



authorizations, that the delta smelt population in California has declined significantly since its listing as threatened and the species' abundance is now extremely low.

- (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, 2077, 2080, 2081 and 2835, Fish and Game Code.

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

None.

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

The DFG *Report to the Fish and Game Commission: A Status Review of the Threatened Delta Smelt in California* (June 2008) is attached.

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

On April 12, 2007 in Bodega Bay, the Commission received testimony from the Bay Institute requesting the delta smelt be "uplisted" to endangered via an emergency regulation. The Commission denied the request for an emergency rulemaking on the basis that the protections afforded to threatened and endangered species under CESA are the same. The Commission then proceeded to consider the petition via a standard rulemaking. On May 4, 2007, in San Diego the Commission received DFG's initial evaluation of the petition. On June 7, 2007 in Truckee, the Commission received public comment on DFG's initial evaluation report, determined that the petitioned action may be warranted, and designated delta smelt as a candidate for uplisting. The Commission's designation triggered a requirement for DFG to prepare and transmit a status review of the species to the Commission within twelve months. On Jan. 9, 2008, DFG issued a press release soliciting public comments for the status review. Those comments were considered prior to recommending the Commission adopt the proposed regulation. On June 27, 2008 in Upland, the Commission received DFG's status review and recommendation. On August 7, 2008 in Carpinteria, the Commission determined that the petitioned action was warranted and proceeded with a notice of proposed rulemaking.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

None.

(b) No Change Alternative:

The no change alternative (i.e. the continued listing of delta smelt as *threatened*) would not be as accurate as, in accordance with the attached scientific evaluation, 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 as 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.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed. The proposal to uplist the species from threatened to endangered is a reflection of its existing condition.

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:

While 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 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 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.

- (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, 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

## 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.