NOTICE OF FINDINGS
Pacific fisher
(Martes pennanti)

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), at its June 23, 2010 meeting in Folsom, California, made a finding pursuant to Fish and Game Code section 2075.5, that the petitioned action to add the Pacific fisher *(Martes pennanti)* to the list of threatened or endangered species under the California Endangered Species Act (CESA)(Fish & G. Code, § 2050 et seq.) is not warranted. (See also Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1).)

I.
BACKGROUND AND PROCEDURAL HISTORY

On January 23, 2008, the Center for Biological Diversity (Center) petitioned the Commission to list the Pacific fisher as a threatened or endangered species under CESA.[1] (Cal. Reg. Notice Register 2008, No. 8-Z, p. 275; see also Cal. Code Regs., tit. 14, § 670.1, subd. (a); Fish & G. Code, § 2072.3.) The Commission received the petition and, pursuant to Fish and Game Code section 2073, referred the petition to the Department of Fish and Game (Department) for its evaluation and recommendation. (*Id.*, § 2073.) Thereafter, on June 27, 2008, the Department submitted its initial Evaluation of Petition: Request of Center for Biological Diversity to List the Pacific fisher (*Martes pennanti*) as Threatened or Endangered (June 2008) (hereafter, the 2008 Candidacy Evaluation Report) to the Commission at its meeting in Upland, California, recommending that the petition be rejected pursuant to Fish and Game Code section 2073.5, subdivision (a)(1). (See also Cal. Code Regs., tit. 14, § 670.1, subd. (d).)

On August 7, 2008, at its meeting in Carpinteria, California, the Commission considered the Department's 2008 Candidacy Evaluation Report and related recommendation, public testimony, and other relevant information, and voted to reject the Center's petition to list the Pacific fisher as a threatened or endangered species pursuant to Fish and Game Code section 2074.2, subdivision (a)(1). In so doing, the Commission determined there was not sufficient information to indicate that the petitioned action may be warranted. (Cal. Code Regs., tit. 14, § 670.1, subd. (e)(1); see also Cal. Reg. Notice Register 2009, No. 8-Z, p. 285.)

On February 5, 2009, at its meeting in Sacramento, California, the Commission voted to postpone and delay the adoption of findings ratifying its August 2008 decision, indicating it would reconsider its earlier action at the next Commission meeting. (Cal. Reg. Notice Register 2009, No. 8-Z, p. 285.) On March 4, 2009, at its meeting in Woodland, California, the Commission set aside its August 2008 determination rejecting the Center's petition, designating the Pacific fisher as a

[1] The definitions of endangered and threatened species for purposes of CESA are found in Fish and Game Code sections 2062 and 2067, respectively.

candidate species under CESA.[2] (Fish & G. Code, § 2074.2, subd. (a)(2), Cal. Code Regs., tit. 14, § 670.1, subd. (e)(2).). In reaching its decision, the Commission considered the petition, the Department's 2008 Candidacy Evaluation Report, public comment, and other relevant information, and determined based on substantial evidence in the administrative record of proceedings that the petition included sufficient information to indicate that the petitioned action may be warranted. The Commission adopted findings to the same effect at its meeting in Lodi, California, on April 8, 2009, publishing notice of its determination as required by law on April 24, 2009. (Cal. Reg. Notice Register 2009, No. 17-Z, p. 609; see also Fish & G. Code, §§ 2074.2, subd. (b), 2080, 2085.)

On April 8, 2009, the Commission also took emergency action pursuant to the Fish and Game Code and the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.), authorizing take of Pacific fisher as a candidate species under CESA, subject to various terms and conditions. (See Fish & G. Code, §§ 240, 2084, adding Cal. Code Regs., tit. 14, § 749.5; Cal. Reg. Notice Register 2009, No. 19-Z, p. 724.) The Commission extended the emergency take authorization for Pacific fisher on two occasions, effective through April 26, 2010. (*Id.,* 2009, No. 45-Z, p. 1942; Cal. Reg. Notice Register 2010, No. 5-Z, p. 170.) The emergency take authorization repealed by operation of law on April 27, 2010.

