

STATE OF CALIFORNIA  
FISH AND GAME COMMISSION  
INITIAL STATEMENT OF REASONS FOR PROPOSED REGULATORY ACTION  
(Pre-publication of Notice Statement)

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. 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

III. Description of Regulatory Action:

(a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

Section 670.2 of Title 14, CCR, provides a list, established by the 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 the list if it finds, upon the receipt of sufficient scientific information, that the action is warranted.

On August 26, 2014, the Commission received a petition from Mr. Heath Bartosh, cosponsored by the California Native Plant Society (CNPS) seeking action to list the Livermore tarplant (*Deinandra bacigalupii*) as endangered under provisions of the California Endangered Species Act (CESA; Fish and Game Code § 2050 et seq.). The Commission transmitted the petition to the Department of Fish and Wildlife (Department) for evaluation.

The Department prepared a petition evaluation report which it delivered to the Commission on January 14, 2015. Based upon information contained in the petition and in relation to other relevant information, the Department recommended to the Commission that there was sufficient information to indicate that the petitioned action may be warranted and that the Commission should accept the petition. During a public meeting on April 9, 2015, the Commission heard the Department's presentation about the

petition evaluation report and recommendation, as well as public testimony, and determined that the petition contained sufficient information to indicate that the petitioned action may be warranted. The Commission published its Notice of Findings in the California Regulatory Notice Register on April 24, 2015. (Cal. Reg. Notice Register 2015, No. 17-Z, p. 656; see also Fish & G. Code, §§ 2068, 2080, 2085.)

Pursuant to Fish and Game Code section 2074.6, the Department then prepared a review of the status of Livermore tarplant, based upon the best scientific information available to the Department. The Department submitted its "*Report to the Fish and Game Commission: Status Review of Livermore Tarplant (Deinandra bacigalupii)*" dated April 2016 ("Status Review"), to the Commission, including a recommendation based upon the best scientific information available that, in the Department's independent judgment, the petitioned action to list Livermore tarplant as endangered under CESA is warranted.

On August 25, 2016, at a noticed public meeting, the Commission found that the petitioned action is warranted. The Commission then published notice of its findings. (Cal. Reg. Notice Register 2016, Vol. 45-Z p. 1973.)

The Legislature has declared that certain species of fish, wildlife, and plants are in danger of, or threatened with, extinction and that these species of fish, wildlife, and plants are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this State, and the conservation, protection, and enhancement of these species and their habitat is of statewide concern. It is the policy of the State to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat. The proposed regulation will add the Livermore tarplant to the list of endangered species in furtherance of the policy of the State.

- (b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 1904 and 2070, Fish and Game Code.

Reference: Sections 1755, 1904, 2062, 2067, 2070, 2072.7 and 2075.5, Fish and Game Code.

- (c) Specific Technology or Equipment Required by Regulatory Change: None.
- (d) Identification of Reports or Documents Supporting Regulation Change:

Petition to list the Livermore tarplant (*Deinandra bacigalupii*) as Endangered under the California Endangered Species Act (Bartosh, August 29, 2014).

Report to the Fish and Game Commission, “*Evaluation of the Petition from Mr. Heath Bartosh and the California Native Plant Society to list Livermore Tarplant (Deinandra bacigalupii) as Endangered under the California Endangered Species Act (CESA)*” (Department of Fish and Wildlife, December, 2014).

Report to the Fish and Game Commission, “*Status Review of Livermore Tarplant (Deinandra bacigalupii)*” (Department of Fish and Wildlife, April 2016).

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

The Commission received the Department’s status review report at its June 23, 2016 meeting, after which the status review report was posted on the Commission and Department websites, and the Commission solicited public testimony at its August 25, 2016 meeting. As required by Fish and Game Code, Section 2074.4, the Department notified interested parties of the proposed listing and requested data and comments on the petition. Comments received are included in the status review report referenced above under section III (d).

IV. 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 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.

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.

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.

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.

## VII. Economic Impact Assessment

The APA process requires an analysis of the proposed regulatory action's economic impact to assess that impact and avoid unnecessary or unreasonable regulatory requirements. Government Code Section 11346.3, subdivision (a), provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. Further, Section 11346.3, subdivision (e) states that "[r]egulatory impact analyses shall inform the agencies and the public of the economic consequences of regulatory choices, not reassess statutory policy."

The Commission's determination pursuant to CESA is governed by scientific considerations. "The Commission shall add or remove species from [the endangered or threatened species] list if it finds, upon the receipt of scientific information pursuant to this article, that the action is warranted." (Fish and Game Code, § 2070.) The Commission shall list the subject species if it determines that its continued existence is in serious danger or is threatened by any one or any combination of enumerated biological factors. (Cal. Code Regs., tit. 14, §§ 670.1(i)(A).)

