

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR PROPOSED REGULATORY ACTION
(Pre-publication of Notice Statement)

Amend Section 670.5
Title 14, California Code of Regulations
Re: Animals of California Declared to Be Endangered or Threatened

- I. Date of Initial Statement of Reasons: May 11, 2009
- II. Dates and Locations of Scheduled Hearings:
- (a) Notice Hearing: Date: December 12, 2008
Location: Sacramento, CA
- (b) Adoption Hearing: Date: August 6, 2009
Location: Woodland, CA

III. Description of Regulatory Action:

- (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Section 670.5 of Title 14, CCR, provides a list of animals, established by the Fish and Game Commission (Commission), designated as endangered or threatened in California. The Commission has the authority to add or remove species from either list if it finds upon the receipt of sufficient scientific information that the action is warranted.

Petition History: On May 4, 2007, the Commission received a petition from Mr. Gary R. Alten, private citizen, seeking action to delist the American peregrine falcon under provisions of the California Endangered Species Act (CESA; Fish and Game Code Section 2050, *et seq.*). The American peregrine falcon is currently listed as endangered under CESA. The American peregrine falcon is also a fully protected species under California Fish and Game Code Section 3511.

The Commission referred the petition to the Department of Fish and Game (Department) on May 15, 2007 for evaluation. The Department found that the information in the petition was sufficient to indicate the petitioned action may be warranted, and recommended the Commission accept the petition (Petition Evaluation Report, September 10, 2007). At the Commission meeting in Concord on October 11, 2007, the Commission received the Department's petition evaluation report, recommendation,

and public testimony, and accepted the petition. On November 2, 2007, the Commission published a Notice of Findings in the California Regulatory Notice Register declaring the American peregrine falcon a candidate species for delisting, thereby starting the one year status review process.

Based on the status review, the Department recommended to the Commission that the American peregrine falcon be delisted from endangered status under CESA. The American peregrine falcon is also a “fully protected species”, pursuant to Fish and Game Code Section 3511(b)(1). Therefore, whether or not the species is delisted pursuant to CESA, the legal prohibition on “take” of the species, as defined in Fish and Game Code Section 86, remains in place and there will be no change in the protections afforded the species pursuant to the Fish and Game Code.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 2070 and 2075.5, Fish and Game Code.

Reference: Sections 1755, 2055, 2062, 2067, 2070, 2074.6, 2075.5 and 2077 Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change:

None.

- (d) Identification of Reports or Documents Supporting Regulation Change:

“Petition to delist the peregrine falcon in California” (Gary R. Alten, petitioner); Report to the California Fish and Game Commission, “Evaluation of petition to delist American peregrine falcon (*Falco peregrinus anatum*)” (Department of Fish and Game, September 2007); Report to the California Fish and Game Commission, “Status review of the American peregrine falcon (*Falco peregrinus anatum*) in California” (Department of Fish and Game, October 2008). A negative declaration for the delisting action was prepared by the Department and was made available on or before April 23, 2009 through the State Clearinghouse and via notice to California county clerk offices for a 30 day public review period. The environmental document was also noticed on the Department’s web page and via newspapers.

- (e) Public Discussions of Proposed Regulations Prior to Notice Publication:

The Commission, at its April 8, 2009 meeting in Lodi, received the Department’s update on the status of the negative declaration and was scheduled to receive public testimony on the petition to delist American

peregrine falcon as an endangered species; however, there were no public speakers. Public testimony was previously taken at the Commission meeting in Concord on October 11, 2007, when the Commission received the Department's petition evaluation report and recommendation, and accepted the petition. Additional public input opportunity was provided at the Commission's meeting of December 12, 2008 in Sacramento when the status review report was presented. Correspondence on the subject delisting was received by the Department and is included either in full or in a summary table in the status review report referenced above under section III (d).

