

CALIFORNIA FISH AND GAME COMMISSION NOTICE OF FINDINGS

NOTICE IS HEREBY GIVEN that, pursuant to the provisions of Fish and Game Code Section 2074.2, the California Fish and Game Commission (Commission), at its February 3, 2005, meeting in San Diego, rejected the petition (Petition 2004) filed by Messrs. Homer T. McCrary and Fabian Alvarado of Big Creek Lumber Co. and Mr. Robert O. Briggs of Central Coast Forest Association to remove coho salmon (*Oncorhynchus kisutch*) south of San Francisco from the list of endangered species. This action was based on a finding that the petition did not provide sufficient information to indicate that the petitioned action may be warranted. At that meeting, the Commission also announced its intention to ratify this finding at its March, 2005, meeting in Oakland.

NOTICE IS ALSO GIVEN that, at its March 17, 2005, meeting in Oakland, the Commission adopted the following formal findings outlining the reasons for the rejection of the petition.

I

BACKGROUND

On June 23, 2004, the Commission received a petition dated June 17, 2004, from Messrs. McCrary and Alvarado of Big Creek Lumber Co. and Mr. Briggs of Central Coast Forest Association to remove coho salmon south of San Francisco from the list of endangered species.

On July 2, 2004, in accordance with Sections 2072.3 and 2073.5 of the Fish and Game Code, the Commission directed the Department to evaluate the petition to remove coho salmon south of San Francisco from the endangered species list and to provide a recommendation to the Commission.

The Department completed its evaluation and submitted it to the Commission on December 31, 2004, after receiving an extension from the Commission on September 21, 2004, so that the Department could thoroughly analyze the petition and the available scientific information. The Department's evaluation concluded that the petition did not contain sufficient information to indicate that the petitioned action may be warranted and recommended that the Commission reject the petition. The Commission, at its February 3, 2005, meeting in San Diego, considered the petition, the Department's written evaluation and recommendation, the Department's oral presentation and comments, and public comments. At that meeting, the Commission rejected the petition and made a finding that the petition did not contain sufficient information to indicate that the petitioned action may be warranted. The Commission ratified this finding on March 17, 2005, at its meeting in Oakland.

II

STATUTORY REQUIREMENTS

A species is endangered under California Endangered Species Act, Fish and Game Code Section 2050 et seq. (CESA), if it "is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, over exploitation, predation, competition, or disease." (Fish & G. Code, § 2062.) The

responsibility for deciding whether a species should be removed from the endangered species list, otherwise known as delisting, rests with the Commission. (Fish & G. Code, § 2070.)

To be accepted by the Commission, a petition to remove a species from the endangered species list must include sufficient scientific information that the delisting may be warranted. (Fish & G. Code, § 2072.3, Cal. Code Regs., tit. 14, § 670.1, subds. (d) and (e).) The petition must include information regarding the species' population trend, range, distribution, abundance and life history; factors affecting the species' ability to survive and reproduce; the degree and immediacy of the threat to the species; the impact of existing management efforts; suggestions for future management of the species; the availability and sources of information about the species; information about the kind of habitat necessary for survival of the species; and a detailed distribution map. (Fish & G. Code, § 2072.3, Cal. Code Regs., tit. 14, § 670.1, subd. (d)(1).) In deciding whether it has sufficient information to indicate the petitioned action may be warranted, the Commission is required to consider the petition itself, the Department's written evaluation report, and comments received about the petitioned action. (Fish & G. Code, § 2074.2.)

The requisite standard of proof to be used by the Commission in deciding whether the petitioned action may be warranted (i.e. whether to accept or reject a petition) was described in *Natural Resources Defense Council v. Fish and Game Commission* (1994) 28 Cal.App.4th 1104 [hereinafter *NRDC*]. In *NRDC*, a case where the petitioned action was listing of a species, the court determined that "the section 2074.2 phrase 'petition provides sufficient information to indicate that the petitioned action may be warranted' means that amount of information, when considered in light of the Department's written report and the comments received, that would lead a reasonable person to conclude there is a substantial possibility the requested listing could occur..." (*NRDC*, supra, 28 Cal. App. 4th at page 1125.) This "substantial possibility" standard is more demanding than the low "reasonable possibility" or "fair argument" standard found in the California Environmental Quality Act, but is lower than the legal standard for a preliminary injunction, which would require the Commission to determine that a listing is "more likely than not" to occur. (*Ibid.*)

