

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

Amend Division 1, Subdivision 3, Chapter 6 and
Add Article 2.5 and Section 786.9
Title 14, California Code of Regulations
Re: Take of Rare Plants

- I. Date of Initial Statement of Reasons: May 7, 2014
- II. Date of Pre-adoption Statement of Reasons: July 15, 2014
- III. Date of Final Statement of Reasons: August 20, 2014
- IV. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: June 4, 2014
Location: Fortuna, CA
 - (b) Discussion and Adoption Hearing: Date: August 6, 2014
Location: San Diego, CA

V. Update:

No modifications were made to the originally proposed language of the Initial Statement of Reasons.

The Commission adopted the proposed regulations as originally noticed at its August meeting in San Diego.

VI. Summary of Primary Considerations Raised in Support of or Opposition to the Proposed Action and Reasons for Rejecting Those Considerations:

The California Fish and Game Commission (Commission) received three letters and one e-mail regarding the specific regulatory adoption proposed. No oral comments were received during the discussion hearing.

- (a) A letter was received from the California Native Plant Society dated July 24, 2014 that supports the proposal.

Response: Support noted.

- (b) A letter was received from the Center for Biological Diversity dated July

24, 2014 that supports the proposal.

Response: Support noted

- (c) A letter was received from the Los Angeles Department of Water and Power dated July 22, 2014.

Summary: The Los Angeles Department of Water and Power expressed concern that the proposed regulations would (1) additionally require a California Endangered Species Act (CESA) incidental take permit to minimize or fully mitigate the take of the 64 species of rare plants, (2) expand the jurisdiction of CESA, (3) disregard the provisions for take of rare plants under the Native Plant Protection Act (NPPA), and (4) that efforts should instead be made to evaluate each of the 64 rare plant species to determine if they warrant protected status as threatened or endangered.

Response: (1) No mechanism currently exists for the regulated community to take, possess, propagate, transport, export, import or sell rare plants except where the activity is allowed by the NPPA exemptions (Fish & Game Code subsections (b) and (c) of Section 1907, Section 1912, and Section 1913.) The proposed regulation will provide the regulated community with several ways to undertake activities that would result in take, possession, propagation, transportation, exportation, importation or sale of rare plants outside of the NPPA exemptions. One of these ways would be through obtaining a CESA incidental take permit. The proposed regulation will therefore provide more options, more certainty and less liability for the regulated community when it comes to completing projects. (2) The regulation relies on the conditions and procedures of CESA permitting, but is being proposed under the authority of the NPPA (Fish & Game Code subsection (a) of Section 1907). (3) The proposed regulation does not change the existing NPPA take exceptions. (4) Undertaking efforts to evaluate each of the 64 rare plant species in order to either up list them to threatened or endangered status under CESA or delist them was considered, however it was found to be currently infeasible due to the limited resources available to the California Department of Fish and Wildlife (Department).

- (d) An e-mail was received from Mr. Tom Engstrom dated August 5, 2014, 2014.

Summary: Mr. Engstrom expressed concern that the cost to comply with the “fully mitigate” standard that could be used to issue permits for the take of rare plants under the same conditions and procedures that are

used for CESA incidental take permits may be a disincentive for small landowners and others to report occurrences of rare plants on their lands. Mr. Engstrom questioned whether the Commission could find another way to incentivize the protection of rare plants.

Response: Some landowners are already reluctant to disclose the locations of sensitive species on their property, and the Commission does not believe that adoption of the proposed regulation will result in any substantial change in landowner attitude. The purpose of the proposed regulation is not to incentivize the protection of rare plants, but to fill a gap in the Department's permitting authority. Habitat enhancements, invasive species control, re-introduction efforts, ex-situ conservation storage, and other conservation actions are needed for many rare plants, yet the Department cannot currently authorize external organizations to undertake these activities if they will involve take, possession, propagation, transportation, exportation, importation or sale of rare plants. The regulation will provide the Department with the ability to write scientific, educational, or management permits for rare plants to facilitate important conservation and management activities and help prevent the extinction of rare plants, however incentivizing the protection of rare plants is beyond the scope of the proposed regulation.