Consistent with the Fish and Game Code and controlling regulation, the Department commenced a 12-month status review of Pacific fisher following published notice of its designation as a candidate species under CESA. As part of that effort, the Department solicited data, comments, and other information from interested members of the public, and the scientific and academic community; and the Department submitted a preliminary draft of its status review for independent peer review by a number of individuals acknowledged to be experts on the Pacific fisher, possessing the knowledge and expertise to critique the scientific validity of the report. (Fish & G. Code, §§ 2074.4, 2074.8; Cal. Code Regs., tit. 14, § 670.1, subd. (f)(2).) The effort culminated with the Department's final Status Review of the Fisher (*Martes pennanti*) in California (February 2010) (Status Review), which the Department submitted to the Commission at its meeting in Ontario, California, on March 3, 2010. The Department recommended to the Commission based on its Status Review and the best science available to the Department that designating Pacific fisher as a threatened or endangered species under CESA is not warranted. (Fish & G. Code, § 2074.6; Cal. Code Regs., tit. 14, § 670.1, subd. (f).) Following receipt, the Commission made the Department's Status Review available to the public, inviting further review and input. (*Id.*, § 670.1, subd. (g).)

[2] The definition of a "candidate species" for purposes of CESA is found in Fish and Game Code section 2068.

On March 26, 2010, the Commission published notice of its intent to begin final consideration of the Center's petition to designate Pacific fisher as an endangered or threatened species at a meeting in Monterey, California, on April 7, 2010. (Cal. Reg. Notice Register 2010, No. 13-Z, p. 454.) At that meeting, the Commission heard testimony regarding the Center's petition, the Department's Status Review, and an earlier draft of the Status Review that the Department released for peer review beginning on January 23, 2010 (Peer Review Draft). Based on these comments, the Commission continued final action on the petition until its May 5, 2010 meeting in Stockton, California, a meeting where no related action occurred for lack of quorum. That same day, however, the Department provided public notice soliciting additional scientific review and related public input until May 28, 2010, regarding the Department's Status Review and the related peer review effort. The Department briefed the Commission on May 20, 2010, regarding additional scientific and public review, and on May 25, 2010, the Department released the Peer Review Draft to the public, posting the document on the Department's webpage. On June 9, 2010, the Department forwarded to the Commission a memorandum and related table summarizing, evaluating, and responding to the additional scientific input regarding the Status Review and related peer review effort.

On June 23, 2010, at its meeting in Folsom, California, the Commission considered final action regarding the Center's petition to designate Pacific fisher as an endangered or threatened species under CESA. (See generally Fish & G. Code, § 2075.5; Cal. Code Regs., tit. 14, § 670.1, subd. (i).) In so doing, the Commission considered the petition, public comment, the Department's 2008 Candidacy Evaluation Report, the Department's 2010 Status Review, and other information included in the Commission's administrative record of proceedings. Following public comment and deliberation, the Commission determined, based on the best available science, that designating Pacific fisher as an endangered or threatened species under CESA is not warranted. (Fish & G. Code, § 2075.5(1); Cal. Code Regs., tit. 14, § 670.1, subd. (i)(2).) At the same time, the Commission directed its staff in coordination with the Department to prepare findings of fact consistent with the Commission's determination for consideration and ratification by the Commission at a future meeting.

II.
STATUTORY AND LEGAL FRAMEWORK

The Commission has prepared these findings as part of its final action under CESA regarding the Center's January 2008 petition to designate Pacific fisher as an endangered or threatened species under CESA. As set forth above, the Commission's determination that listing Pacific fisher is not warranted marks the end of formal administrative proceedings under CESA prescribed by the Fish and Game Code and controlling regulation. (See generally Fish & G. Code, § 2070 et seq.; Cal. Code Regs., tit. 14, § 670.1.) The Commission, as established by the California Constitution, has exclusive statutory authority under California law to

designate endangered, threatened, and candidate species under CESA. (Cal. Const., art. IV, § 20, subd. (b); Fish & G. Code, § 2070.)[3]

The CESA listing process for Pacific fisher began in the present case with the Center's submittal of its petition to the Commission in January 2008. (Cal. Reg. Notice Register 2008, No. 8-Z, p. 275.) The regulatory process that ensued is described above in some detail, along with related references to the Fish and Game Code and controlling regulation. The CESA listing process generally is also described in some detail in published appellate case law in California, including

- *Mountain Lion Foundation v. California Fish and Game Commission* (1997) 16 Cal.4th 105, 114-116;
- *California Forestry Association v. California Fish and Game Commission* (2007) 156 Cal.App.4th 1535, 1541-1542;
- *Center for Biological Diversity v. California Fish and Game Commission* (2008) 166 Cal.App.4th 597, 600; and
- *Natural Resources Defense Council v. California Fish and Game Commission* (1994) 28 Cal.App.4th 1104, 1111-1116.

