27. CLEAR LAKE HITCH

Today's Item **Information** ☐ **Action** ☒

Adopt proposed regulation changes to add Clear Lake hitch to the list of threatened species.

Summary of Previous/Future Actions

- Notice hearing — August 6, 2014
- **Today's adoption hearing** — **Feb 10-11, 2016; Sacramento**

Background

On September 25, 2012, the Center for Biological Diversity petitioned FGC to list the Clear Lake hitch as a threatened species under the California Endangered Species Act (CESA). On March 6, 2013, FGC voted to accept the petition for further evaluation and to initiate a 12-month review of the status of Clear Lake hitch in California. DFW submitted its final status review at FGC's Jun 4, 2014 meeting and gave a presentation on the status review at FGC's Aug 6, 2014 meeting. FGC considered the petition, DFW's status report and other information included in the administrative record of proceedings and determined that listing Clear Lake hitch as a threatened species under CESA is warranted. At the same meeting, FGC authorized publication of a notice of its intent to amend Section 670.5 regarding animals of California declared to be endangered or threatened; the notice was published in the California Regulatory Notice Register on Dec 24, 2015

Significant Public Comments (N/A)

Recommendation

FGC staff: Adopt the proposed changes to Section 670.5 to add Clear Lake hitch to the list of threatened species.

DFW: Adopt the proposed changes to Section 670.5 to add Clear Lake hitch to the list of threatened species.

Exhibits

1. ISOR

Motion/Direction

Moved by _____ and seconded by _____ that the Commission adopts the consent calendar, items 27-28.

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

Amend Section 670.5
Title 14, California Code of Regulations
Re: Animals of California Declared to Be Endangered or Threatened

I. Date of Initial Statement of Reasons: November 24, 2015

II. Dates and Locations of Scheduled Hearings:

(a) Notice Hearing: Date: August 6, 2014
Location: San Diego

(b) Adoption Hearing: Date: February 11, 2016
Location: Sacramento

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 670.5 of Title 14, CCR, provides a list, established by the Fish and Game Commission (Commission), of animals designated as endangered or threatened 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 September 25, 2012, the Commission received a petition from the Center for Biological Diversity seeking action to list the Clear Lake hitch (*Lavinia exilicauda chi*) as threatened 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 31, 2013. 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 March 6, 2013, 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 March 22, 2013. (Cal. Reg. Notice Register 2013, Vol. 12-Z p. 488; 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 Clear Lake hitch, based upon the best scientific information available to the Department. The Department submitted its *"Report to the Fish and Game Commission: A Status Review of the Clear Lake hitch (Lavinia exilicauda chi),"* dated May 2014 ("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 the Clear Lake hitch as threatened under CESA is warranted.

On August 6, 2014, 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 2014, Vol. 52-Z p. 2099.)

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 Clear Lake hitch to the list of threatened species in furtherance of the policy of the State.

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

Authority: Sections 240, 2070, 2075.5, 2076.5, Fish and Game Code.
Reference: Sections 1755, 2055, 2062, 2067, 2070, 2072.7, 2074.6, 2075.5, 2077, 2080, 2081 and 2835, 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 Clear Lake hitch (*Lavinia exilicauda chi*) as Threatened under the California Endangered Species Act (Center for Biological Diversity, September 25, 2012).

Report to the Fish and Game Commission, *"Initial Review of Petition to list the Clear Lake hitch (Lavinia exilicauda chi) as Threatened under the California Endangered Species Act (CESA)"* (Department of Fish and Wildlife, January 31, 2013).

Report to the Fish and Game Commission*, "A status review of Clear Lake hitch (Lavinia exilicauda chi)"* (Department of Fish and Wildlife, May 28, 2014).

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

The Commission received the Department's status review report at its June 4, 2014 meeting, after which the status review report was posted on the Commission and Department websites, and the Commission solicited public testimony at its August 6, 2014 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 Clear Lake hitch (*Lavinia exilicauda chi*) will have no formal State legal status, the position it held prior to the petition filing.

(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:

Although localized economic impacts could result from adding Clear Lake hitch to the list of threatened species, the Commission does not anticipate that there will be significant, statewide adverse economic impact on California businesses or significant costs to private or public entities due to the limited area affected by the listing.

