

constitutional authority has been repealed; revising structure, syntax, or grammar; or changing an “authority” or “reference” citation for a regulation.

The Commission proposed to change section 670.5(b) of title 14, CCR, by adding Scott Bar salamander as a new subparagraph (3)(G) as follows:

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:

- (a) Endangered: ...
- (b) Threatened: ...
- (3) Amphibians:
 - (A) Siskiyou mountain salamander (*Plethodon stormi*)
 - (B) Kern Canyon slender salamander (*Batrachoseps simatus*)
 - (C) Tehachapi slender salamander (*Batrachoseps stebbinsi*)
 - (D) Limestone salamander (*Hydromantes brunus*)
 - (E) Shasta salamander (*Hydromantes shastae*)
 - (F) Black toad (*Bufo exsul*)
 - (G) Scott Bar salamander (*Plethodon asupak*)

....

The Commission’s reason for this change is based on a June 2005 article published in *Herpetologica* that identified the Scott Bar salamander (“SBS”) as a separate species from the listed Siskiyou mountain salamander (“SMS”). Previously SBS, known by another name prior to the June 2005 article, was thought to be a sub-population of the SMS. (Commission’s Notice of Finding, Finding and Statement of Reason, dated 5/10/07, p. 1.)

Additionally, the Commission provided that in January and March of 2006, the Department of Fish and Game (“Department”) informed the Department of Forestry and Fire Protection (“DFFP”) that SBS is a “genetically different species” from SMS and “[a]s such, there are no prohibitions against take as there are for (SMS).” (*Id.*) The Department further informed DFFP that SBS is not endangered, rare or threatened pursuant to the California Environmental Quality Act (“CEQA”). (*Id.*) This action by the Department resulted in the Department being sued in a San Francisco superior court. On January 12, 2007, the court found 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listed, protected species, the Scott Bar salamander’s protection under the California Endangered Species Act cannot be withdrawn by the California Department of Fish and Game without action first being taken by the California Fish and Game Commission.” (*Environmental Protection Information Center, et al. v. California Department of Fish and Game, et al.* (Super. Ct. San Francisco County, 2007, No. CPF-06-506585).)

The Legislature clearly intended rules that govern adding or removing species from the list of endangered species or the list of threatened species be adopted by the Fish and Game Commission not only pursuant to the California Endangered Species Act, but also pursuant to the Administrative Procedure Act. Fish and Game Code section 2075.5 provides the following:

At the meeting scheduled pursuant to Section 2075, the commission shall make one of the following findings:

- (1) The petitioned action is not warranted, in which case the finding shall be entered in the public records of the commission and the petitioned species shall be removed from the list of candidate species maintained pursuant to Section 2074.2.
- (2) The petitioned action is warranted, in which case the commission shall publish a notice of that finding and a notice of proposed rulemaking pursuant to Section 11346.4 of the Government Code to add the species to, or remove the species from, the list of endangered species or the list of threatened species. Further proceedings of the commission on the petitioned action shall be made in accordance with Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code [the APA].

The Commission characterizes the designation of SBS as a new species to be merely a taxonomic change; however, this does not persuade OAL. OAL finds the proposal to add SBS to the list of threatened species by filing a "change without regulatory effect" with OAL not to be within the limits of section 100 or in accordance with Fish and Game Code section 2075.5. A change to the CCR pursuant to section 100 is only authorized if the change is without regulatory effect. (Cal. Code Regs., tit. 1, sec. 100.)

SBS has been designated to be its own species. Each species must go through the decision listing or delisting process and evaluation in accordance with the provisions of the California Endangered Species Act¹ based on its own merits and the facts specific to

¹ In its Notice of Finding, Finding and Statement of Reason ("Notice"), dated 5/10/07, the Commission provided the following summary of its duties and responsibilities under CESA:

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, sec. 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, sec. 2072.3, Cal. Code Regs., tit. 14, sec. 670.1, subs. (d) and (e).) The petition must

that particular species provided to the Commission by a petitioner, the Department's written evaluation report and public comments.² It is also the Commission's responsibility to determine whether the specific species should be listed as endangered or threatened based on the individual facts and information. (Cal. Code Regs., tit. 14, sec. 670.1.) As the Commission's findings note, the information that was looked at when determining whether to list the SMS does not presently apply to the SBS. For example, the Commission states, "The currently identified range of SBS does not overlap the range for SMS as it was documented at the time of the original listing [of SMS]." (Commission's Notice of Finding, Finding and Statement of Reason, dated 5/10/07, p. 4.)

Thus, OAL has determined that the addition of Scott Bar salamander to the list of threatened species in section 670.5(b) as proposed by the Commission is not a change without regulatory effect. For the reasons stated above, OAL disapproved the Commission's proposed action as "change without regulatory effect" pursuant to section 100 of title 1 of the CCR.

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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, sec. 2072.3, Cal. Code Regs., tit. 14, sec. 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, sec. 2074.2.)

² In the absence of a petitioner, the Department may recommend to the Commission to add or remove a species, but it must also submit the same information required of a petitioner. (Fish & G. Code, sec. 2072.7.)