

State of California
Department of Fish and Wildlife

Memorandum

Date: May ¹⁷7, 2014

To: Sonke Mastrup
Executive Director
Fish and Game Commission

From: Charlton H. Bonham 
Director

Subject: **Agenda Item for the June 4, 2014 Fish and Game Commission Meeting
Regarding the Addition of Section 786.9, Title 14, California Code of
Regulations, Take of Rare Plants**

The Department of Fish and Wildlife (Department) requests that the Fish and Game Commission (Commission) authorize publication of its intent to add a new Section 786.9, to Title 14, California Code of Regulations at its June 4, 2014 meeting. Attached are the Initial Statement of Reasons and supporting documents for the notice.

The proposed regulation pertains to the take of plants designated as "rare" under the Native Plant Protection Act (NPPA). Although the Department may permit take of threatened, endangered and candidate 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 the 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 that can be used for threatened, endangered and candidate plant species.

If you have any questions or need additional information, please contact Mr. Jeb Bjerke, Senior Environmental Scientist (Specialist), by telephone at (916) 651-6594 or by e-mail at Jeb.Bjerke@wildlife.ca.gov.

Attachments

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

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. 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

III. Description of Regulatory Action:

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

Under existing law, the Native Plant Protection Act (NPPA) allows the Fish and Game Commission (Commission) to adopt regulations governing the taking, possession, propagation, transportation, exportation, importation, or sale of any endangered or rare native plants (Fish & Game Code subsection (a) of Section 1907). No such regulation has been adopted by the Commission, therefore the California Department of Fish and Wildlife (Department) does not have the ability to permit the take, possession, propagation, transportation, exportation, importation, or sale of plants that are state designated as rare, regardless of the reason. The lack of implementing regulations under the authority of Fish and Game Code subsection (a) of Section 1907 creates confusion, limits activities that may be conducted by the regulated community, puts rare plants at a greater risk of extinction from take that is neither minimized nor mitigated, and is a barrier to scientific research and important conservation actions. The proposed regulation will close this gap in the Department's permitting authority by allowing the Department to permit the take of rare plants using the same procedures and subject to the same conditions as programs that already exist in law and regulation for authorizing the take of species that are designated as threatened, endangered or candidates

for listing.

The NPPA was enacted in 1977 and allows the Commission to designate plants as rare or endangered. There are 64 species, subspecies, and varieties of plants that are currently designated as rare under the NPPA. The NPPA prohibits take of endangered or rare native plants (Fish & Game Code Section 1908), but includes some exceptions for certain agricultural operations; timber operations; nursery operations; emergencies; vegetation removal from canals, lateral ditches, building sites, roads, or other rights-of-way by landowners; or public or private utilities providing service to the public (Fish & Game Code subsections (b) and (c) of Section 1907, Section 1912, and Section 1913).

The California Endangered Species Act (CESA; Fish & Game Code Section 2050 *et seq.*) was modified in 1984 to allow the Commission to designate plants, as threatened or endangered (Fish & Game Code Section 2070 *et seq.*) Plants listed as endangered under the NPPA became endangered under CESA (Fish & Game Code Section 2062), however plants listed as rare under the NPPA did not receive a designation under CESA (Fish & Game Code Section 2067). Under CESA, the Department may permit the incidental take of species that are designated as threatened, endangered, or candidates for listing (Fish & Game Code subsection (b) of Section 2081). The Department may also authorize the import, export, take or possession of species designated as threatened, endangered, and candidates for scientific, educational or management purposes (Fish & Game Code subsection (a) of Section 2081). In addition, the Department may authorize the take of species designated as threatened, endangered, or candidates through Voluntary Local Programs pursuant to Section 786 *et seq.*, Title 14, California Code of Regulations (CCR); Natural Community Conservation Plans pursuant to Fish and Game Code Section 2800 *et seq.*; and Safe Harbor Agreements pursuant to Fish and Game Code Section 2089.2 *et seq.*

Because plants listed as rare under the NPPA did not receive a designation under CESA, and because the Commission has not yet adopted a regulation governing the taking, possession, propagation, transportation, exportation, importation, or sale of rare plants, the Department is left without the authority to permit the take, possession, propagation, transportation, exportation, importation, or sale of rare plants.

