

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

Amend Section 670.2
Title 14, California Code of Regulations
Re: Plants of California Declared to Be Endangered, Threatened or Rare

- I. Date of Initial Statement of Reasons: October 20, 2016
- II. Date of Final Statement of Reasons: May 25, 2017
- III. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: August 25, 2016
Location: Folsom
 - (b) Adoption Hearing Date: February 8, 2017
Location: Rohnert Park
- IV. Update:

At its February 8, 2017, meeting in Rohnert Park, the Fish and Game Commission adopted the regulations as described in the Notice of Proposed Action without any changes.
- V. Summary of Primary Considerations Raised in Support of or Opposition to the Proposed Actions and Reasons for Rejecting Those Considerations:

No public comments, written or oral, were received during the public comment period.
- VI. 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
- VII. Location of Department Files:

Department of Fish and Wildlife
1416 Ninth Street
Sacramento, California 95814
- VIII. Description of Reasonable Alternatives to Regulatory Action:
 - (a) Alternatives to Regulation Change:

No alternatives were identified.

(b) No Change Alternative:

If the regulation change is not adopted, the Livermore tarplant (*Deinandra bacigalupii*) will have no formal State legal status, the position it held prior to the petition filing. The no change alternative is inconsistent with the Commission's determination, at its August 25, 2016 meeting, that listing the species as endangered is warranted pursuant to Fish and Game Code Section 2075.5.

(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, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

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 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.

Designation of Livermore tarplant as endangered will subject it to the provisions of CESA. This Act prohibits take and possession except as may be permitted by the Department, the Native Plant Protection Act, or the California Desert Native Plants Act.

Endangered 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 endangered species to be subject to the same requirements under CEQA as though they were already listed by the Commission in Section 670.2 (CEQA Guidelines, Section 15380). Livermore tarplant has qualified for protection under the CEQA Guidelines Section 15380 since its formal scientific description in 1999.

Required mitigation as a result of lead agency actions 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, establishing new populations, installation of protective devices such as fencing, protection of additional habitat, 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 proponent. If the mitigation measures required by the CEQA lead agency do not minimize and fully mitigate to the standards of CESA, listing could increase business costs by requiring measures beyond those required by CEQA.

- (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. The entire distribution of Livermore tarplant is limited to four occurrences in and near the city of Livermore, California. Because of this localized distribution, adding Livermore tarplant to the list of endangered species under CESA is unlikely to affect the creation or elimination of jobs or businesses within the state as a whole.

The Commission does not anticipate benefits to the health and welfare of California residents or to worker safety.

The Commission anticipates benefits to the State's environment by the protection of Livermore tarplant.

(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 informal 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.

Although it is unlikely that the listing of Livermore tarplant will have an adverse economic impact, it should be noted that most populations of Livermore tarplant occur on private property. Such private holdings are subject to possible sale and/or development, which could be impacted by this listing 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, Government Code:

None.

- (h) Effect on Housing Costs:

None.

Updated Informative Digest/Policy Statement Overview

Section 670.2 of Title 14, California Code of Regulations (CCR), provides a list, established by the California Fish and Game Commission (Commission), of plants designated as endangered, threatened or rare in California. The Commission has the authority to add or remove species from this list if it finds that the action is warranted.

As required by Fish and Game Code Section 2075.5, subsection (e)(2), the Commission must initiate proceedings in accordance with the Administrative Procedure Act to amend subsection (a)(2) of Section 670.2, to add Livermore tarplant (*Deinandra bacigalupii*) to the list of endangered plants.

In making the recommendation to list Livermore tarplant pursuant to the California Endangered Species Act, the Department identified the following primary threats: 1) recent and ongoing development and changes in land use; 2) impacts from invasive species; 3) recreation activities; 4) herbicide use; and 5) the vulnerability of small populations. More detail about the current status of Livermore tarplant can be found in the Report to the Fish and Game Commission, "Status Review of Livermore Tarplant (*Deinandra bacigalupii*)" (Department of Fish and Wildlife, April 2016).

The proposed regulation will benefit the environment by protecting Livermore tarplant as an endangered species.

Commission staff has searched the CCR and has found that the proposed regulation is neither inconsistent nor incompatible with existing state regulations. No other state entity has the authority to list threatened and endangered species.

UPDATE

At its February 8, 2017, meeting in Rohnert Park, the Fish and Game Commission adopted the regulations as described in the Notice of Proposed Action without any changes.

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action.