was not excessive when compared with benefit of allowing lobster population to increase); *Davrod Corp. v. Coates*, 971 F.2d 778, 790 (1st Cir. 1992) (holding that the squid vessel-length restriction is not clearly excessive when compared to the benefits of increasing squid spawn).

## B. Equal Protection and Due Process

Additionally, because Chapter 785 treats similarly situated individuals differently by allowing vessels with permits to fish,<sup>56</sup> and likewise, by only granting these permits to vessels that utilize specific fishing equipment,<sup>57</sup> Chapter 785's unequal treatment of these fishermen may be challenged as violating their equal protection rights.<sup>58</sup> Circumstances affecting suspect classes are afforded heightened scrutiny review under the Equal Protection Clause.<sup>59</sup> However, discrimination affecting nonsuspect classes need only be supported by a rational basis.<sup>60</sup> The courts have consistently applied suspect classification to specified groups,<sup>61</sup> and fishermen are not likely to merit such protection.<sup>62</sup> Similarly, interests in permits may be recognized as liberty and property interests subject to the Due Process<sup>63</sup> protection.<sup>64</sup> Yet, the right to fish has not been elevated to a fundamental right subject

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56. See *supra* notes 16, 26-27 and accompanying text (explaining permit requirements)

57. See *supra* notes 21-22 and accompanying text (detailing gear requirements to be issued a permit).

58. See U.S. CONST. amend. XIV (requiring that, "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); CAL. CONST. art. I, § 7 (declaring that "a person may not be . . . denied equal protection of the laws").

59. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

60. See *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (holding that unless a statute impairs fundamental rights or involves an inherently suspect classification, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest").

61. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (declaring that government imposition of racial classifications are to be analyzed under strict scrutiny. These classifications will only be deemed constitutional if they are narrowly tailored and further compelling governmental interests); see also *Cleburne*, 473 U.S. at 440 (requiring strict scrutiny review of statutes that classify by race, alienage, or national origin); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 289-290 (1978) (regarding racial classifications of all kinds as "inherently suspect" for purposes of equal protection); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (requiring heightened scrutiny review for statutes that classify based upon gender).

62. See *Sisk v. Texas Parks & Wildlife Dep't*, 644 F.2d 1056, 1058 (5th Cir. 1981) (holding that the class of commercial fishermen is not a suspect class which would subject the state's disparate treatment of the class to strict scrutiny); see also *Jensen v. United States*, 743 F. Supp. 1091, 1114 (D.N.J. 1990) (proclaiming that full-time fishermen are not a suspect class subject to strict scrutiny protection; thus legislation discriminating against this class is subject to rational basis review).

63. See U.S. CONST. amend. XIV (dictating that, "nor shall any State deprive any person of life, liberty, or property, without due process of law"); see also CAL. CONST. art. I, § 7 (stating that, "a person may not be deprived of life, liberty, or property without due process of law"); *id.* art. I, § 25 (providing that, "the people shall have the right to fish upon and from the public lands of the State and in the waters thereof . . .").

64. See *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957) (demanding that, "a State cannot exclude a person from . . . any . . . occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."); see also *Lebbos v. Santa Clara County*, 883 F.2d 810, 818 (9th Cir. 1989) (holding that common occupations or professions of life are liberty or property interests protected by substantive due process); *Board of Supervisors v. Local Agency Formation Comm.*, 3 Cal. 4th 903, 913, 13 Cal. Rptr. 2d 245, 251 (1992) (requiring that a law be subject to strict scrutiny review when fundamental rights are affected. To meet this standard, "a discriminatory law will not be given effect unless its classification bears a close relation to the promoting of a compelling state interest, the classification is necessary to achieve the government's goal, and the classification is narrowly drawn to achieve the goal by the least restrictive means possible").

to heightened scrutiny under the Due Process clause.<sup>65</sup> Therefore, because fishermen are not a suspect classification and because fishing is not a fundamental right, only a reasonable relationship to a legitimate state purpose need exist to uphold the regulations on a rational basis review under the Due Process Clause.<sup>66</sup> Because the legislation limits the issuance of permits to those vessels utilizing specific nets and this limitation will foster squid research and management efforts, Chapter 785 should be deemed rationally related to the preservation of squid stocks.<sup>67</sup> Therefore, Chapter 785 is constitutionally sound under both the Equal Protection and Due Process clauses.

## V. CONCLUSION

Chapter 785 requires the issuance of permits to individuals owning and operating commercial market squid fishing vessels and squid light boats.<sup>68</sup> These regulations are intended to fund scientific and management studies designed to learn more about squid before implementing additional regulations that are needed to promote sustainable fishing levels of squid.<sup>69</sup> Primarily because of the environmental concerns that Chapter 785 addresses, these new laws should pass any constitutional challenge.<sup>70</sup> Legislative efforts like Chapter 785 are necessary to protect the commercial squid fishing industry from befalling the same environmental and economic fate as the California sardine industry.<sup>71</sup>

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65. *California Gillnetters Ass'n v. Department of Fish & Game*, 39 Cal. App. 4th 1145, 1153-54, 46 Cal. Rptr. 2d 338, 343 (1995); see *Washington Kelpers Ass'n v. Washington*, 502 P.2d 1170, 1172-73 (Wash. 1972) (declaring that the state owns the fish in the waters and that fishermen have no property rights in taking fish).

66. *Board of Supervisors*, 3 Cal. 4th at 913, 13 Cal. Rptr. 2d at 251; see also *Ferrante v. Fish & Game Comm'n*, 29 Cal. 2d 365, 371-72, 175 P.2d 222, 226 (1946) (explaining that legislation that discriminates based on classifications violates equal protection only when it is "essentially arbitrary").

67. See *Baldwin*, 436 U.S. at 391 (declaring that the state is granted great deference in determining methods of protecting wildlife); see also *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 562-64 (1916) (stating that the taking of fish and wildlife are legitimate state interests subject to regulation); *California Gillnetters Ass'n*, 39 Cal. App. 4th at 1156, 46 Cal. Rptr. 2d at 344 (holding that banning of gill net fishing, while permitting other forms of fishing, was rationally related to the preservation of oceanic resources, and permissible under Equal Protection clause); *Martinet v. Department of Fish and Game*, 203 Cal. App. 3d 791, 795, 250 Cal. Rptr. 7, 9-10 (1988) (signifying that equal protection was not violated by law that limits number of fishing permits available to new entrants, but does not limit number to prior permittees, because regulation is reasonable to protect from overfishing).

68. See *supra* notes 15-16, 21-22 and 30-32 and accompanying text (describing Chapter 785's permitting requirements).

69. See *supra* notes 16-26 and 34-48 and accompanying text (observing the import of scientific and management studies).

70. See *supra* notes 49-67 and accompanying text (documenting the constitutional challenges that Chapter 785 will likely face).

71. See *supra* notes 9, 35, 37, 40 and 42-47 and accompanying text (detailing the environmental and economic necessity of measures like Chapter 785).