The "is not warranted" determination at issue here for Pacific fisher stems from Commission obligations established by Fish and Game Code section 2075.5. Under this provision, the Commission is required to make one of two findings for a candidate species at the end of the CESA listing process; namely, whether the petitioned action is warranted or is not warranted. Here with respect to Pacific fisher, the Commission made the finding under section 2075.5(1) that the petitioned action is not warranted.

The Commission was guided in making this determination by various statutory provisions and other controlling law. The Fish and Game Code, for example, defines an endangered species under CESA as a native species or subspecies of a bird, mammal, fish, amphibian, reptile or plant which 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.)

Similarly, the Fish and Game Code defines a threatened species under CESA as a native species or subspecies of a bird, mammal, fish, amphibian, reptile or plant that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by this chapter. *(Id.*, § 2067.)

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[3] The Commission, pursuant to this authority, may add, remove, uplist, downlist, or choose not to list any plant or animal species to the list of endangered or threatened species, or designate any such species as a candidate for related action under CESA. (See also Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(A)-(C) and (2).) In practical terms, any of these actions is commonly referred to as subject to CESA's "listing" process.

Likewise as established by published appellate case law in California, the term "range" for purposes of CESA means the range of the species within California. (*California Forestry Association v. California Fish and Game Commission*, *supra*, 156 Cal. App.4th at p. 1540, 1549-1551.)

The Commission was also guided in making its determination regarding Pacific fisher by Title 14, section 670.1, subdivision (i)(1)(A), of the California Code of Regulations. This provision provides, in pertinent part, that a species shall be listed as endangered or threatened under CESA if the Commission determines that the species' continued existence is in serious danger or is threatened by any one or any combination of the following factors:

1. Present or threatened modification or destruction of its habitat;
2. Overexploitation;
3. Predation;
4. Competition;
5. Disease; or
6. Other natural occurrences or human-related activities.

Fish and Game Code section 2070 provides similar guidance. This section provides that the Commission shall add or remove species from the list of endangered and threatened species under CESA only upon receipt of sufficient scientific information that the action is warranted. Similarly, CESA provides policy direction not specific to the Commission per se, indicating that all state agencies, boards, and commissions shall seek to conserve endangered and threatened species and shall utilize their authority in furtherance of the purposes of CESA. (Fish & G. Code, § 2055.) This policy direction does not compel a particular determination by the Commission in the CESA listing context. Yet, the Commission made its determination regarding Pacific fisher mindful of this policy direction, acknowledging that "'[l]aws providing for the conservation of natural resources' such as the CESA 'are of great remedial and public importance and thus should be construed liberally." (*California Forestry Association v. California Fish and Game Commission*, *supra*, 156 Cal. App.4th at pp. 1545-1546, citing *San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 601; Fish & G. Code, §§ 2051, 2052.)

Finally in considering these factors, CESA and controlling regulation require the Commission to actively seek and consider related input from the public and any interested party. (See, e.g., *Id.*, §§ 2071, 2074.4, 2078; Cal. Code Regs., tit. 14, § 670.1, subd. (h).) The related notice obligations and public hearing opportunities before the Commission are also considerable. (Fish & G. Code, §§ 2073.3, 2074, 2074.2, 2075, 2075.5, 2078; Cal. Code Regs., tit. 14, § 670.1, subds. (c), (e), (g), (i); see also Gov. Code, § 11120 et seq.) All of these obligations are in addition to the requirements prescribed for the Department in the CESA listing process, including an initial evaluation of the petition and a

related recommendation regarding candidacy, and a 12-month status review of the candidate species culminating with a report and recommendation to the Commission as to whether listing is warranted based on the best available science. (Fish & G. Code, §§ 2073.4, 2073.5, 2074.4, 2074.6; Cal. Code Regs., tit. 14, § 670.1, subds. (d), (f), (h).)

III.
FACTUAL AND SCIENTIFIC BASES FOR THE COMMISSION'S FINDING

The factual and scientific bases for the Commission's finding that designating Pacific fisher as an endangered or threatened species under CESA is not warranted are set forth in detail in the Commission's administrative record of proceedings. Substantial evidence in the administrative record in support of the Commission's determination includes, but is not limited to, the Department's 2008 Candidacy Evaluation Report and 2010 Status Review, and other information specifically presented to the Commission and otherwise included in the Commission's administrative record as it exists up to and including the Commission meeting in Folsom, California, on June 23, 2010, and up to and including the adoption of these findings.

