

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

Amend Title 14, CCR, Section 670.5
Re: Uplisting the delta smelt to endangered species status

I. Date of Initial Statement of Reasons: September 8, 2008

II. Date of Final Statement of Reasons: November 10, 2009

III. Dates and Locations of Scheduled Hearings:

(a) Notice Hearing: Date: August 7, 2008
Location: Carpinteria, California

(b) Adoption Hearing: Date: March 4, 2009
Location: Woodland, California

IV. Update:

Minor technical changes have been made to the originally proposed language of the Initial Statement of Reasons.

This Final Statement of Reasons (FSOR) reflects that the public hearing date and location were changed from March 6, 2009 in Monterey to March 4, 2009 in Woodland. In addition, the Proposed Regulatory Language is updated to reflect the current language of Section 670.5 following the removal of Brown Pelican and American peregrine falcon from the list of endangered birds. Brown Pelican and American peregrine falcon are deleted, the list of endangered birds in subsection (a)(5) re-lettered, and the Note under Section 670.5 updated to remove a reference to section 2072.7 and add a reference to section 2074.6. This proposed regulatory change also adds references to sections 2080, 2081, and 2835.

Other minor changes to the FSOR include a correction in Section VIII(b) to reference the *Status Review of the Threatened Delta Smelt in California* instead of attaching it and the non-substantive addition of a paragraph at the end of section IX(a) for clarity. The added paragraph repeats, in summary form, the analysis and explanation already found in section IX(c).

At the March 4, 2009 adoption hearing, the Commission unanimously approved the proposed regulatory change as noticed in the Initial Statement of Reasons.

V. Summary of Primary Considerations Raised in Support of or Opposition to the Proposed Actions and Reasons for Rejecting those Considerations:

1. Six hundred three emails, and one oral comment at the March 4, 2009 adoption hearing, were received in support of changing the status of the delta smelt from threatened to endangered. Reasons given included the precipitous decline in the numbers of delta smelt and continuing threats to the species.

Robin McCarthy (Attachment 1, Comment 1)(a sample of the 603 form letters received via e-mail) and Gary Bobker (The Bay Institute)(oral testimony).

Department Response: The Department agrees that the delta smelt listing should be changed from “threatened” to “endangered.” The population has declined significantly since its listing as threatened, threats to the species continue, and the species’ abundance is now extremely low. Thus, it meets the California Endangered Species Act (CESA) definition of “endangered” 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.”

2. Three letters were received opposing the reclassification of delta smelt from threatened to endangered. Reasons given were the drought and the potential impact a reclassification could have on agricultural water supplies. One commenter also suggested that a re-stocking program would be a better approach to management.

Debra Tash (District 19, Citizens Advisory Water Board, Ventura County)(Attachment 1, Comment 2) and Helen A. Johnson (Attachment 1, Comments 3 and 4).

Department Response: CESA does not include potential economic impacts as a factor in determining whether a species meets the definition of “threatened” or “endangered,” or should be removed from the list of threatened or endangered species. In addition, the delta smelt is already listed as a threatened species. Therefore, take of the species without authorization is currently prohibited. If, based on best available science, a measure was determined to be necessary to protect the population from the impact of exporting water to agricultural service areas, it would be required whether the species was listed as threatened or endangered. Finally, because the success or failure of future potential management options cannot be assessed at the time of listing, they are not a factor affecting the determination of whether the species meets the criteria for “endangered” at the present time. However, if a species population recovers, CESA provides

a process for downlisting or removing the species from the list of threatened or endangered species.

VI. Location and Index of Rulemaking File:

A rulemaking file with attached index is maintained at:
California Fish and Game Commission
1416 Ninth Street
Sacramento, CA 95814

VII. Location of Department files:

Department of Fish and Game
1416 Ninth Street
Sacramento, CA 95814

VIII. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

None.

(b) No Change Alternative:

670.5(b) Threatened:

(2) Fishes:

(A) Delta smelt (*Hypomesus transpacificus*)

The no change alternative (i.e. the continued listing of delta smelt as *threatened*) would not be accurate as, in accordance with the DFG Report to the Fish and Game Commission: *A Status Review of the Threatened Delta Smelt in California* (June 2008), it now meets the criteria for an *endangered* species. This is because the species numbers have declined sharply since being listing as threatened in 1993 and the current population abundance is extremely low.

(c) Consideration of Alternatives:

In view of the best scientific information currently available, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation. It is important to note that affected private persons are already prohibited from taking delta smelt without authorization because the species is currently listed under CESA as threatened. The take prohibition is the same whether a species is listed as threatened or endangered.

