

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

Amend Section 670.5
Title 14, California Code of Regulations
Re: Animals of California Declared to be Endangered or Threatened

- I. Date of Initial Statement of Reasons: October 1, 2015
- II. Date of Final Statement of Reasons: September 15, 2016
- III. Dates and Locations of Scheduled Hearings:
 - (a) Notice Hearing: Date: June 4, 2014
Location: Fortuna, CA
 - (b) Discussion/Adoption Hearing Date: December 10, 2015
Location: San Diego

IV. Update:

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action.

At its December 10, 2015 meeting in San Diego, the Commission adopted the regulations as originally proposed.

V. Summary of Primary Considerations Raised in Support of or Opposition to the Proposed Actions and Reasons for Rejecting Those Considerations:

- (1) Comment by Michael Payne, Shasta County Sportsmen's Association: email received on October 23, 2015: Concerned that adding gray wolf to the endangered species list will cause a decline in deer and elk herds and other species such as rabbits and ground nesting birds.

Response:

No change was made to the proposed regulation in response to this comment. The Commission may consider a number of factors when weighing the decision whether to designate a species as endangered or threatened pursuant to the

California Endangered Species Act (CESA.) These factors include considering whether the species proposed for listing is in danger of becoming extinct immediately or in the foreseeable future as a result of present or threatened modification or destruction of its habitat, overexploitation, predation, competition, disease or other natural occurrences or human-related activities. (Fish and G. Code, §§ 2062, 2067, Cal. Code Regs., tit. 14, § 670.1(i)(1)(A).) However, all of the factors the Commission may consider focus on whether the species that is proposed for listing is in serious danger or threatened. The Fish and Game Code does not authorize the Commission to consider whether listing the species will detrimentally impact other wildlife and natural resources. As a result, the Commission is obligated to amend its regulations and add a species to the threatened or endangered list if the requisite threats exist to the species proposed for listing, despite the impact on other species.

In addition to CESA mandated considerations, currently gray wolves in California are listed as endangered pursuant to the federal Endangered Species Act of 1973 (16 U.S.C. § 1531 *et seq.*) (ESA). If the Commission had opted not to list gray wolf under State law, species such as deer, elk, rabbit and ground nesting birds would experience the same impacts because wolves in California are already protected under federal law. The Commission's decision to list gray wolf under State law reinforces the existing federal protections in place now and would preserve those protections in the event of future federal delisting.

Until wolves become established in California, and are then studied, the relationships among predators, ungulate prey, their numbers, and their effects on habitats, will be simulated and modeled based on seemingly similar environments elsewhere. However, in its Status Review the California Department of Fish and Wildlife (CDFW) noted that it is too speculative to conclude that ecosystem processes, stressors, and system dynamics will operate the same in California given that so few variables are used in the model systems. (CDFW Status Review, p. 19.)

- (2) Comment by Holly Gallagher, Colusa County Fish & Game Advisory Commission, letter received on November 4, 2015: Wolves are a threat to our state and the people served. The Colusa County Commission would like to address: 1) liability issues with wolf-livestock interaction and 2) the state should be responsible to compensate ranchers for the direct loss from wolf attacks.

Response:

No change was made to the proposed regulation in response to this comment.

See Response to Comment No. 1 for explanation of the statutorily required criteria for adding a species to the list contained in Title 14, section 670.5.

- (3) Comment by Kirk Wilbur, California Cattlemen's Association, Noelle Cremers, California Farm Bureau Federation, Erica Sanko, California Wool Growers Association, email received November 24, 2015: Opposes the Commission's proposed action to list the gray wolf as an endangered species. Reasons given include:

- a. The gray wolf is not "in serious danger of becoming extinct throughout its range" as required by CESA.

Response:

No change was made to the proposed regulation in response to this comment.

The Commission voted to amend its regulations to add the gray wolf to the list of endangered species based on its determination that the gray wolf in California is an endangered species, "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, overexploitation, predation, competition, or disease." (Fish & G. Code, § 2062.) The Commission's conclusion was based on a number of findings including, but not limited to the existence of substantial evidence to support:

- the conclusion that gray wolves occurred in California historically until approximately 1920 when the species was extirpated from the State (Commission findings, p. 5;)
- the conclusion that beginning in 2011 one radio-collared wolf had established a range that included portions of Northern California and Southern Oregon, crossing back and forth over a period of several years (Commission findings, p. 6;)
- the conclusion that other wolves likely exist undetected in the State (Commission findings, pp. 6-7;)
- the conclusions that dispersing wolves and small wolf populations are inherently at risk due to a number of threats including, but not limited to, human caused mortality, demographic and environmental stochasticity and disease (Commission findings, pp. 7-9;)

- b. The Commission's interpretation of "range" as meaning "California range" is an underground regulation in violation of the California APA

Response:

No change was made to the proposed regulation in response to this comment.

The Commission's interpretation of "range" in CESA is consistent with statute and established caselaw.

- c. Gray wolves are not provably "native" to the state of California as required by CESA.

Response:

No change was made to the proposed regulation in response to this comment.

The Commission listed the gray wolf species, consistent with the allowances in CESA. See Response to Comment No. 3(a.)

- d. The legislative intent behind CESA was to protect species in decline, precisely the opposite scenario presented by gray wolves in California.

Response:

No change was made to the proposed regulation in response to this comment.

See Response to Comment No. 1 for explanation of the statutorily required criteria for adding a species to the list contained in Title 14, section 670.5.

- e. Rejecting the proposed amendment allows the Department to better manage the species and reduce harms associated with listing that are outlined in the ISOR.

Response:

No change was made to the proposed regulation in response to this comment.