The *NRDC* court noted that this "substantial possibility" standard involves an exercise of the Commission's discretion and a weighing of evidence for and against the petitioned action in contrast to the "fair argument" standard that examines evidence on only one side of the issue. (*NRDC*, supra, 28 Cal. App. 4th at page 1125.) As the court concluded, the decision-making process involves:

...a taking of evidence for and against listing in a public quasi-adjudicatory setting, a weighing of that evidence, and a Commission discretion to determine essentially a question of fact based on that evidence. This process, in other words, contemplates a meaningful opportunity to present evidence contrary to the petition and a meaningful consideration of that evidence." (*Id.* at 1126.)

Therefore, in determining whether the petitioned action "may be warranted," the Commission must consider not only the petition and the evaluation report prepared on the petition by the Department, but other evidence introduced in the proceedings. The Commission must decide this question in light of the entire record.

REASON FOR FINDING

This statement of reasons for the finding sets forth an explanation of the basis for the Commission's finding and its rejection of the petition to remove coho salmon south of San Francisco from the endangered species list. It is not a comprehensive review of all information considered by the Commission and for the most part does not address evidence that, while relevant to the petitioned action, was not at issue in the Commission's decision.

In order to accept this petition, the Commission is required to determine that it has information to persuade a reasonable person that there is a substantial possibility that coho salmon south of San Francisco will be removed from the endangered species list. As the decision in *NRDC* makes clear, the Commission must critically evaluate and weigh all evidence, and this process does not allow the Commission to resolve all uncertainties in favor of either the proponents or opponents of the petitioned action. The Commission may deal with data gaps by drawing inferences based on available information or by relying on expert opinion that the Commission finds persuasive, but in the end the petition and other information presented to the Commission must affirmatively demonstrate the species no longer meets the criteria for protection as an endangered species.

As was previously mentioned, Fish and Game Code section 2072.3 provides that certain sufficient scientific information must be included in a petition in order for it to be accepted. The petition includes some information regarding: species' population trends, range, distribution, abundance and life history; factors affecting the species' ability to survive and reproduce; the degree and immediacy of the threat to the species; the impact of existing management efforts; suggestions for future management of the species; the availability and sources of information about the species; information about the kind of habitat necessary for survival of the species; and a detailed distribution map.

However, in its oral presentation and comments, the Department informed the Commission as to the current status of coho salmon South of San Francisco, noting that:

- It appears that coho salmon south of San Francisco may be doing better now than they were ten years ago, but populations are still quite depressed and restricted, and are still vulnerable to extinction.
- In 1995, coho salmon were found in Waddell and Scott Creeks and the San Lorenzo River.
- In 2003, only Scott Creek contained all three brood years, and Waddell Creek contained only two of three brood years, one of which contained less than 20 adults.
- Currently, it appears that all three brood years are present in both Scott and Waddell Creeks, and possibly San Vincente Creek, but at far fewer numbers than Scott and Waddell Creeks. Gazos Creek appears to have only two brood years with very low numbers.

In addition, the petition is premised on an argument that the listing of coho salmon south of San Francisco as an endangered species was unfounded or in error because coho salmon

are not native to streams south of San Francisco. The petition appears to base this argument on five main points:

- Archeological evidence supports the concept that coho salmon populations were not present prehistorically in the coastal streams south of San Francisco.
- Harsh environmental conditions prevented the establishment of permanent coho salmon populations south of San Francisco.
- The scientific and historical record substantiates the absence of coho salmon populations south of San Francisco.
- Coho salmon south of San Francisco have been introduced through frequent replanting of hatchery produced coho salmon of various origins.
- Recent reductions in hatchery support have allowed the naturally hostile-to-coho salmon environment to nearly extirpate the introduced coho salmon populations south of San Francisco.