IX. 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 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:

While the CESA statutes do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office 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 process.

CESA listing 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.

Here, the species is already listed as threatened under CESA. The proposed regulation would change the listing to endangered. However, CESA's prohibitions against taking a listed species without authorization and its requirements for issuing a take authorization are the same whether a species is listed as threatened or endangered. Since it is not the listing category which affects the scope of measures which may be required but the project-specific environmental analysis and best available scientific information at the time of the action, removing the species from the list of threatened species and adding it to the list of endangered species does not create any statewide significant adverse effects directly affecting California businesses or their ability to compete with businesses from other states.

- (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:

Designation of threatened or endangered status, per se, would not necessarily result in any significant cost to private persons or entities undertaking activities subject to CEQA. CEQA presently requires private applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) and rare species to be subject to the same protections under CEQA as though they are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380).

Any added costs should be more than offset by savings that would be realized through the information consultation process available to private applicants under CESA. The process would allow conflicts to be resolved at an early stage in project planning and development, thereby avoiding conflicts later in the CEQA review process, which would be more costly and difficult to resolve.

Moreover, here the species is already listed as threatened. The proposed regulation would change the listing to endangered. However, as stated above, it is not the listing category which affects the scope of mitigation measures which may be required, it is the project-specific environmental analysis and best available scientific information at the time of the action.

(d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

(e) Nondiscretionary Costs/Savings to Local Agencies:

None.

(f) Programs Mandated on Local Agencies or School Districts:

None.

(g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4:

None.

(h) Effect on Housing Costs:

None.

Updated Informative Digest/Policy Statement Overview

The California Endangered Species Act (CESA)(Fish & G. Code §§ 2050 et seq.) prohibits the take of threatened or endangered species (i.e. actions which would cause mortality) without authorization from the Department of Fish and Game (DFG). (Fish & G. Code § 2080.) DFG's authorizations help manage species by requiring avoidance, mitigation, and other measures for their protection. (Fish & G. Code §§ 2081, 2835.) The existing regulation (Title 14, CCR, Section 670.5) provides that delta smelt are listed as threatened. CESA defines a "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 CESA. (Fish & G. Code § 2067.) The proposed regulation would provide that delta smelt are listed as endangered. CESA defines an "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. (Fish & G. Code § 2062.) If implemented, the proposed regulation would accurately reflect that the delta smelt population in California has declined significantly since its listing as threatened and the species' abundance is now extremely low.

At its March 4, 2009 hearing, the Commission adopted the proposed changes to the regulation.

PROPOSED REGULATORY LANGUAGE

Section 670.5, Title 14, CCR, is amended to read:

§ 670.5. Animals of California Declared To Be Endangered or Threatened.

The following species and subspecies are hereby declared to be endangered or threatened, as indicated:

(a) Endangered:

(1) Crustaceans:

(A) California freshwater shrimp (*Syncaris pacifica*)

(B) Shasta crayfish (*Pacifastacus fortis*)

(2) Fishes:

(A) Bull trout (*Salvelinus confluentus*)

(B) Mohave tui chub (*Gila bicolor mohavensis*)

(C) Owens tui chub (*Gila bicolor snyderi*)

(D) Bonytail (*Gila elegans*)

(E) Colorado pikeminnow (*Ptychocheilus lucius*)

(F) Lost River sucker (*Deltistes luxatus*)

(G) Modoc sucker (*Catostomus microps*)

(H) Shortnose sucker (*Chasmistes brevirostris*)

(I) Razorback sucker (*Xyrauchen texanus*)

(J) Desert pupfish (*Cyprinodon macularius*)

(K) Owens pupfish (*Cyprinodon radiosus*)

(L) Unarmored threespine stickleback (*Gasterosteus aculeatus william soni*)

(M) Winter run chinook salmon (*Oncorhynchus tshawytscha*)

(N) Coho salmon (*Oncorhynchus kisutch*) south of Punta Gorda (Humboldt County), California.