The Commission finds the substantial evidence highlighted in the preceding paragraph, along with other substantial evidence in the administrative record, supports the Commission's determination that the continued existence of Pacific fisher in the State of California is not in serious danger or threatened by one or a combination of the following factors:

1. Present or threatened modification or destruction of its habitat;
2. Overexploitation;
3. Predation;
4. Competition;
5. Disease; or
6. Other natural occurrences or human-related activities.

The Commission also finds that the same substantial evidence constitutes sufficient scientific information to establish that designating Pacific fisher as an endangered or threatened species under CESA is not warranted. The Commission finds in this respect that the Pacific fisher is not in serious danger of becoming extinct throughout all, or a significant portion, of its range. Similarly, the Commission finds that, although the Pacific fisher is not presently threatened with extinction, it is also unlikely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by CESA.

The following Commission findings highlight in more detail some of the scientific and factual information and other substantial evidence in the administrative record of proceedings that support the Commission's determination that

designating Pacific fisher as an endangered or threatened species under CESA is not warranted:

1. Survey and monitoring information from private timberlands, some in collaboration with the Department, indicates fisher inhabit forests that are not late successional.
2. Over the past twenty or more years, forests on public lands have undergone changes in management and direction, including significant protections for forest habitats beneficial to fisher. On private lands, the State has instituted Forest Practice Rules and ensured compliance with CEQA, both of which benefit fisher habitat values.
3. Trapping and poisoning of fisher and its prey has been made unlawful, thereby eliminating a significant historical mortality factor.
4. Comparative evidence between the historical and modern fisher populations indicates fisher are likely as numerous now, if not more numerous, than during the period 1910-1940. There is no indication of a fisher population decline in the southern Sierra, northern California, or statewide since the 1920s era.
5. There have been studies that included examination of predation, disease, and competition, however none have demonstrated that fisher populations are unduly at risk from these mortality factors. While these factors do affect fisher, there is not evidence that they limit populations.
6. Current fisher populations are not at risk of catastrophic population decline from wildfires. Modeling may demonstrate impacts to fisher populations from large and frequent fires; however current fuels management activities and other forest management prescriptions may reduce fuel loading and effects to fisher. Southern California forest managers in particular are actively selecting for conditions supporting fisher.
7. Management activities underway, such as the translocation effort in the northern Sierra Nevada, demonstrate that active management rather than listing provides adequate protections to fisher.

IV.
ADDITIONAL CONSIDERATIONS INFORMING THE COMMISSION'S FINAL DETERMINATION

The Commission's determination that designating Pacific fisher as an endangered or threatened species under CESA is not warranted is informed by various additional considerations. In general, the Fish and Game Code contemplates a roughly 12-month long CESA listing process before the Commission, including multiple opportunities for public and Department review and input, and peer review specifically whenever possible. (See generally Fish & G. Code, § 2070 et seq.; Cal. Code Regs., tit. 14, § 670.1.) The CESA listing process for Pacific fisher, in contrast, is approaching the 3-year mark. This length of time is not unusual compared to other recent CESA listing actions by

the Commission.[4] What the length of time does underscore in the present case, however, is the depth, breadth, and complexity of the scientific and legal issues that the Commission has considered in making its final determination regarding Pacific fisher. This section highlights some of those issues to more fully document the Commission's final determination in the present case.

From the initial receipt of the Center's petition in January 2008 through adoption of these findings in September 2010, the Commission received numerous comments and other significant public input regarding the status of Pacific fisher from a biological and scientific standpoint, and with respect to the petitioned action under CESA, including the listing process generally. For example, considerable controversy surrounded the Department's 2010 Status Review and its related peer review effort. Similarly, the Commission received many comments focusing on the current and historical status of Pacific fisher throughout all or a significant portion of its range. The Commission also received comments regarding the related status of Pacific fisher under the federal Endangered Species Act (ESA)(16 U.S.C. § 1531 et seq.). (See 69 Fed.Reg. 18770 (April 8, 2004).) Finally, the Commission received various comments and other important information regarding a number of scientific issues related to the status of Pacific fisher in California. The Commission, as highlighted below, was informed by and considered all of these issues, among others, in making its final determination that designating Pacific fisher as an endangered or threatened species under CESA is not warranted. (Fish & G. Code, § 2075.5(1); Cal. Code Regs., tit. 14, § 670.1, subd. (i)(2).)