(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 Clear Lake hitch is limited to the Clear Lake watershed. Because of this localized distribution, adding the Clear Lake hitch to the list of threatened 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 environment by the protection of the Clear Lake hitch.

(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 projects subject to public agency review and approval under the California Environmental Quality Act (CEQA), since impacts to Clear Lake hitch would have been evaluated as part of the CEQA lead agency's mandatory consideration of a project's impacts to biological resources and species of special concern.

Some costs to individuals associated with avoiding take or obtaining take authorization arose with the candidacy designation, which took place more than two years ago. Because the take prohibition for both candidate and listed species is the same, such costs would not be increased by the act of adding Clear Lake hitch to the threatened species list. However, individuals may have delayed actions in anticipation of a final listing decision by the Commission; therefore listing could increase such costs.

(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 the Clear Lake hitch as a threatened 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. Clear Lake hitch has been subject to CESA's take prohibition for more than two years, since the Commission designated it as a candidate species in March 2013.

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 Clear Lake hitch 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 Department's non-regulatory designation of Clear Lake hitch as a

Species of Special Concern in 1995, and again heightened when Clear Lake hitch became a candidate for listing in March 2013.

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 a threatened 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. Some costs to individuals associated with avoiding take or obtaining take authorization arose with the candidacy designation. Because the take prohibition for both candidate and listed species is the same, such costs would not be increased by the act of adding Clear Lake hitch to the threatened 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:

It should be noted that the entire Clear Lake hitch population is confined to Clear Lake, Lake County, California, and to associated lakes and ponds within the Clear Lake watershed. While adding Clear Lake hitch to the list of threatened species under CESA may have localized economic impacts, it is unlikely that these effects would spread beyond the Clear Lake region, 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 Clear Lake hitch, it is unlikely that adding the species to the list of threatened 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:

Clear Lake hitch 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 threatened species and their habitat as an issue of statewide concern and recognized these species' value, including their economic value. Improved conditions in the Clear Lake watershed resulting from take avoidance and species enhancement efforts could also be expected to result in improved conditions for other native and introduced species that are critical to the Clear Lake economy, as well as improvements to water quality and other environmental resources.

Informative Digest/Policy Statement Overview

Section 670.5 of Title 14, California Code of Regulations (CCR), provides a list, established by the California Fish and Game Commission (Commission), of animals designated as endangered or threatened 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 (b)(2) of Section 670.5, to add Clear Lake hitch (*Lavinia exilicauda chi*) to the list of threatened animals.

In making the recommendation to list Clear Lake hitch pursuant to the California Endangered Species Act, the Department identified the following primary threats: 1) present or threatened modification or destruction of habitat; 2) predation; 3) competition; and 4) climate change. More detail about the current status of Clear Lake hitch can be found in the Report to the Fish and Game Commission, "A status review of Clear Lake hitch (*Lavinia exilicauda chi*)" (Department of Fish and Wildlife, May 28, 2014).

The proposed regulation will benefit the environment by protecting Clear Lake hitch as a threatened 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.

Subsection (b)(2) of Section 670.5, Title 14, CCR is amended to read:

§670.5. Animals of California Declared To Be Endangered or Threatened.
The following species and subspecies are hereby declared to be endangered or threatened, as indicated:

[No changes to subsections (a)(1) through (a)(6)]

(b) Threatened:
- (1) Gastropods:
  - (A) Trinity bristle snail (*Monadenia setosa*)
- (2) Fishes:
  - (A) Cottonball Marsh pupfish (*Cyprinodon salinus milleri*)
  - (B) Rough sculpin (*Cottus asperrimus*)
  - (C) Spring-run chinook salmon (*Oncorhynchus tshawytscha*) of the Sacramento River drainage.
  - (D) Coho salmon (*Oncorhynchus kisutch*) from Punta Gorda (Humboldt County), California to the northern border of California.
  - (E) Longfin smelt (*Spirinchus thaleichthys*)
  - <u>(F) Clear Lake hitch (*Lavinia exilicauda chi*)</u>

[No changes to subsections (b)(3) through (b)(6)]

Note: Authority cited: Sections 240, 2070, 2075.5, 2076.5, Fish and Game Code. Reference: Sections 1755, 2055, 2062, 2067, 2070, <u>2072.7,</u> 2074.6, 2075.5, 2077, 2080, 2081 and 2835, Fish and Game Code.