(O) Delta smelt (*Hypomesus transpacificus*)

(3) Amphibians:

(A) Santa Cruz long-toed salamander (*Ambystoma macrodactylum croceum*)

(B) Desert slender salamander (*Batrachoseps aridus*)

(4) Reptiles:

(A) Coachella Valley fringe-toed lizard (*Uma inornata*)

(B) Blunt-nosed leopard lizard (*Gambelia silus*)

(C) San Francisco garter snake (*Thamnophis sirtalis tetrataenia*)

(5) Birds:

(A) California condor (*Gymnogyps californianus*)

- (B) Bald eagle (*Haliaeetus leucocephalus*)
- (C) California clapper rail (*Rallus longirostris obsoletus*)
- (D) Light-footed clapper rail (*Rallus longirostris levipes*)
- (E) California least tern (*Sterna antillarum browni*)
- (F) Western yellow-billed cuckoo (*Coccyzus americanus occidentalis*)
- (G) Elf owl (*Micrathene whitneyi*)
- (H) Great gray owl (*Strix nebulosa*)
- (I) Least Bell's vireo (*Vireo bellii pusillus*)
- (J) Inyo California towhee (*Pipilo crissalis eremophilus*)
- (K) Willow flycatcher (*Empidonax traillii*)
- (L) Arizona Bell's vireo (*Vireo bellii arizonae*)
- (M) Gila woodpecker (*Melanerpes uropygialis*)
- (N) Gilded northern flicker (*Colaptes auratus chrysoides*)
- (O) Belding's savannah sparrow (*Passerculus sandwichensis beldingii*)
- (P) Marbled murrelet (*Brachyramphus marmoratus*)

(6) Mammals:

- (A) Riparian brush rabbit (*Sylvilagus bachmani riparius*)
- (B) Morro Bay kangaroo rat (*Dipodomys heermanni morroensis*)
- (C) Giant kangaroo rat (*Dipodomys ingens*)
- (D) Tipton kangaroo rat (*Dipodomys nitritoides nitratoides*)
- (E) Fresno kangaroo rat (*Dipodomys nitritoides exilis*)
- (F) Salt-marsh harvest mouse (*Reithrodontomys raviventris*)
- (G) Amargosa vole (*Microtus californicus scirpensis*)
- (H) California bighorn sheep (*Ovis canadensis californiana*)

(b) Threatened:

(1) Gastropods:

- (A) Trinity bristle snail (*Monadenia setosa*)

(2) Fishes:

- ~~(A)~~ Delta smelt (*Hypomesus transpacificus*)
- ~~(B)~~ (A) Cottonball Marsh pupfish (*Cyprinodon salinus milleri*)
- ~~(C)~~ (B) Rough sculpin (*Cottus asperimus*)
- ~~(D)~~ (C) Spring-run chinook salmon (*Oncorhynchus tshawytscha*) of the Sacramento River drainage.
- ~~(E)~~ (D) Coho salmon (*Oncorhynchus kisutch*) from Punta Gorda (Humboldt County), California to the northern border of California.

(3) Amphibians:

- (A) Siskiyou mountain salamander (*Plethodon stormi*)
- (B) Kern Canyon slender salamander (*Batrachoseps simatus*)
- (C) Tehachapi slender salamander (*Batrachoseps stebbinsi*)
- (D) Limestone salamander (*Hydromantes brunus*)

- (E) Shasta salamander (*Hydromantes shastae*)
- (F) Black toad (*Bufo exsul*)

(4) Reptiles:

- (A) Desert tortoise (*Gopherus agassizii*)
- (B) Barefoot banded gecko (*Coleonyx switaki*)
- (C) Southern rubber boa (*Charina bottae umbratica*)
- (D) Alameda whipsnake (*Masticophis lateralis euryxanthus*)
- (E) Giant garter snake (*Thamnophis couchi gigas*)

(5) Birds:

- (A) Swainson's hawk (*Buteo swainsoni*)
- (B) California black rail (*Laterallus jamaicensis coturniculus*)
- (C) Yuma clapper rail (*Rallus longirostris yumanensis*)
- (D) Greater sandhill crane (*Grus canadensis tabida*)
- (E) Bank swallow (*Riparia riparia*)
- (F) Xantus's murrelet (*Synthliboramphus hypoleucus*)

(6) Mammals:

- (A) Mohave ground squirrel (*Spermophilus mohavensis*)
- (B) San Joaquin antelope squirrel (*Ammospermophilus nelsoni*)
- (C) Stephens' kangaroo rat (*Dipodomys stephensi*)
- (D) Sierra Nevada red fox (*Vulpes vulpes necator*)
- (E) San Joaquin kit fox (*Vulpes macrotis mutica*)
- (F) Island fox (*Urocyon littoralis*)
- (G) Wolverine (*Gulo gulo*)
- (H) Guadalupe fur seal (*Arctocephalus townsendi*)
- (I) Peninsular bighorn sheep (*Ovis canadensis cremnobates*)

NOTE: Authority cited: Sections 2070 and 2075.5, Fish and Game Code. Reference: Sections 1755, 2055, 2062, 2067, 2070, 2074.6, 2075.5, and 2077, 2080, 2081 and 2835, Fish and Game Code.