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Downlist to Threatened:

The Commission could exercise its discretion and downlist the American peregrine falcon to a threatened species under CESA. The Department addressed this option in the status review and found that, relative to the regulatory standard, peregrine falcons are not likely to become endangered in the foreseeable future in the absence of special protection and management efforts. Peregrines have reoccupied most historic breeding range in California and their population size has recovered to historic levels. Productivity goals as set by the federal recovery planning effort have been met in the State as a whole, although not at all sites. Intensive management efforts performed on behalf of this species including nest augmentation, captive breeding and cross-fostering were suspended in 1992 following a highly successful campaign and the determination that these actions were no longer necessary for this self-sustaining population.

(b) Decline to Delist (No Change Alternative):

If the Commission determines that delisting is not warranted, the American peregrine falcon will remain endangered, the position it held prior to the petition filing.

Relative to the regulatory standard for endangered status, the American peregrine falcon does not currently face the same imminent threats as other endangered species with habitat loss/fragmentation, population decline, and predation as major threats. Retaining endangered status is problematic under the regulatory standard given the steady population increase of American peregrine falcons that has been underway for some time and given reoccupation throughout most of historic breeding range. If the American peregrine falcon is delisted, and if the population trend subsequently declines, the species could be petitioned for re-listing under CESA.

Additionally, because the American peregrine falcon is and would remain fully protected pursuant to Fish and Game Code Section 3511, the prohibition on take contained in Fish and Game Code Section 86 would continue to apply to the species. This code section provides that take is allowed under permit only for scientific research or for efforts to recover fully-protected, threatened, or endangered species.

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective as and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

An initial study and negative declaration were prepared pursuant the California Environmental Quality Act. This analysis resulted in the conclusion that the proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. Impact of Regulatory Action:

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 Businesses, 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.

Although the statutes of the California Endangered Species Act (CESA) do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Office of the Attorney General has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing or delisting process.

CESA is basically a two-stage process. During the first stage, the

Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of the APA, specifically sections 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of economic impact on businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on businesses and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Delisting of the American peregrine falcon will remove the species from the provisions of CESA. However, this delisting action is not expected to result in any significant adverse economic effect on small business or significant cost to private persons or entities undertaking activities subject to CEQA because the American peregrine falcon will remain protected under additional provisions as described elsewhere in this document.

- (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:

None.

- (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. Delisting the American peregrine falcon will not result in any significant cost to private persons or businesses undertaking

activities subject to CEQA and may result in a cost savings to such persons and businesses.

- (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:

None.

- (h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

The Department of Fish and Game recommends that the Commission amend Subsection (a)(5) of Section 670.5 of Title 14, CCR, to delete the American peregrine falcon (*Falco peregrinus anatum*) from the list of endangered birds.

In making the recommendation to delist the American peregrine falcon pursuant to CESA, the Department relied most heavily on the following information: 1) Current American peregrine falcon breeding range in California includes most of the known historic breeding range; 2) American peregrine falcon breeding population size has increased dramatically following State and federal listing as endangered and may have reached or even exceeded historical levels within California, as best as can be determined given the uncertainty of the historic population data; 3) The threat posed to the peregrine falcon nesting populations in California by organochlorine pesticide contamination has lessened due to the restrictions imposed on the use of such substances in the United States and Canada since the 1970s. However, "hot spots" remain in the State; these areas need further evaluation and monitoring as to their impact on peregrine recovery; 4) Recovery goals specific to California populations of peregrine falcons as established through the federal recovery plan for the Pacific States have been met for range and population size; productivity goals have been met at most, but not all, sites in California; 5) The U.S. Fish and Wildlife Service (Service) delisted the peregrine falcon from the federal endangered species list in 1999 and established a monitoring program, contingent on funding, to document breeding status of this species through the year 2015. A sub-set of 30 nest sites will be monitored in California every three years, providing current occupancy and productivity data for the State's peregrine population; 6) The captive breeding and reintroduction program established in the 1970s and continued through 1992 was highly successful in aiding the recovery of the peregrine in California; and 7) If delisted, the American peregrine falcon will remain a fully protected species under Fish and Game Code section 3511(b)(1).