A. The Peer Review Effort Informing the Commission's Final Determination

The Commission received a number of comments during the CESA listing process expressing concern regarding the Department's peer review effort pursuant to Title 14, section 670.1, subdivision (f)(2), of the California Code of Regulations. Various individuals and other interested members of the public expressed concern to the Commission that the Department, for example, failed to seek peer review as required by the controlling regulation or that the Department's related effort fell short of the overall mark under Title 14. Individuals and interested members of the public also highlighted changes between the Department's Peer Review Draft and final 2010 Status Review as

[4] For example, with respect to the California tiger salamander, the species most recently designated as endangered or threatened under CESA, the Commission received the petition on January 30, 2004, and adopted findings that listing is warranted on May 20, 2010. (See Cal. Reg. Notice Register 2004, No. 9-Z, p. 270; Cal. Reg. Notice Register 2010, No. 23-Z, p. 855). Likewise, the CESA listing process for the longfin smelt, and not the related subsequent action under the APA, occurred over the time period from August 14, 2007 to June 25, 2009. (Cal. Reg. Notice Register 2007, No. 36-Z, p. 1512; 2009, No. 24-Z, p. 924. Similarly, the delisting of the Brown pelican, and again not the related subsequent APA process, occurred over the time period from May 26, 2006 to February 5, 2009. (Cal. Reg. Notice Register 2006, No. 24-Z, p. 784; 2008, No. 3-Z, p. 111.)

submitted to the Commission, criticizing the Department for: (1) failure to recirculate the latter document for additional peer review, (2) changes reflected in the final Status Review following peer review of the earlier draft, and (3) the Department's allegedly according peer-reviewed scientific studies and other relevant information equal weight in the final Status Review. The Commission is aware of and has considered all of these comments in making its final determination regarding Pacific fisher.

In considering the comments discussed above, the Commission acknowledges that some level of criticism directed at the Department's peer review effort may be appropriate. The Commission disagrees, however, that the Department failed to comply with the peer review requirement prescribed by regulation. For purposes of that regulation, peer review is defined as the analysis of a scientific report by persons of the scientific/academic community commonly acknowledged to be experts on the subject under consideration, possessing the knowledge and expertise to critique the scientific validity of the report. The same regulation directs the Department to seek such independent and competent peer review whenever possible during the 12-month status review period prescribed by Fish and Game Code section 2074.6. Likewise, the regulation casts the requirement to seek peer review whenever possible against the backdrop of the Department's broader obligation to solicit data and comments, pursuant to section 2074.4, to inform development of the status review ultimately submitted to the Commission. (Cal. Code Regs., tit. 14, § 670.1, subd. (f)(2).)

In the present case, the administrative record of proceedings before the Commission establishes that the Department released the Peer Review Draft to a select group of independent, competent and respected members of the scientific community in February 2010. The administrative record also establishes that those individuals provided related input to the Department, input that is reflected in or otherwise informed the Department's final Status Review as submitted to the Commission in March 2010. The Department, in this respect, sought and obtained analysis of a scientific report during the status review period prescribed by Fish and Game Code section 2074.6, and it appears to the Commission that the related information submitted to the Department informed or was otherwise reflected in the Department's final Status Review submitted to the Commission. The Commission, in this respect, finds that the Department complied with the peer review requirements prescribed by Title 14, section 670.2, subdivision (f)(2). Having made this finding, the Commission also disagrees with the contention that the Department was required, as a matter of law, to seek peer review of the final 2010 Status Review as a result of changes to the earlier Peer Review Draft, or that the Department was required to seek peer review of the final 2010 Status Review either before or after submittal of that analysis to the Commission.

In making these findings, the Commission acknowledges the criticism aired by various members of the public and certain individual peer reviewers regarding

the process followed by the Department during development of the Status Review. Members of the public and certain peer reviewers also criticized the Department's Status Review from a substantive standpoint. Even the Commission, following submittal of the Status Review in March 2010, initially expressed concern about the process followed by the Department to conduct required peer review. Yet, while there is certainly room to improve the CESA listing process in its current form, including required peer review, the Commission disagrees that the process followed by the Department to seek peer review in the present case failed to comply with Title 14, section 670.2, subdivision (f)(2). The same is true of criticism leveled against the Department's substantive conclusions in the final Status Review; that is, the existence of substantive disagreement regarding points established by, or the reasonable inferences appropriately drawn from, relevant scientific information, does not itself establish that the Department failed to conduct required peer review.

