

- a. The range of longfin smelt extends up to Alaska and therefore longfin smelt is not in danger of becoming extinct; and
- b. There would be a high cost to the people and economy of California.

Response:

- a. This regulatory rulemaking codifies the Commission's previous finding that listing the species "is warranted" by adding the name "longfin smelt (*Spirinchus thaleichthys*)" to the list of threatened fishes found in the CCR Section 670.5(b)(2). Mr. O'Hanlon's comment appears to be directed at the basis of the "is warranted" decision, not the very limited action of the rulemaking. Regardless, a recent California court of appeal decision (*California Forestry Association v. California Fish and Game Commission*) confirms the Commission's longstanding practice of only considering California populations when making a finding as to whether listing a species, or subpopulation of a species, is or is not warranted. The court's decision holds that the Commission is precluded from considering populations outside of California in making its listing determinations. The relevance of this court decision was made clear by counsel for the Department of Fish & Game (Department) and the Commission at the Notice hearing.
- b. Mr. O'Hanlon's comment appears to be directed at the economic costs the "is warranted" decision will have, not the economic costs of the very limited action of the rulemaking. This regulatory action should be viewed in its proper context, which is that the proposed amendment to CCR Section 670.5 is merely an action to conform the Commission's regulations to its prior, substantive decision that the longfin smelt should be listed as a threatened species under CESA. The Commission made its final listing determination at its June meeting. The purpose of this regulatory action is simply to conform the regulations to the Commission decision that was made in June. Any impacts alleged by Mr. O'Hanlon occurred or will occur, if at all, as a result of the Commission's June decision and not as a result of this conforming regulatory change.

Despite the contention that an economic analysis is not required, the Commission did provide an economic analysis, noting that required mitigation may increase the costs of projects. Such costs may include, but are not limited to, purchasing off-site habitat, development and implementation of management plans, installation of protective devices such as fencing, protection of additional habitat, imposing flow restrictions and long-term monitoring of mitigation sites.

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, California 95814

VII. Location of Department files:

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

VIII. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulatory Change:

No alternatives were identified.

(b) No Change Alternative:

In light of the Commission decision that listing longfin smelt is warranted, it is appropriate to proceed with a rulemaking. If the Commission had determined that listing was not warranted, the longfin smelt would not have any protected status under CESA.

Longfin smelt currently face numerous imminent threats such as habitat loss, population decline, and predation. Without protected status under CESA, longfin smelt will not benefit from the take prohibitions that attach to such status. Delaying or withholding threatened status is problematic under the regulatory standard given the steady population decrease of longfin smelt. If the longfin smelt is listed and the population increases, they could be petitioned for de-listing under CESA.

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative 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.

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:

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.

This regulatory action should be viewed in its proper context, which is that the proposed amendment to CCR Section 670.5 is merely an action to conform the Commission's regulations to its prior, substantive decision that the longfin smelt should be listed as a threatened species under CESA. Any economic impacts will occur, if at all, as a result of the Commission's listing decision and not as a result of this conforming regulatory change.

The Commission is prohibited from considering economic impacts in determining if listing is warranted. Fish and Game Code (FGC) Section 2072.3 requires the Commission to add a species to the threatened or endangered list upon receipt of sufficient scientific information that the action is warranted. The criteria contained in FGC Section 2072.3 are biological criteria only, and do not mandate or even suggest that "economic impacts" can be considered in a listing determination. Government Code Section 11346.3 requires an analysis of the economic impact on businesses and private persons only to the extent that the requirements do not conflict with other state laws. The consideration of economic impacts in the regulatory process would be directly contrary to the stated purpose and policies of CESA.

