

**TITLE 14. Fish and Game Commission
Notice of Proposed Changes in Regulations**

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by Sections 2070 and 2075.5 of the Fish and Game Code and to implement, interpret or make specific sections 1755, 2055, 2062, 2067, 2070, 2074.6, 2075.5, 2077, 2080, 2081 and 2835, of said Code, proposes to amend Section 670.5, Title 14, California Code of Regulations, relating to Animals of California Declared to Be Endangered or Threatened.

Informative Digest/Policy Statement Overview

The Department of Fish and Game recommends that the Commission amend subsection (b)(3) of Section 670.5 of Title 14, CCR, to add the California tiger salamander (*Ambystoma californiense*) to the list of threatened animals.

In making the recommendation to list the California tiger salamander pursuant to CESA, the Department identified the following primary threats: 1) continued and long-term habitat loss/conversion and fragmentation (the California tiger salamander requires both aquatic and upland habitats; anything that impedes movements such as roads or other barriers restricts the salamander from moving between the two habitats); 2) hybridization with introduced non-native tiger salamanders over the past 60 years, resulting in decreased population and distribution of genetically "pure" native tiger salamanders; 3) increased predation by, and competition with, other non-native species - particularly fishes and amphibians. More detail about the current status of the California tiger salamander can be found in the "Report to the California Fish and Game Commission, "A Status Review of the California tiger salamander (*Ambystoma californiense*)" (Department of Fish and Game, January 11, 2010; <http://www.dfg.ca.gov/wildlife/nongame/publications/>)

NOTICE IS ALSO GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held at the Stockton Rod and Gun Club, 3120 Monte Diablo Avenue, Stockton, California, on Wednesday, May 5, 2010 at 8:30 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before April 30, 2010 at the address given below, or by fax at (916) 653-5040, or by e-mail to FGC@fgc.ca.gov. Written comments mailed, faxed or e-mailed to the Commission office, must be received before 5:00 p.m. on May 3, 2010. All comments must be received no later than May 5, 2010 at the hearing in Stockton, CA. If you would like copies of any modifications to this proposal, please include your name and mailing address.

The regulations as proposed in strikeout-underline format, as well as an initial statement of reasons, including environmental considerations and all information upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, John Carlson, Jr., Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct requests for the above mentioned documents and inquiries concerning the regulatory process to John Carlson, Jr., or Sheri Tiemann at the preceding address or phone number. **Dr. Eric Loft, Wildlife Branch, Department of Fish and Game, phone (916) 445-3555, has been designated to respond to questions on the substance of the proposed regulations.**

Copies of the Initial Statement of Reasons, including the regulatory language, may be obtained from the address above. Notice of the proposed action shall be posted on the Fish and Game Commission website at <http://www.fgc.ca.gov>.

Availability of Modified Text

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to the date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from the agency program staff.

Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

- (a) Significant Statewide Adverse Economic Impact Directly Affecting Business, Including the Ability of California Businesses to Compete with Businesses in Other States:

Although (CESA) statutes do not specifically prohibit the consideration of economic impact in determining if listing is warranted, the Attorney General's Office has consistently advised the Commission that it should not consider economic impact in making a finding on listing. This is founded in the concept that CESA was drafted in the image of the federal Endangered Species Act. The federal act specifically prohibits consideration of economic impact during the listing or delisting process.

CESA is basically a two-stage process. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. By statute, once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process to make a corresponding regulatory change. To accomplish this second stage, the Commission follows the statutes of the Administrative Procedure Act (APA).

The provisions of the APA, specifically section 11346.3 and 11346.5 of the Government Code, require an analysis of the economic impact of the proposed regulatory action. While Section 11346.3 requires an analysis of economic impact of businesses and private persons, it also contains a subdivision (a) which provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws. In this regard, the provisions of CESA leading to a finding are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for economic impact analysis. While the Commission does not believe this is the case, an abbreviated analysis of the likely economic impact of the proposed regulation change on business and private individuals is provided. The intent of this analysis is to provide disclosure, the basic premise of the APA process. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

Designation of the California tiger salamander as threatened will subject it to the provisions of CESA. This act prohibits take and possession except as may be permitted by the Department.

Threatened status is not expected to result in any significant adverse economic effect on small business or significant cost to private persons or entities undertaking activities subject to the California Environmental Quality Act (CEQA). The CEQA requires local governments and private applicants undertaking projects subject to the CEQA to consider *de facto* endangered species to be subject to the same requirements under the CEQA as though they were already listed by the Commission in Section 670.2 (CEQA Guidelines, Section 15380). California tiger salamander has qualified for protection under the CEQA Guidelines Section 15380 since its designation by the Department in 1994 as a species of special concern and the US Fish and Wildlife Service in 2004 as threatened throughout its range.

Required mitigation as a result of lead agency actions under the CEQA, whether or not the species is listed by the Commission, may increase the cost of a project. Such costs may include, but are not limited to, purchasing off-site habitat, development and implementation of management plans, establishing new populations, installation of protective devices such as fencing, protection of additional habitat, and long-term monitoring of mitigation sites. Lead agencies may also require additional actions should the mitigation measures fail, resulting in added expenditures by the proponent. If the mitigation measures required by the CEQA lead agency do not minimize and fully mitigate to the standards of CESA, listing could increase business costs by requiring measures beyond those required by the CEQA.

- (b) Impact on the Creation or Elimination of Jobs within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California:

No significant impact.

(c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Designation of threatened or endangered status, per se, would not necessarily result in any significant cost to private persons or entities undertaking activities subject to CEQA. CEQA presently requires private applicants undertaking projects subject to CEQA to consider *de facto* endangered (or threatened) and rare species to be subject to the same protections under CEQA as though they are already listed by the Commission in Section 670.2 or 670.5 of Title 14, CCR (CEQA Guidelines Section 15380).

Any added costs should be more than offset by savings that would be realized through the information consultation process available to private applicants under CESA. The process would allow conflicts to be resolved at an early stage in project planning and development, thereby avoiding conflicts later in the CEQA review process, which would be more costly and difficult to resolve.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None.
- (e) Nondiscretionary Costs/Savings to Local Agencies: None.
- (f) Programs Mandated on Local Agencies or School Districts: None.
- (g) Costs Imposed on any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4: None.
- (h) Effect on Housing Costs: None.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business. The Commission has drafted the regulations in Plain English pursuant to Government Code sections 11342.580 and 11346.2(a)(1).

Consideration of Alternatives

The Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention of the Commission, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

FISH AND GAME COMMISSION

Dated: March 9, 2010

John Carlson, Jr.
Executive Director