Importantly, when the Department submitted the final Status Review to the Commission in March 2010, the Commission made the analysis available to the public as required by law. (Cal. Code Regs., tit. 14, § 670.1, subd. (g)(2).) Thereafter, in response to related controversy and at the Commission's urging, the Department subjected the final Status Review to additional public and scientific review for a near month-long period during May 2010, also releasing the earlier Peer Review Draft to the public on May 25, 2010. The Department, in turn, prepared and submitted to the Commission a memorandum dated June 9, 2010, describing and analyzing the scientific information received by the Department in response to the request for additional scientific review. Taken together, in the Commission's opinion, these combined efforts provided the Commission with the robust public discourse and the type of information intended by the peer review provision in Title 14, along with, more importantly, the broader statutory charge that Commission listing determinations under CESA are based on the best scientific information available. (See, e.g., Fish & G. Code, § 2074.6.)

Finally, as part of the controversy surrounding the Department's peer review effort, the Commission received a number of comments critical of how much relative weight or not that the Department gave to certain information discussed in or relevant to the Status Review. The Commission also received various comments contending that certain Department scientists may have disagreed with or expressed criticism of the Department's final recommendation to the Commission regarding the petitioned action. The Commission finds that, in many instances, these comments and the related criticism reflect differences in opinion not necessarily related to the body of scientific evidence and other information regarding the status of Pacific fisher in California, or what can be reasonably inferred from that evidence and information from a biological standpoint. Instead, the comments and criticism reflect differences in opinion regarding whether that body of evidence and information provides sufficient information to indicate that the petitioned action is or is not warranted.

B. The Status of Pacific Fisher Throughout All or a Portion of Its Range and the Existing Northern and Southern Populations

The Commission received a number of comments during the CESA listing process calling for more robust, individualized analysis of the two distinct population of Pacific fisher in northern and southern California. A number of comments asserted that, despite the related information already before the Commission, without this additional population-specific analysis by the Department the Commission could not assess whether Pacific fisher is in serious danger of becoming extinct or, absent listing under CESA, threatened with extinction throughout all or a significant portion of its range. (See generally Fish & G. Code, §§ 2062, 2067.) Finally, some comments indicated that, because there is no evidence of a persistent population of Pacific fisher in the northern and central Sierra Nevada, a recognized portion of the species' historical range, designating Pacific fisher as an endangered or threatened species under CESA is warranted per se.

The Commission disagrees that the lack of evidence of a persistent population of Pacific fisher in the northern and central Sierra Nevada for nearly the last century compels a listing "is warranted" determination by the Commission for Pacific fisher. Information before the Commission indicates Pacific fisher in this portion of the species' historical range declined significantly as the result of trapping and related practices in the late 19th and early 20th centuries. Other information before the Commission indicates that, while there are a number of documented observations of Pacific fisher in this portion of the species' historical range over the last number of decades, there is no evidence of a persistent population within the northern and central Sierra Nevada for the last 80 years at a minimum. This information is an indication that the current status of Pacific fisher in the northern and central Sierra Nevada has likely improved relative to the species' status following the decline in the late 19th and early 20th centuries. Evidence before the Commission also indicates that recent species translocation efforts by the Department in collaboration with the academic and regulated communities, among other things, is also improving the status of Pacific fisher overall, with respect to the southern population, and Pacific fisher in the southern Sierra Nevada. In short, the Commission recognizes there is no current evidence of a persistent population of Pacific fisher in the northern and central Sierra Nevada a portion of the species' historical range in California. Yet, the evidence before the Commission indicates that the status of the two California populations of Pacific fisher within the species' historical range has been and is stable, and likely improving as of late.

Against this backdrop, the Commission recognizes that Pacific fisher declined significantly in the northern and central Sierra Nevada as a result of trapping and related activity in the late 19th and early 20th centuries. Likewise, the Commission recognizes that, while there have been a number of documented

observations of the species over the last number of decades, there is no evidence of a current persistent population in this portion of the species' historical range. The Commission disagrees, however, that the lack of evidence of a persistent population of Pacific fisher in the northern and central Sierra Nevada constitutes sufficient scientific information in and of itself to indicate that the petitioned action is warranted for Pacific fisher as a whole, or for the northern and southern populations respectively. The Commission has reached this determination informed by the Department's Status Review and related public comments, and other scientific information, recognizing and understanding the scientific information regarding the lack of a persistent population in the northern and central Sierra Nevada contributes to the species' vulnerability overall, as well as the northern and southern populations, respectively. In the Commission's opinion, however, there is not sufficient scientific information to indicate that the continued existence of Pacific fisher is, or the northern and southern populations are, respectively, in serious danger or threatened by the lack of a persistent population in the northern and central Sierra Nevada, alone or in combination with other threats.