Moreover, the Federal Endangered Species Act (FESA) precludes consideration of "economic impacts" when making a listing decision. CESA was drafted in the image of FESA. (*NRDC v. Fish and Game Commission* 28 Cal.App. 4th 1104.) When a state act is patterned after a federal act, interpretations of the federal act should be given great weight. (*Moreland v. DOC* 194 Cal.App. 3d 506.) The intent of the federal act has been interpreted as seeking the cessation and reversal of the trend towards species extinction at whatever the cost. (*TVA v. Hill* 437 U.S. 153.) The Commission's decision-making process, and subsequent rule-making, should be analyzed with the same standard. If the species meets

the scientific criteria for listing then it should be added to the regulatory list of threatened or endangered species at whatever the cost.

The Commission does not believe it must consider the economic impacts of its listing decision. However an analysis of the likely economic impact of the proposed regulation change on businesses and private individuals was provided below. The intent of the analysis was to provide disclosure, the basic premise of the APA process.

Designation of the longfin smelt as threatened will entitle it to CESA protection. CESA prohibits “take” except as may be permitted by the Department. Threatened status 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 the California Environmental Quality Act (CEQA). CEQA requires local governments and private applicants undertaking projects subject to CEQA to consider *de facto* threatened species to be subject to the same requirements under CEQA as though they were already listed by the Commission (CEQA Guidelines, Section 15380).

Required mitigation under CEQA, whether or not the species is listed by the Commission, may increase the cost of a project. Such costs may include, but are not limited to, purchasing off-site habitat, development and implementation of management plans, installation of protective devices such as fencing, protection of additional habitat, imposing flow restrictions and long-term monitoring of mitigation sites. Lead agencies may also require additional actions should the mitigation measures fail, resulting in added expenditures by the project proponent. If the CEQA mitigation measures do not minimize and fully mitigate to the standards of CESA, listing could increase business costs to the extent of any necessary additional measures.

- (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 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 were already listed under CESA.

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. This 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.

- (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

State law (Section 2070, Fish and Game Code) specifies that the Commission shall establish a list of endangered species and a list of threatened species and it shall add or remove species from either list if it finds, upon the receipt of sufficient scientific information, that the action is warranted.

On August 14, 2007, the Commission received a petition to list longfin smelt as threatened or endangered under CESA. Pursuant to the provisions of Section 2074.2 of the Fish and Game Code, the Commission, at its February 7, 2008 meeting, accepted the petition for consideration and made a finding that the petitioned action may be warranted. Pursuant to the provisions of Section 2075.5 of the Fish and Game Code, the Commission, at its March 4, 2009, meeting, made a finding that the petitioned action to list the longfin smelt as threatened is warranted.

The Commission seeks to amend Section 670.5 of Title 14, CCR, to add the longfin smelt to the list of threatened fish (subsection (b)(2)).

In making the recommendation to list the longfin smelt pursuant to the California Endangered Species Act, the Department relied most heavily on the following: (1) longfin smelt is short-lived, (2) introductions of exotic organisms have altered its habitat, distribution, food supply, and possibly abundance, (3) water projects have adversely modified its habitat, distribution, food supply, and probably abundance, and (4) contaminants identified in ambient water samples have periodically adversely affected test organisms and may be affecting longfin smelt abundance. Threats to the longfin smelt population are likely to continue or increase, and several measures of longfin smelt abundance were examined and the Department found that they all indicate that the population has declined substantially.

Minor technical changes have been made to the proposed regulatory language of California Code of Regulations (CCR), Title 14 Section 670.5 in order to a) correct a typographical error in the scientific name *Spirinchus thaleichthys*; and, b) reflect a preceding regulatory action which removes delta smelt from the list of threatened fishes in CCR Section 670.5(b)(2) and re-letters the remaining fishes.

The Fish and Game Commission adopted the proposed regulations at its June 25, 2009 meeting.

Addendum to Final Statement of Reasons
Section 650.5, Title 14, CCR
Animals of California Declared to be Threatened or Endangered

An emailed letter was received from Mr. O'Hanlon on June 25, 2009 and a letter dated November 16, 2009 was received from Mrs. Johnson. The notice specifies that all written comments, mailed, faxed or e-mailed to the Commission office must be received before 5:00 p.m. on June 22, 2009; therefore, no response to comments is required.