CALIFORNIA FISH AND GAME COMMISSION
NOTICE OF FINDING, FINDING AND STATEMENT OF REASON

(Denying Petition to List Scott Bar Salamander)

NOTICE IS HEREBY GIVEN, that, pursuant to the provisions of Section 2074.2 of the California Fish and Game Code, the California Fish and Game Commission ("Commission"), at its April 12, 2007 meeting in Bodega Bay, rejected the Petition to List the Scott Bar Salamander (*Plethodon asupak*) ("SBS") submitted by the Environmental Protection Information Center, the Center for Biological Diversity, and the Klamath-Siskiyou Wildlands Center. This rejection is based on a finding that the petitioned action does not provide sufficient information to indicate that the petitioned action may be warranted because the SBS is already protected under the California Endangered Species Act (CESA; Fish and Game Code section 2050 *et seq.*)

NOTICE IS ALSO GIVEN that, at its May 3-4 meeting in San Diego, the Commission adopted the following formal statement of reasons (findings of fact and law) outlining the basis for rejection of the Petition.

BACKGROUND

June 2005. Article published in *Herpetologica* identifying SBS as a separate species from the listed Siskiyou Mountain Salamander ("SMS"). Previously SBS, though not called that, was thought to be a sub-population of the SMS.

January 12, 2006. Department of Fish and Game (DFG) staff send notification to California Department of Forestry and Fire Protection (CDFFP) indicating that SBS is a "genetically different species" from SMS and "[a]s such, there are no prohibitions against take as there are for (SMS)".

March 1, 2006. DFG sends another communication to CDFFP similar to the above but also stating that SBS is not endangered, rare or threatened pursuant to the California Environmental Quality Act.

March 16, 2006. The organizations that submitted the Petition file a lawsuit in Siskiyou County Superior Court challenging DFG and CDFFP's position that SBS is not currently protected under CESA, later dismissing the action without prejudice on May 30, 2006.

April 10, 2006. The Commission receives a petition to list SBS from the above-referenced organizations. The Commission returns the Petition as incomplete on April 19, 2006.

April 25, 2006. The U.S. Fish and Wildlife Service ("FWS") publishes notice of its 90-day finding regarding SMS and SBS under ESA. The FWS rejects both petitions at the

candidacy stage, finding there is not substantial information indicating that the listing may be warranted.

August 24, 2006. The petitioning organizations file another lawsuit, this time in San Francisco Superior Court, challenging DFG's position that SBS is not currently listed under CESA.

September 28, 2006. The petitioning organizations submit the Petition to the Commission to list SBS under CESA, noting in a May 1, 2006 cover memo that their position is that SBS is "currently protected under CESA."

October 12, 2006. The Commission sends a letter to the petitioning organizations acknowledging receipt of the Petition to list SBS, indicating that the Petition is complete. The Commission forwards the Petition to DFG the same day.

October 27, 2006. The Commission publishes notice of receipt of the Petition in the California Regulatory Notice Register.

January 12, 2007. The San Francisco Superior Court issues an order against DFG holding that "[b]y virtue of its having been accorded protection as a subgroup of a listed, protected species, the Scott Bar salamander's protection under [CESA] cannot be withdrawn by the [Department] without action first being taken by the California Fish and Game Commission."

January 19, 2007. A federal court sets aside the FWS' 90-day finding under ESA.

January 25, 2007. The petitioning organizations submit a letter to the Commission highlighting the state and federal court actions and asserting that the "SBS Petition should be held in abeyance pending proper consideration of the (SBS)'s current protection" under CESA.

February 2, 2007. Commission formally receives DFG's 90-day report regarding the Petition. DFG recommends that the Commission reject the petition based on a finding that there is not sufficient information to indicate that the petition action may be warranted.

April 12, 2007. Commission rejects the Petition because the petitioned action is not warranted.

STATUTORY REQUIREMENT

The responsibility for deciding whether a species should be added or removed from the endangered species list, otherwise known as listing or delisting, rests with the Commission. (Fish & G. Code, § 2070.) The Commission makes these decisions pursuant to the provisions of California Endangered Species Act, Fish and Game Code Section 2050 *et seq*. (CESA)

To be accepted by the Commission, a petition to add or remove a species from the endangered and threatened species list must include sufficient scientific information that the listing or delisting may be warranted. (Fish & G. Code, § 2072.3, Cal. Code Regs., tit. 14, § 670.1, subs. (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 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 the 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.*)

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.

REASONS FOR FINDING

At its meeting on April 12, 2007, DFG notified the Commission that it stood by its earlier recommendation that the petitioned action was not warranted. According to the Department, in its substantive, biological review of the Petition there was not sufficient information for the Commission to conclude that the petitioned action may be warranted. (See January 23, 2007 evaluation report by DFG.)

However, DFG advised the Commission of the background of the species listed above.

According to DFG, the known range of SMS when originally listed covered approximately six square miles in northern Siskiyou County. Over time, numerous additional occurrences of salamanders identified as SMS were discovered and the range of SMS was expanded to approximately 380 square miles. The salamanders now identified as SBS occupy about 106 square miles of that range. The currently identified range of SBS does not overlap the range for SMS as it was documented at the time of the original listing. However, since SBS was previously believed to be SMS, SBS has received the protections of a listed species under CESA.

Once SBS was described as a distinct species from SMS in 2005, DFG believed that until such time as the Commission acted to place SBS on the list, it could not be treated as a listed species. The San Francisco Superior Court advised DFG that its position was incorrect. It mandated that DFG treat the SBS as a protected species until the Commission took some action as to the species.

FINAL DETERMINATION BY COMMISSION

The Commission has weighed all of the evidence in the administrative record, including the conclusions of the organizations submitting the Petition that the petitioned action is not warranted because the species is currently protected under CESA. In its May 1, 2007 letter to the Commission, the petitioning organizations stated that "[i]t is our position that the [SBS] is currently protected under CESA, and should remain so protected until the Commission has taken some action to clarify the status of this recently recognized species." Similarly, in a January 25, 2007 letter to the Commission, the organizations stated that "the [SBS] retains the protection that it previously enjoyed under CESA as a subpopulation of the listed [SMS] unless and until the Commission takes action, in accordance with CESA's procedures, to remove that protection."

In addition to these letters, the Commission has considered all of the other relevant documents contained in its administrative record. Weighing this evidence, the Commission has determined that the petitioned action is not warranted because SBS is currently a protected species under CESA. SBS was thought to be SMS until the scientific article in 2005 identified SBS as a separate species. Publication of the 2005 article produced merely a taxonomic change. It did not change the legal status of the salamanders under CESA, and SBS continues to have CESA protections.

The Commission acknowledges that DFG has submitted a petition to delist the SMS. This action is currently under consideration by the Commission. As of the date of these Findings, the Commission is awaiting receipt of a CEQA environmental document for its consideration of DFG's recommended action. Should DFG determine that SBS should also be delisted, it will need to take the appropriate actions under CEQA and CESA to properly bring that issue before the Commission.

The Commission further finds that because this designation is merely a taxonomic change, it is appropriate to add the species to the list of threatened species through a

technical change to the California Code of Regulations, Title 14. Should the Office of Administrative Law determine that this is not simply a technical change, the Commission staff is hereby directed to take such other actions as are appropriate to add SBS to CESA's list.

DATE: 5-10-07

For the Fish and Game Commission