



Submitted via Facsimile and U.S. Mail

February 7, 2008

Mr. Richard B. Rogers, President  
Cindy Gustafson, Vice President  
Mr. Jim Kellogg, Member  
Mr. Michael Sutton, Member  
Mr. John Carlson, Jr., Executive Director  
California Fish and Game Commission  
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Dear President Rogers, Vice President Gustafson, Commissioners Kellogg and Sutton, and Mr. Carlson and Mr. McCamman,

I am writing on behalf of the Center for Biological Diversity (“Center”) regarding Agenda Item number 23, RECEIPT OF DEPARTMENT REPORT ON THE PETITION TO LIST THE AMERICAN PIKA (*Ochotona princeps*) AS A THREATENED SPECIES, scheduled for the February 8, 2008 Fish and Game Commission hearing. The Center is a non-profit conservation organization with over 40,000 members that works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center submitted the Petition to list the American pika under the California Endangered Species Act on August 21, 2007.

I am writing to express our grave concerns regarding the processing of this Petition and serious misstatements of the Commission’s and Department’s legal authority in the Department Report.<sup>1</sup> We also disagree strenuously with the characterization of the Petition and the scientific literature in the Department Report and will be submitting additional comments to you in advance of the Commission’s Candidacy determination, per Fish & G. Code § 2074.

First, the new procedure that the Commission apparently proposes to implement in which an

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<sup>1</sup> Gustafson, J.R., and R.J. Logsdon. 2007 (Dec. 21). Evaluation of petition from Ctr. for Biological Diversity to list American pika (*Ochotona princeps*) as threatened. Calif. Dep. Of Fish and Game, Wildl. Branch, Sacramento CA. Nongame Wildlife Program Report 2007-03, 19 pp. (hereinafter “Department Report” or “Report.”)

extra hearing has been inserted for the Commission to “receive” the Department Report is contrary to both the letter and intent of CESA. The statute clearly sets forth the steps in the listing process, which may be set in motion in two ways: “any person” may petition the Commission to list a species, or the Department may on its own initiative put forward a species for consideration. In the case of a citizen proposal, as here, CESA sets forth the steps and deadlines in the listing process.

Upon receipt of a petition to list a species, a 90-day (or 120 day period if a 30-day extension is granted) review period ensues during which the Commission refers the petition to the Department, as the relevant expert agency, to prepare a detailed report. The Department’s report must determine whether the petition, along with other relevant information possessed or received by the Department, contains sufficient information indicating that listing may be warranted. Fish & G. Code § 2073.5. During this period, interested persons are notified of the petition and public comments are accepted by the Commission. Fish & G. Code § 2073.3. After receipt of the Department’s report, the Commission “shall schedule the petition for consideration at its next available meeting, but not sooner than 30 days after receipt of the petition and public release of the evaluation report, and distribute its pending agenda to interested persons pursuant to Fish & G. Code § 2078. The commission also shall make the petition, evaluation report, and other materials received available for review.” Fish & G. Code § 2074 (emphasis added).

At its next meeting that occurs at least 30 days after the public release of the evaluation report, the Commission is charged with its first substantive decision: determining whether the Petition, together with the Department’s written report, and comments and testimony received, present sufficient information to indicate that listing of the species “may be warranted.” Fish & G. Code § 2074.2. This determination is known as the Candidacy finding. These deadlines ensure that petitions to protect imperiled species are processed in a timely manner. The process is mandatory, not discretionary.

In early January, growing concerned that we had heard nothing regarding our American pika Petition submitted on August 21, 2007, I telephoned the Department of Fish and Game to inquire about the status of the Department’s report. After several days, on January 8<sup>th</sup>, I received a call back from Mr. Gustafson of the Department. Mr. Gustafson informed me that the Department had requested, and received, a 30-day extension of time to complete the Report, and that the Report had in fact been completed and transmitted to the Commission on December 21, 2007. Mr. Gustafson declined to send me a copy of the Report, or to tell me the Report’s conclusion, but instead referred me to the Commission for a copy.

Emily Brown from our office then called the Commission’s office on January 9, 2008, to request a copy of the Report. Ms. Brown spoke with Executive Director John Carlson, Jr. and was told that the Commission would not release the Report until the Commissioners “actually receive and review it” and that Commission is not obligated to release the Report until after the public hearing on the matter. Mr. Carlson advised Ms. Brown to obtain the Report from the Department.

Startled by this unprecedented response, I then called the Commission’s office along with Ms. Brown to discuss the matter. We spoke with Deputy Executive Director Jon Fischer, who explained to us that Commissioners were tired of receiving feedback from the public on Department reports prior to having reviewed the reports themselves, and therefore the Commission was instituting a new procedure whereby a hearing would be scheduled for the Commission to “receive” a Department report on a CESA listing petition, and the report would not be released to the public until that time. Following that

hearing, a second hearing would be scheduled for the Commission to make its Candidacy determination on the CESA petition.

As I explained to Mr. Fischer on January 9<sup>th</sup>, and will detail further below, the Center most strenuously objects to this proposed new procedure, which is a complete departure from the way the Commission has previously handled CESA petitions and which violates both the letter and intent of the law. Mr. Fischer promised to look into the matter and get back to us as soon as possible. On January 16, 2008, Mr. Fischer again spoke with Ms. Brown and informed her that the Commission intends to make the new procedure their standard practice. He informed Ms. Brown that they had decided to make the Department Report available to us on or around January 29, 2008, the day that the Report would be mailed to the Commissioners. He promised to detail the decision in a letter that would be sent shortly. We received a letter from Mr. Fischer on January 17, 2008 and received a copy of the report on January 30, 2008.