The Department, on the other hand, provided the Commission with information in its oral presentation and comments and written evaluation report that:

- Coho salmon were historically present in at least nine coastal streams south of San Francisco.
- The petitioners' assertion that the archeological evidence indicates that coho salmon populations were not present prehistorically in the coastal streams south of San Francisco is not supported by the available information and not supported by the scientists that performed the investigations. There were not enough salmonid bones recovered at the sites to make the conclusion that coho salmon were absent from this region, and many more samples are needed before a definitive conclusion can be made (Gobalet et al. 2004).
- The climatic and hydrologic evidence does not support the petitioners' conclusion that harsh environmental conditions prevented the establishment of permanent coho salmon populations south of San Francisco Bay. Climatic and hydrologic data show that the environmental conditions in San Mateo and Santa Cruz counties are not significantly different from coastal areas north of San Francisco, and the Santa Cruz counties are actually more favorable than east San Francisco Bay sites where coho salmon were documented historically.
- Historical museum records from 1895 indicate that coho salmon were present in several streams south of San Francisco and there is documentation that commercial harvest of coho salmon was ongoing as late as 1870 on two San Mateo County streams. These and other evidence demonstrate that coho salmon were present prior to 1906, which is the date of the first known planting of hatchery coho salmon south of San Francisco.

- The petitioners do not provide any evidence that supports their assertion that coho salmon have been maintained in streams south of San Francisco by hatchery input. The Department knows of no data that supports or refutes this assertion, primarily because there is little data available to evaluate the hatchery contribution to natural abundance. However, hatchery reports show that since the early 1900s hatchery production in the region has been sporadic and relatively small even when out-of-basin broodstock or eggs were used. Recent hatchery output has been extremely variable and declining.
- There are no data to support the petitioners' assertion that recent reductions in hatchery support have caused the severe reduction in coho salmon populations south of San Francisco. Recent status reviews support the conclusion that coho salmon hatchery production in the region south of San Francisco has declined in recent years. The availability of local broodstock has been a major influence on hatchery output in the region. As fish have become more scarce, hatcheries in the region using local broodstock have had an increasingly difficult time obtaining enough fish to support their programs. There is much more information and data supporting the argument that recent declines in coho salmon populations are attributable to well-documented habitat degradation caused by land-use practices, urbanization, and reduced stream flows.
- In contrast to petitioners' assertions, all recent genetic analyses support the genetic distinctiveness of coho salmon from Scott, Waddell, and Gazos creeks, and their affinities to other nearby California coho salmon populations. These recent genetic analyses support the California ESU delineations drawn by NOAA Fisheries and adopted by the Department. The available genetics information does not support the petitioners' assertions that coho salmon found today in streams south of San Francisco are not native. Also, because of the wide range of responses of naturally spawning populations to hatchery stocking, stocking records alone cannot be used to conclusively document replacement of the naturally spawning stock by the hatchery stock.
- CESA covers certain native species that the Commission has designated as candidate, threatened, or endangered. A native species is one that is indigenous to California. CESA's protection extends to covered species wherever they occur in California. In addition, CESA does not discriminate between hatchery and naturally spawning populations. Recent Commission action to list coho salmon north of San Francisco under CESA includes hatchery as well as naturally spawning populations in this region.
- NOAA Fisheries scientists have also reviewed the information contained in the petition (Pete Adams, NOAA Fisheries, pers. comm.). NOAA Fisheries has recently completed a status review update of the CCC Coho ESU, which includes coho salmon south of San Francisco. They are proposing that the CCC Coho ESU be uplisted under the federal Endangered Species Act from its current status as threatened to endangered, and they are not proposing to exclude coho salmon south of San Francisco.

IV
FINAL DETERMINATION BY COMMISSION

The Commission has weighed all the scientific and general evidence in the petition, the Department's written evaluation report and oral presentation and comments, and other

comments received from the public, and, based upon that weighing of the evidence, the Commission has determined that the petition does not provide sufficient evidence to persuade the Commission that the petitioned action may be warranted. (Fish & G. Code, § 2074.2). In making this determination, the Commission considered the petition in light of the Department's written evaluation and oral presentation and comments, and other comments received from the public, and could not reasonably conclude there is a substantial possibility that the listing of coho salmon south of San Francisco was unfounded or in error such that delisting could occur. Nor could the Commission reasonably conclude that there is a substantial possibility that coho salmon south of San Francisco no longer meets the criteria for protection as an endangered species such that delisting could occur.

Fish and Game Commission

Dated: March 17, 2005

Robert R. Treanor
Executive Director