The proposed regulation will allow the Department to permit the take, possession, propagation, transportation, exportation, importation or sale of rare plants using the procedures and subject to the same conditions that are in Section 783 *et seq.*, Title 14, 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 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 proposed regulation will not require a permit or other authorization for the take, possession, propagation, transportation, exportation, importation, or sale of rare plants if the activity is otherwise allowed under the NPPA as described above. The proposed regulation will also "grandfather" any existing permit, plan, agreement or program that the Department may have inadvertently issued to authorize the take, possession, propagation, transportation, exportation, importation, or sale of a rare plant in the past. Such documents will remain in effect as of the day they were approved.

The Commission believes that the proposed regulation is necessary for the following reasons:

- (1) 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 (Fish and Game Code Section 1900). Because no permitting mechanism for rare plants has been available since the NPPA was adopted over 35 years ago, it is reasonable to conclude that all take, possession, propagation, transportation, exportation, importation or sale of rare plants that has occurred in that time was either (1) done in accordance with the exceptions in the NPPA which provide little or no protection for rare plants, or (2) not done in accordance with the law, particularly for activities that are not covered by the NPPA take exceptions (see Fish & Game Code subsections (b) and (c) of Section 1907, Section 1912, and Section 1913). Without adopting a regulation, the gap in the Department's permitting authority will continue to put rare plants at greater risk of extinction from unregulated take. The proposed regulation will allow the Department to permit the incidental take of rare plants where the take is minimized and fully mitigated pursuant to Fish and Game Code subsection (b) of Section 2081, or using the other

mechanisms provided in the proposed regulation that will provide for protection, enhancement, conservation or other benefits to the rare plants through voluntary local programs, safe harbor agreements, or natural community conservation plans.

- (2) 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 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 therefore provide more options, more certainty and less liability for the regulated community when it comes to completing projects.
- (3) The lack of regulations to permit the take, possession, propagation, transportation, exportation, importation or sale of rare plants creates confusion among the regulated community because the Department may permit the import, export, take, or possession of threatened, endangered or candidate plant species under CESA, but the Department may not permit such activities for rare plants under the NPPA. The proposed regulation will allow take, possession, propagation, transportation, exportation, importation or sale of rare plants to be authorized through other regulatory programs administered by the Department which 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.
- (4) Many rare plants are known to have limited distributions and are at risk of extinction. 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 Department needs 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.
- (5) Research on the 64 species of plants that are designated as rare

under the NPPA cannot currently be permitted by the Department if it will involve take, possession, propagation, transportation, exportation, importation or sale of rare plants. This limitation is a barrier to scientific research that will increase understanding of the taxonomy, life history, habitat requirements, distribution, status, beneficial uses, and other characteristics of rare plants. The Department needs the ability to write scientific, educational, or management permits for rare plants to facilitate important scientific research.

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

Authority: Section 1907, Fish and Game Code. Reference: Sections 1900, 1906, 1908, 1910, 1912, and 1913, Fish and Game Code

- c) Specific Technology or Equipment Required by Regulatory Change: None

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

Economic Impact Assessment.

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

- (1) The Department held in-person meetings in Sacramento, California with the following stakeholders to solicit feedback on the proposed regulation prior to publication of the Notice.

- California Native Plant Society on August 7, 2013
- California Building Industry Association on October 3, 2013
- California Forestry Association on October 9, 2013
- California Farm Bureau Federation on October 14, 2013
- Pacific Gas and Electric Company, California Department of Transportation, California Department of Parks and Recreation, and California Native Plant Society on December 10, 2013.

- (2) The Department distributed a letter to a list of 68 stakeholders on November 13, 2013 to solicit feedback on the proposed regulation prior to publication of the notice.

- (3) The Department held a conference call regarding the proposed regulation with representatives from Sempra Energy, Southern California Edison, Southern California Gas Company, and San Diego

Gas and Electric on December 19, 2013.