The Commission's final determination is also based on relevant statutory language. Section 2062 of the Fish and Game Code defines an endangered species, in pertinent part, as a species "in serious danger of becoming extinct through all, or a significant portion, of its range[.]" Section 2067, in turn, defines threatened species as a species "that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future[.]" In the Commission's opinion, the quoted language, when given its ordinary meaning and construed in context, denotes a present-tense condition of being at risk of a future, undesired event. To say a species "is in danger" in an area where it no longer exists (i.e., in a portion of its historical range) is not consistent with the common ordinary meaning of phrase at issue. In addition to "range" meaning California for purposes of CESA (*California Forestry Association*, *supra*, 156 Cal.App.4th at pp. 1549-1551), for purposes of the issue at hand, it strikes the Commission that range must mean current occupied range and not historical range. This interpretation is further supported in the Commission's opinion by the fact that, assessing whether a species is endangered involves consideration of "present or threatened" (i.e., future), rather than past "modification or destruction of its habitat." (Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(A).) Taken together, the Commission does not agree that the lack of evidence of a persistent population of Pacific fisher in the northern and central Sierra is a basis per se to conclude that the petition action is warranted.

C. The Status of Pacific Fisher under the Federal Endangered Species Act

On April 8, 2004, the U.S. Fish & Wildlife Service (Service) added the West Coast distinct population segment (DPS) of Pacific fisher, which includes fisher in Washington, Oregon, and California, to the list of candidate species under the federal ESA. (69 Fed.Reg. 18770.) The Service designated Pacific fisher within

the West Coast DPS as candidate species after considering all available scientific and commercial information available at the time, and determining that designating fisher in the West Coast DPS as an endangered or threatened species under the federal ESA was warranted, but precluded by higher priority listing actions. (See generally 16 U.S.C. § 1533, subd. (b)(3)(B)(iii).) In so doing, the Service concluded that the overall magnitude of threats to the West Coast DPS is high, but that the immediacy of those threats was non-imminent. (69 Fed.Reg. at p. 18792.) At the same time the Service also assigned the West Coast DPS a Listing Priority Number of 6, an assignment the Service affirmed most recently in the Federal Register on November 9, 2009. (74 Fed.Reg. 57804.)

The Commission received a number of comments during the CESA listing process for Pacific fisher tied to the species' status under the federal ESA. Principal among those comments is the contention that Pacific fisher's status under the federal ESA necessarily requires a similar finding by the Commission under CESA. Others questioned whether the Commission has the legal authority to reach a conclusion under CESA with respect to Pacific fisher in California different from the Service's finding under federal law relative to the West Coast DPS. Finally, one commenter correctly pointed out a Department misstatement early in the CESA listing process that failed to acknowledge the federal candidate status of the West Coast DPS is premised on a Service finding that listing is warranted, but precluded under the federal ESA.

In making its final determination under CESA the Commission carefully considered the Service's findings and analysis under the federal ESA related to the West Coast DPS. The Commission also carefully considered related public comment and other information and evidence in its own administrative record of proceedings. With respect to the petitioned action under CESA, the Commission is charged by law to review and exercise its independent judgment in determining whether to designate Pacific fisher in California as an endangered or threatened species. The Commission, in this respect, must reach its own conclusion regarding the status of Pacific fisher in California independent of, but informed by, among other things, the Service's related findings under the federal ESA. The Commission is not obligated to adopt or otherwise compelled to find that the petitioned action is warranted under CESA as a result of the species' status under the federal ESA. Instead, the Commission must carefully review and consider the scientific and other information as included in the administrative record of proceedings, which it has, and reach its own conclusion as to whether there is sufficient scientific information to indicate that the petitioned action is warranted.

D. Various Scientific Issues Related to the Petitioned Action and Status of Pacific fisher in California

Throughout the petition evaluation and status review process, the Commission received a broad spectrum of scientific information, as well as additional information beyond that, for which there exists vigorous, appropriate, robust discourse that is critical to informing the determination required by the regulatory framework that lies with the Commission. The discussion surrounding this information, which occurred via public comments aired orally at Commission meetings and via comment letters, is an encouraged part of the evaluation process which helped to inform and influence the Commission's ultimate determination.

One topic about which the Commission received a great deal of discussion was whether managed timberland provides habitat elements supporting all essential Pacific fisher life requirements, such as denning, resting, and rearing young. Some comments asserted that individuals of the species are thriving on managed timberland, proving the sufficiency of this habitat. Comments on the opposite end of the spectrum assert that managed timberland does not resemble that described by scientists as being favorable for fisher, and may be of poor quality for fisher. The totality of the information received by the Commission does not support a finding that the available habitat for Pacific fisher is insufficient to support the species' life requirements.

