

**CALIFORNIA FISH AND GAME COMMISSION
NOTICE OF FINDING**

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 December 7, 2006, meeting in Santa Monica, rejected the petition filed by the Department of Fish and Game to delist Tracy's eriastrum (*Eriastrum tracyi* H. Mason) and remove it from the list of rare plants under the California Endangered Species Act, Fish and Game Code Section 2050 et seq. The Commission's decision was based on a finding that the petition did not provide sufficient information to indicate that the petitioned action may be warranted. At this meeting, the Commission also announced its intention to ratify its finding at its February 1, 2007, meeting in Monterey.

NOTICE IS ALSO GIVEN that at its February 1, 2007, formal meeting in Monterey, the Commission adopted the following formal finding and statement of the reasons for its rejection of the petition.

I
BACKGROUND

On September 1, 2006, the Department prepared and submitted a petition to delist Tracy's eriastrum and remove it from the list of rare plants. The petition stated that Tracy's eriastrum was not a valid and distinct taxon but was included in a more widespread taxon, Brandegee's eriastrum (*Eriastrum brandegeeeae* H. Mason). The Commission was scheduled to consider this petition during its December 7, 2006, hearing. However, the Department requested to withdraw the petition based on the following rationale. On November 29, 2006, Dr. J. Mark Porter, a scientist at Claremont Graduate University, contacted the Department regarding the petition to delist Tracy's eriastrum. Dr. Porter is overseeing research on *Eriastrum* and stated that Tracy's eriastrum is still considered to be a valid and distinct taxon and should not be delisted. In withdrawing the petition, Tracy's eriastrum will be retained on the list of rare plants.

II
STATUTORY REQUIREMENTS

A species is endangered under California Endangered Species Act, Fish and Game Code § 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.) A species is threatened under CESA if it is "not presently threatened with extinction [but] is likely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by [CESA]..." (Fish & G. Code, § 2067.) The responsibility for deciding whether a species should be listed as endangered or threatened rests with the Fish and Game Commission (Commission). (Fish & G. Code, § 2070.)

California law does not define what constitutes a "serious danger" to a species, nor does it describe what constitutes a "significant portion" of a species' range. The Commission makes the determination as to whether a species currently faces a serious danger of extinction throughout a significant portion of its range, (or for a listing as threatened whether such a future threat is likely) on a case-by-case basis after evaluating and weighing all the biological and management information before it. This approach is consistent with the process followed by

federal agencies in deciding whether to list species under the federal Endangered Species Act, 16 U.S.C. § 1531 et seq.

Non-emergency listings involve a two-step process: first, the Commission “accepts” a petition to list the species, which immediately triggers regulatory protections for the species as a candidate for listing and also triggers a year-long study by the Department of Fish and Game (Department of the species’ status (Fish & G. Code, §§ 2074.2, 2074.6, and 2084); second, the Commission considers the Department’s status report and information provided by other parties and makes a final decision to formally list the species as endangered or threatened (Fish & G. Code, § 2075.5).

To be accepted by the Commission, a petition to list a species under CESA must include sufficient scientific information that the listing may be warranted. (Fish & G. Code, § 2072.3, Cal. Code Regs., tit. 14, § 670.1, subds. (d) and (e).) The petition must also 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 listing may be warranted, the Commission is required to consider the petition itself, the Department of Fish and Game’s written evaluation report, and other 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 listing 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. In the *NRDC* case, 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 listing, 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 listing “may be warranted,” the Commission must consider not only the petition and the 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.

III COMMISSION FINDING

For the reasons stated below, the Commission finds that the petition to delist Tracy's eriastrum from the list of rare plants under CESA does not provide sufficient information to indicate that the petitioned action may be warranted, and that the petition must therefore be rejected.

IV STATEMENT OF REASONS

This statement of reasons sets forth an explanation of the basis for the Commission's rejection of the petition to delist Tracy's eriastrum and remove it from the list of rare plants. Tracy's eriastrum was first published as a species by Mason (1945)¹. It was retained as a species in Munz and Keck (1968)² and was considered distinct in a 1972 monograph (Harrison, 1972)³. However, Tracy's eriastrum was not included in the current version of The Jepson Manual – Higher Plants of California (Hickman, 1993)⁴. Instead, it was included in a more widespread taxon, Brandegees eriastrum. Authors of treatments in Hickman were instructed to "lump" species undergoing study into related taxa even if previous taxonomic treatments considered them distinct. Thus, because Tracy's eriastrum was no longer considered distinct in Hickman, the Department prepared a delisting petition to remove it from the list of rare plants.

Subsequent to the Department's petition, new and more accurate botanical evaluations treat Tracy's eriastrum as distinct. For example, a new edition of The Jepson Manual is being compiled which will include Tracy's eriastrum as a separate and valid taxon. The treatment of the genus *Eriastrum* for the new edition is the subject of a PhD dissertation by Ms. Sarah DeGroot, a student of Dr. Porter. Her research provided genetic and morphological data that supports retaining *Eriastrum tracyi* as a distinct species, and was reviewed by Dr. Robert Patterson at San Francisco State University. Dr. Patterson is an authority on *Eriastrum* and the Phlox Family (Polemoniaceae) and is co-author, with Sarah DeGroot, of the genus *Eriastrum* for the new edition of The Jepson Manual. The Commission finds credibility in the work of Ms. DeGroot, Dr. Porter and Dr. Patterson; therefore delisting is not warranted and Tracy's eriastrum should be retained on the list of rare plants.

Fish and Game Commission

Dated: December 19, 2006

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Executive Director

¹ Mason, H.L. 1945. The genus *Eriastrum* and the influence of Bentham and Gray upon the problem of generic confusion in Polemoniaceae. *Madroño* 8:87-88.
² Munz, P.A. and Keck, D.D. 1968. A California flora and supplement. University of California Press, Berkeley.
³ Harrison, H.K. 1972. Contributions to the study of the genus *Eriastrum*. Brigham Young University Science Bulletin. Biological Series 16(4). 26 pp.
⁴ Hickman, J. C., ed. 1993. The Jepson manual: higher plants of California. University of California Press, Berkeley. 1400 pp.