The Commission's proposed new procedure violates the law in a number of regards. First, it adds an additional step into the process not provided for in the statute, which is quite explicit about the steps to be followed, and it delays protection for a species by a minimum of 30 days. Second, it violates the requirement of Fish & G. Code § 2074, which mandates that the "commission also shall make the petition, evaluation report, and other materials received available for review."

The proposed new procedure is also nonsensical. Just as the Commission received the petition on August 22, 2007, the day that it was received at the Commission's offices, so too did the Commission receive the Department Report on December 21, 2007. At that point, the Commission was legally obligated to make the Report publicly available, and then schedule the Candidacy decision at the next available Commission hearing once the 30-day public review period had run. Thus, the Center should have received a copy of the Report shortly after December 21, 2007, as we have with past CESA petitions, and the Candidacy finding should have been scheduled for the February 7-8, 2008 meeting. Instead, we did not even learn of the Report's existence until January 9, 2008, and then only because we began to investigate the matter.

If the Commission is perturbed that members of the public are raising concerns relating to Department reports on CESA petitions prior to the time that the Commissioners themselves review the reports, there is a very simple solution to this perceived problem: Commission staff should simply be directed to transmit the reports to the Commissioners as soon as they are received, rather than waiting until shortly before the next scheduled meeting. This concern simply cannot justify the insertion of an additional step into the listing process which is not provided for in the very specific instructions provided by the California Legislature in CESA, particularly when that additional step reduces protection to imperiled species by increasing the length of time to respond to a CESA petition.

Moreover, regardless of the intentions of its instigator(s), the proposed new procedure will inevitably create the perception that the Commission is attempting to restrict access to public documents and influence the Department behind closed doors on often politically sensitive CESA issues. The Commission is a venerable institution with a critically important mission that includes protecting California's plants, animals, and natural habitats. The Commission's reputation has already been damaged by court decisions, including Judge Connelly's opinion in Center for Biological Diversity v. California Fish and Game Commission, Civ. No. 05CS00233, in which the Court wrote:

In sum, there is no substantial evidence in the administrative record to support the Commission's findings of no substantial possibility that [California tiger salamander] listing under CESA could occur. In making the findings, the Commission misstated or ignored substantial evidence in the administrative record and relied on conflicting information of doubtful scientific value....(December 14, 2006 Order at 14.)

The Commission should not continue to attempt to implement this ill-conceived new procedure or take other actions which contribute to the perception that the Commission is allowing political considerations to distort decisions which are required by law to be based solely on science.

The second concern I would like to share with you is a grave misstatement of the Commission's and Department's legal authority contained in the Department Report on the American pika. The Department Report states, on page 14:

The Petition makes the following general recommendations as needed for managing the pika in California: "mitigating greenhouse gas pollution, facilitating adaptation to climate change, and monitoring pika populations and their habitat." We believe that the former two recommendations are not in the purview of the Commission or Department to effect.... (emphasis added).

This is clearly incorrect and deeply troubling. While the CESA, like the federal Endangered Species Act, was passed well before global warming had been identified as the leading threat to the planet's biological diversity, it was intentionally drafted broadly to include all factors which threaten species. The Commission and Department are both bound by CESA to protect species from global warming, just as they would protect species from any other threat such as invasive species or development pressure. *See, e.g.* Fish & G. Code §§ 2051, 2052, 2055; *see also* § 2061 (defining "conserve," "conserving," and "conservation" very broadly as methods and procedures which are necessary to protect and recover threatened and endangered species which "include but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition, restoration and maintenance, propagation, live trapping, and transplantation...." (emphasis added); *see also* §2062 (defining "endangered species" as one imperiled by "one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease...." (emphasis added).

Moreover, both the California Legislature and the Governor have now made it crystal clear that all state agencies must respond to climate change and take action to reduce their emissions. The California Global Warming Solutions Act (AB 32, 2006) notes that

Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other human health-related problems.

California Health and Safety Code § 38501.

The Global Warming Solutions Act then unambiguously directs that “[a]ll state agencies shall consider and implement strategies to reduce their greenhouse gas emissions.” California Health and Safety Code § 38592(a).

Similarly, Executive Order S-3-05, noting that California is “particularly vulnerable to the impacts of climate change,” and that global warming both threatens both “to greatly reduce the Sierra snowpack,” and California’s “natural habitats,” set targets for greenhouse gas reductions within the state and also directs the California Environmental Protection Agency to coordinate efforts to meet those goals by the California Resources Agency (within which both the Commission and Department reside) and other agencies.

The Center is extremely concerned that this misunderstanding of the law may have infected all of the findings and analysis contained within the Department Report, which mischaracterizes both the Petition and the scientific literature. The Center will submit further comments to you regarding the many substantive errors in the Department Report prior to the Candidacy hearing.

In conclusion, the Center formally requests that the Commission immediately make the Department Report publicly available, schedule the Candidacy finding for the American pika for the March 6-7, 2008 Commission hearing in Stockton, and confirm that the proposed new procedure will be abandoned and that the Commission will comply with the procedures set for in CESA in the future.

Thank you so much for your attention to this important matter. Please do not hesitate to contact me at (760) 366-2232 ext. 302 should you have any questions or wish to discuss this further.

Yours Sincerely,



Kassie Siegel  
Climate, Air, and Energy Program Director  
Center for Biological Diversity