VII. Location and Index of Rulemaking File:

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

VIII. Location of Department Files:

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

IX. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulatory Action:

The first alternative to the proposed regulation considered was to adopt the proposed regulation with subsection (b) omitted. The purpose of subsection (b) is to allow the procedures and conditions of incidental take permits, voluntary local programs, natural community conservation plans, and safe harbor agreements to also be used to authorize the take of rare

plants. The second alternative to the proposed regulation considered was to adopt a simpler, less stringent process to authorize the take of rare plants.

(b) No Change Alternative:

If no regulatory action occurs the Department will continue to be left without a means to permit the take, possession, propagation, transportation, exportation, importation, or sale of plants that are designated as rare, regardless of the reason. The gap in the Department's permitting authority will continue to put rare plants at a greater risk of extinction from take that is neither minimized nor mitigated; the regulated community will continue to be left without a means to take, possess, propagate, transport, export, import or sell rare plants outside of the exceptions in the NPPA (Fish & Game Code subsections (b) and (c) of Section 1907, Section 1912, and Section 1913); there will continue to be confusion with regard to the take of rare plants; and there will continue to be a barrier to important conservation actions and scientific study of rare plants.

(c) Consideration of Alternatives:

The Commission has rejected the alternatives because the Department's ability to permit the take of rare plants under both subsections (b) and (c) of the proposed regulation are necessary for the conservation and protection of rare plants. A simpler, less stringent process to authorize the take of rare plants would not be consistent with the intent of the Legislature and purpose of the NPPA to preserve, protect and enhance endangered or rare native plants of California; and furthermore, an additional process to authorize the take of rare plants that differs from the processes available to authorize take of threatened, endangered or candidate plant species would contribute to more confusion by creating regulatory overlap that would require obtaining permits with different standards and requirements under CESA and the NPPA for the same activity.

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

X. 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 regulation will permit greater certainty and flexibility for business pursuits.

- (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; Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:

The Commission does not anticipate any impacts on the creation or elimination of jobs, the creation of new business, the elimination of existing businesses or the expansion of businesses in California. In situations where take of rare plants was otherwise not allowed by law, the regulation will provide a mechanism for take that was otherwise unavailable, thereby increasing certainty and flexibility for businesses in California in situations where a rare plant could be taken by a project. The proposed regulation will not require a permit or other authorization for rare plants where the take is otherwise allowed by law, and therefore will not place an additional burden on business in those situations.

The Commission anticipates benefits to the health and welfare of California residents from better protection of the State's natural resources. The Commission does not anticipate any benefits to worker safety from the proposed regulation. The Commission anticipates benefits to the environment through better regulation of the take of rare plants by the Department, and the ability of the Department to permit important research, conservation, and management actions for rare plants.

- (c) Cost Impacts on a Representative Private Person or Business:

In some situations where rare plants are present the proposed regulation will eliminate a barrier to pursuing the highest value use of land. The

permit and mitigation costs to a representative private person or business would likely be offset by the increased returns on projects that would have previously been prohibited due to the presence of a rare plant. For example, if a permit were to be issued to take, possess, propagate, transport, export, import or sell rare plants for activities that are not allowed by the NPPA exemptions (Fish & Game Code subsections (b) and (c) of Section 1907, Section 1912, and Section 1913) by the same procedures and subject to the same conditions as an incidental take permit pursuant to Fish and Game Code subsection (b) of Section 2081, applying for and complying with such a permit would mean that the representative private person or business would have to minimize and fully mitigate the take allowed by the permit, and ensure adequate funding to conduct the minimization and full mitigation. This minimization and full mitigation could involve habitat restoration, the purchase and management of compensatory habitat, or the purchase of credits from an approved mitigation bank. The costs of complying with such a permit would vary depending upon the extent of the take being permitted, the extent and quality of the habitat being removed or disturbed, and other site specific factors.

To quantify the cost to an applicant to comply with a rare plant permit issued by the Department using the same procedures and conditions as in Fish and Game Code subsection (b) of Section 2081, the Department reviewed incidental take permits that were issued by the Department for threatened and endangered plant species from 2000 to present. The Department's records for many of these permits show that a security was required or other financial information was provided. The Department's records indicate that the average security or other cost for compliance with an incidental take permit that covers at least one threatened or endangered plant species is approximately \$879,000 per permit; however many of these permits also cover animal species, so the Department assumed that each species covered by an incidental take permit contributed equally to its cost. Therefore the average cost for the threatened and endangered plant species' contribution to an incidental take permit is approximately \$531,000.