- (4) The Department distributed a letter to a list of 183 tribal representatives on March 3, 2014 to solicit feedback on the proposed regulation prior to publication of the notice.

In response to these initial public outreach efforts the Department received written comments from the California Building Industry Association, California Department of Transportation, California Farm Bureau Federation, California Forestry Association, California Native Plant Society, California Department of Parks and Recreation, Center for Biological Diversity, Southern California Edison Company, Southern California Gas Company, San Diego Gas & Electric Company, and Pacific Gas & Electric Company.

Based upon the feedback received from stakeholders, the Department made a number of changes to the preliminary regulatory language that was distributed prior to publication of the Notice. These changes included:

- Adding a definition for the term “rare plants” in subsection (a);
- Removing the term “(hereafter “take”)” from the regulation to avoid any confusion about the definition of “take”, and instead defining the term “rare plant impacts” in subsection (a) to mean take, possession, propagation, transportation, exportation, importation or sale;
- Clarifying the language of subsection (b) of the proposed regulation;
- Expanding upon subsection (d) of the proposed regulation to directly reference the Native Plant Protection Act instead of using the phrase “otherwise allowed by law”; and
- Adding subsection (e) to “grandfather” any existing permit, plan, agreement or program that the Department may have inadvertently issued to authorize the take, possession, propagation, transportation, exportation, importation, or sale of a rare plant in the past, and make such authorizations effective as of the day they were approved.

IV. Description of Reasonable Alternatives to Regulatory Action:

- (a) Alternatives to Regulation Change:

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.

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:

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 project 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

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.

DRAFT

Regulatory Language

Amend Division 1, Subdivision 3, Chapter 6 to read:

Chapter 6. Regulations for Implementation of the California Endangered Species Act and Native Plant Protection Act

Add Article 2.5 and Section 786.9 after Article 2 as follows:

Article 2.5. Take of Rare Plants under the Native Plant Protection Act

§786.9. Take of Rare Plants

(a) Definitions:

(1) The term “rare plants” shall mean those plants listed as rare by the commission in Section 670.2(c) of these regulations.

(2) The term “rare plant impacts” shall mean the take, possession, propagation, transportation, exportation, importation or sale of rare plants.

(b) The department may issue permits that authorize rare plant impacts using the same procedures and under the same conditions as take authorizations issued pursuant to Section 783 *et seq.* of these regulations relating to Incidental Take Permits, Section 783 *et seq.* of these regulations relating to Voluntary Local Programs, Fish and Game Code Section 2800 *et seq.* relating to Natural Community Conservation Plans, or Fish and Game Code Section 2089.2 *et seq.* relating to Safe Harbor Agreements as if rare plants were listed as endangered, threatened, or candidate species. The choice among the four sets of conditions and procedures listed in this subsection to be applied to the permit for authorization of rare plant impacts shall be made by the person or entity seeking the permit.

(c)(1) Except as provided in (2) below, the department may issue permits that authorize rare plant impacts for scientific, educational or management purposes pursuant to either Fish and Game Code Section 1002 *et seq.* and Section 650 *et seq.* of these regulations, or Fish and Game Code subsection (a) of Section 2081. The choice between using Fish and Game Code Section 1002 *et seq.* or Fish and Game Code subsection (a) of Section 2081 shall be made by the department.

(2) Where propagation is being conducted for scientific, educational or management purposes, a permit will be issued as described in this subsection (c). All other rare plant propagation shall be permitted under (b) above.

(d) Nothing in this section requires a permit or other authorization for rare plant impacts where the rare plant impacts are otherwise allowed pursuant to Fish and Game Code Section 1900 *et seq.* including, but not limited to, those activities covered by Fish and Game Code Section 1913.

(e) Nothing in this section affects the validity of any authorization for rare plant impacts if the rare plant impacts were authorized by the department in a permit, plan, agreement or program approved by the department prior to the effective date of these regulations. The authorization contained in such permit, plan, agreement or program is deemed to be in effect as of the date it was approved.

NOTE: Authority: Section 1907, Fish and Game Code. Reference: Sections 1900, 1906, 1908, 1910, 1912, and 1913, Fish and Game Code.

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