Another topic about which the Commission received competing information was whether the southern Sierra fisher population's isolation makes it more vulnerable to threats such as fire, disease, predation, and stochastic events. Some comments assert that threats such as logging, roads, disease, predation, small population size, and development can impact the fisher population cumulatively, and therefore represent a significant threat to the population's continued existence. Opposing comments assert that the southern population has endured for many decades despite these extant threats, so its isolation alone is not an indicator of serious danger or immediate threat to the continued existence of the population. As discussed above, the Pacific fisher populations in California have been isolated for decades, if not a century, during which time neither stochastic events nor the enumerated threats have resulted in the extinction of either population. The Commission cannot conclude based on the information before it that the relative isolation of the two distinct California fisher populations poses an imminent threat to the species' or either populations' continued existence, including in combination with other threats, such that listing is warranted.

A third magnet for robust debate was the question of whether the geographic gap between the two California fisher populations reflects a contraction in population size and constitutes an indicator of population instability. Some comments assert that the two populations are thriving and that the gap does not impact the survival of the species. Opposing comments assert that the geographic separation has caused both genetic differences between the populations, as well as a corresponding increase in genetic similarity among individuals within each

population, representing yet another threat to the continued existence of fisher in the California. As discussed above, substantial evidence in the administrative record of proceedings before the Commission indicates that the gap in geographic range has existed for decades, if not a century, so the passage of time itself has answered the question as to whether the geographic gap poses a serious danger or threat of extinction in the foreseeable future to fisher populations in California. In light of the evidence before it, the Commission cannot conclude that the geographic gap between the two California fisher populations constitutes evidence that the Pacific fisher is at serious danger of extinction or threatened with extinction in the foreseeable future such that listing is warranted.

A final topic that received much attention was whether the Department's ongoing reintroduction effort will benefit fisher long term, since the release sites are located on managed timberlands. Some comments point to the reintroduction effort as evidence that the Department considers fisher to be in need of the protection afforded by listing. Some of these same commenters also note the uncertainty of whether the translocation effort will be a success to assert that the effort does not remove the imminent threat to the survival of the species that the petition suggests. Opposing comments assert that the availability of suitable habitat as yet unpopulated by the species makes reintroduction a valuable tool for expanding its available range and allowing the species to grow. The totality of the information received by the Commission does not support a finding that the available habitat for Pacific fisher is insufficient to support the species' life requirements, and the Department's relocation efforts further reinforce the Commission's determination that listing is not warranted.

Finally, the issues highlighted in this section represent only a portion of the complex issues aired and considered by the Commission during the CESA listing process for Pacific fisher. The issues addressed here in these findings represent some, but not all of the information, issues, and considerations affecting the Commission's final determination. Other issues aired before and considered by the Commission are addressed in detail in the Commission's administrative record of proceedings.

V.
FINAL DETERMINATION BY THE COMMISSION

The Commission has weighed and evaluated all information and inferences for and against designating Pacific fisher as an endangered or threatened species under CESA. This information includes scientific and other general evidence in the Center's 2008 petition, the Department's 2008 Candidacy Evaluation Report and 2010 Status Review, and the Department's related recommendations based on the best available science, written and oral comments received from members of the public, the regulated community, various public agencies, and the scientific community; and other evidence included in the Commission's administrative

record of proceedings. Based upon substantial evidence in the administrative record the Commission has determined that the best scientific information available indicates that the continued existence of Pacific fisher is not in serious danger or threatened by present or threatened modifications or destruction of the species' habitat, overexploitation, predation, competition, disease, or other natural occurrences or human-related activities. (See generally Cal. Code Regs., tit. 14, § 670.1, subd. (i)(1)(A); Fish & G. Code, §§ 2062, 2067.) The Commission finds for the same reason that there is not sufficient scientific information at this time to indicate that the petitioned action is warranted. (See *Id.*, § 2070.) The Commission finds, as a result, that designating Pacific fisher, or the northern or southern populations, respectively, as an endangered or threatened species under CESA is not warranted and that, with adoption of these findings, Pacific fisher for purposes of its legal status under CESA shall revert to its status prior to the filing of the Center's petition. *(Id.*, § 2075.5(2); Cal. Code Regs., tit. 14, § 670.1, subd. (i)(2).)