However, because a representative private person or business could continue to avoid conducting any of the activities that are currently prohibited by the NPPA, they would not necessarily incur any additional costs that may be associated with obtaining and complying with authorization to take, possess, propagate, transport, export, import or sell rare plants provided by the proposed regulation.

Since 2000 there have been an average of 4 incidental take permits

issued by the Department per year that cover at least one threatened or endangered plant species. There are approximately 42 percent as many rare plants (64) as there are threatened and endangered plants (154). Applying this proportion to the average annual number of incidental take permits covering at least one threatened or endangered plant species we estimate that approximately 1.7 incidental take permits covering at least one rare plant could be issued per year. Because incidental take permits often cover multiple different species, this does not necessarily indicate that 1.7 additional permits will be issued per year.

- (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, Government Code: None
- (h) Effect on Housing Costs: None

Updated Informative Digest/Policy Statement Overview

The California Fish and Game Commission (Commission) has not yet adopted regulations to be implemented by the California Department of Fish and Wildlife (Department) to govern the take, possession, propagation, transportation, exportation, importation, or sale of rare or endangered plants under the authority of the Native Plant Protection Act (NPPA), (Fish & Game Code subsection (a) of Section 1907). Although the Department may permit the take of threatened and endangered plants under the California Endangered Species Act (CESA) and other statutes, the Department does not have the ability to permit take, possession, propagation, transportation, exportation, importation, or sale of rare plants.

There are 64 species, subspecies and varieties of plants that have been designated as rare by the Commission. The proposed regulation will allow the Department to permit the take, possession, propagation, transportation, exportation, importation, or sale of rare plants using the same procedures and subject to the same conditions in Section 783 *et seq.*, Title 14, California Code of Regulations (CCR), relating to incidental take permits; in Section 786 *et seq.*, Title 14, CCR, relating to Voluntary Local Programs; in Fish and Game Code Section 2800 *et seq.* relating to Natural Community Conservation Plans; or in Fish and Game Code Section 2089.2 *et seq.* relating to Safe Harbor Agreements. The proposed regulation will allow the person or entity seeking the take authorization to select which one of the four programs listed above that they would like to use. The proposed regulation will also allow the Department to permit the take, possession, propagation, transportation, exportation, importation or sale of rare plants for scientific, educational or management purposes pursuant to either Fish and Game Code subsection (a) of Section 2081 or Fish and Game Code Section 1002 *et seq.* and Section 650 *et seq.*, Title 14, CCR, at the Department's discretion.

The NPPA prohibits take, possession or sale of endangered or rare native plants (Fish & Game Code Section 1908), but includes exceptions for some activities, and the proposed regulation will not change or limit those existing exceptions. The proposed regulation also includes a "grandfather" provision for plans, permits, or other agreements that may have inadvertently authorized rare plant impacts in the past, and make such authorizations effective as of the day they were approved.

The proposed regulation will promote the purpose of the NPPA and intent of the Legislature to preserve, protect and enhance endangered or rare native plants of California by allowing the Department to permit the incidental take of rare plants where the take is minimized and fully mitigated or using the other mechanisms provided in the proposed regulation that will provide for protection, enhancement, conservation or other benefits to rare plants. The proposed regulation will provide more options, more certainty and less liability for the regulated community when it comes to completing projects, because the regulation will provide a way to undertake activities that are now prohibited because they may involve take, possession, propagation, transportation,

exportation, importation or sale of rare plants. The proposed regulation will ensure that there is no confusing regulatory overlap that would require obtaining different permits with different standards and requirements under CESA and the NPPA for the same activity. The Department needs the ability to write scientific, educational, or management permits for rare plants to facilitate important scientific research and important conservation and management activities to help prevent the extinction of rare plants.

The Commission has reviewed its own regulations and finds that the proposed regulation is neither inconsistent nor incompatible with existing state regulations. The Commission has searched the CCR and finds no other state agency regulations pertaining to the take of rare plants. Eighteen plants that are designated by California as rare are also designated as threatened, endangered or candidates under the federal Endangered Species Act (ESA), however the proposed regulation is neither inconsistent nor incompatible with existing federal regulations.

The Commission adopted the proposed regulations as originally noticed at its August meeting in San Diego.

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

Nonsubstantive Changes Made to the Regulatory Text During OAL Review

There were a number of nonsubstantive changes to text to change punctuation, grammar, section references and reference citations during OAL review of proposed action.