CESA is silent as to consideration of the economic impacts, and caselaw states that the Commission's decisions are based on science, not economics. (*Natural Resources Defense Council v. Cal. Fish & Game Comm'n.* (1994) 28 Cal.App.4th 1104, 1118, fn. 11.) This caselaw reflects the fact that CESA was drafted in the image of the federal Endangered Species Act. (*Id.* at 1117-1118.) The federal act specifically prohibits consideration of possible economic impacts during the listing or delisting process. (50 C.F.R. § 424.11(b) (2015).)

The Legislature additionally declares a statutory policy in Section 2051 of the Fish and Game Code that species of fish, wildlife and plants that are in danger of or threatened with extinction "are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this state, and the conservation, protection, and enhancement of these species and their habitat is of statewide concern."

The Commission's findings pursuant to CESA are final decisions that are subject to judicial review. (Fish and Game Code, § 2076.) However, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process under the APA to make a corresponding regulatory change. (Fish and Game Code, § 2075.5(e)(2).)

The following analysis of the likely economic impact of the proposed regulatory change on businesses and private individuals provides information to the public and agencies, as contemplated by Government Code section 11346, subdivision

(e) and serving a basic purpose of the APA process. (See *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568.) Consistent with the APA, this analysis does not reassess the policy set forth in the Fish and Game Code and exercised by the Commission in its listing determination. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

(a) Effects of the regulation on the creation or elimination of jobs within the State:

Designation of Livermore tarplant as an endangered species will subject it to the provisions of CESA. CESA prohibits the take, import, export, possession, purchase and sale of listed species except as provided by the Fish and Game Code. Livermore tarplant has been subject to CESA's take prohibition since the Commission designated it as a candidate species in April 2015.

Prior to listing, where an activity was a project subject to public agency review and approval under the California Environmental Quality Act (CEQA), impacts to Livermore tarplant would have been evaluated as part of the CEQA lead agency's mandatory consideration of a project's impacts to biological resources. The intensity of that evaluation was heightened by the non-regulatory designation of Livermore tarplant as a California Rare Plant Rank 1B.1 plant, and also heightened when Livermore tarplant became a candidate for listing in April, 2015.

Prior to listing, project costs arising from CEQA compliance may have included, but not been limited to, purchase of off-site habitat, development and implementation of management plans, establishment of new populations, protection of additional habitat, and long-term monitoring of mitigation sites. Public agencies might also require additional actions should the mitigation measures fail, resulting in added expenditures by the project proponent. These costs would have been experienced even without an endangered species listing.

Following listing, if the mitigation measures required by the public agency for purposes of CEQA do not minimize and fully mitigate project effects on a listed species as required for the Department to issue an incidental take permit pursuant to CESA, additional compliance costs may arise as a result of the listing. A similar scenario would exist for activities not subject to CEQA review. Because the take prohibition for both candidate and listed species is the same, such costs would not be increased by the act of adding Livermore tarplant to the endangered species list. However, individuals may have delayed actions in anticipation of a final listing decision by the Commission; therefore listing could increase such costs.

(b) Effects of the regulation on the creation of new businesses or the elimination of existing businesses within the State:

The entire distribution of Livermore tarplant is limited to four occurrences in and near the City of Livermore in Alameda County, California. While adding Livermore tarplant to the list of endangered species under CESA may have localized economic impacts, it is unlikely that these effects would spread beyond the vicinity of Livermore, resulting in the creation of new businesses or the elimination of existing businesses within the State.

- (c) Effects of the regulation on the expansion of businesses currently doing business within the State

Because of the localized distribution of Livermore tarplant, it is unlikely that adding the species to the list of endangered species under CESA will affect the expansion of businesses currently doing business within the State.

- (d) Benefits of the regulation to the health and welfare of California residents:

Livermore tarplant is of ecological, educational, historical, recreational, esthetic, cultural, and scientific value to the people of this State. The conservation, protection, and enhancement of the species and its habitat will benefit the health and welfare of California residents.

- (e) Benefits of the regulation to worker safety.

The proposed regulation will not affect worker safety because it does not address working conditions.

- (f) Benefits of the regulation to the State's environment

As discussed above, the Legislature has identified the conservation, protection and enhancement of endangered species and their habitat as an issue of statewide concern and recognized these species' value, including their economic value. Improved conditions in Livermore tarplant habitat resulting from take avoidance and species enhancement efforts could also be expected to result in improved conditions for other species that are critical to the economy, as well as improvements to water quality and other environmental resources.

## 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.