See Response to Comment No. 1 for explanation of the statutorily required criteria for adding a species to the list contained in Title 14, section 670.5.

- (4) Staci Heaton, Regulatory Affairs Advocate, Rural County Representatives of California (RCRC), letter dated December 4, 2015: Questions whether the gray

wolf meets the requirements for listing under CESA, particularly as the U.S. Fish and Wildlife Service is considering delisting populations of the species and other states, such as Oregon are electing to delist the gray wolf under their own state laws. RCRC is also concerned that listing the gray wolf under CESA will undo much of the good work that has been done by the California Department of Fish and Wildlife in concert with various stakeholders on the Wolf Management Plan (Plan). An unwarranted listing under CESA will unnecessarily hinder the industry's ability to protect their livestock and potentially harm some of the State's most economically challenged rural communities.

Response:

See Response to Comment No. 1 and Responses to Comment Nos. 3a, b, c, and d.

- (5) Kirk Wilbur, California Cattlemen's Association, oral testimony at December 10, 2015 Commission meeting: Opposed to listing the gray wolf as an endangered species under CESA.

Response:

See Response to Comment No. 1 and Responses to Comment Nos. 3a, b, c, and d.

- (6) Noelle Cremers, California Farm Bureau Association, oral testimony at December 10, 2015 Commission meeting: Opposed to listing the gray wolf as an endangered species under CESA

Response:

See Response to Comment No. 1 and Responses to Comment Nos. 3a, b, c and d.

- (7) Brendan Cummins, Center for Biological Diversity, oral testimony at the December 10, 2015 Commission meeting: Supports listing the gray wolf as an endangered species under CESA

Response:

Comment noted

- (8) Jennifer Fearing, Humane Society and Defender of Wildlife, oral testimony at the December 10, 2015 Commission meeting: Supports listing the gray wolf as an

endangered species under CESA

Response:

Comment noted

- (9) Kimberly Richard, Democrats of Napa Valley, oral testimony at the December 10, 2015 Commission meeting: Supports listing the gray wolf as an endangered species under CESA

Response:

Comment noted

- (10) Richard Egan, County of Lassen, Administrative Services, letter received December 22, 2015, supporting the Rural County Representatives of California in its correspondence to the Fish and Game Commission dated December 4, 2015.

Response

Comment noted

VI. Location and Index of Rulemaking File:

A rulemaking file with attached file index is maintained at:
California Fish and Game Commission
1416 Ninth Street
Sacramento, California 95814

VII. Location of Department Files:
Department of Fish and Wildlife
1416 Ninth Street
Sacramento, California 95814

VIII. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulatory Action:

No alternatives were identified.

(b) No Change Alternative:

If the Commission were not to add gray wolf to the list of endangered

species, valuable State mechanisms to protect the species would not be available. The Commission would fulfill its statutory obligation in adopting the proposed regulation.

- (c) Consideration of Alternatives: In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

IX. 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 determinations relative to the required statutory categories have been made:

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

While the 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 process.

The CESA listing process 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 sections 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 on 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 that listing is warranted are in apparent conflict with Section 11346.3, which requires an agency to consider economic impacts of its proposed regulations.

Since the finding portion of CESA is silent as to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 requires the preparation of an 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 businesses 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 gray wolf as endangered will subject the species to the provisions of CESA. This act prohibits take and possession except as may be permitted by the Department.

Presently the gray wolf is listed as endangered throughout portions of its range, including California, under the federal Endangered Species Act of 1973 (16 U.S.C. § 1531 *et seq.*) (ESA). Wolves that enter California are therefore protected by the ESA. Under the ESA, the U.S. Fish and Wildlife Service has lead responsibility for wolves in California.

For species listed as endangered or threatened under the ESA, activities that result in "take" of the species are prohibited. The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." (16 U.S.C. § 1532) Harass is further defined as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering" (50 CFR 17.3).

As long as the gray wolf remains federally listed, concurrent listing under the CESA, should not result in a significantly greater economic impact. As a result of the federal or State listing, the economic impacts on commercial timber and other industries' whose activities occur near wolf den or rendezvous sites could be significant. To avoid prohibited take under CESA and ESA, may require consultation with the Department and federal counterparts as to the timing of activities and potentially incidental take permitting. Based on these considerations, the Commission finds that

the amendment of this regulation may have a significant adverse economic impact on business.

The Commission has made a determination that the amendment of this regulation may have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. The Commission has considered proposed alternatives that would lessen any adverse economic impact on business and invites you to submit proposals. Submissions may include the following considerations:

- (i) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.
- (ii) Consolidation or simplification of compliance and reporting requirements for businesses.
- (iii) The use of performance standards rather than prescriptive standards.
- (iv) Exemption or partial exemption from the regulatory requirements for businesses.

In most cases, conservation measures implemented by the Department for newly listed endangered species have relatively little effect on members of the public. That effect, if any, usually arises from requiring persons to avoid any take of endangered species, or implementing the conditions of an incidental take permit. Fish and Game Code Section 2081(b) addresses the requirements for an incidental take permit:

- Take must be incidental to an otherwise lawful activity.
- Impacts of authorized take must be minimized.
- Impacts of the authorized take must be “fully mitigated.”
- The permit applicant must ensure adequate funding to implement the measures required for minimizing and fully mitigating the impacts of authorized take, and for monitoring compliance with and effectiveness of those measures.
- A permit cannot be issued if the Department determines that issuance of the permit will jeopardize the continued existence of the species.

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 the California Environmental Quality Act (“CEQA”). CEQA currently requires private applicants undertaking

projects subject to CEQA to consider *de facto* endangered or threatened species to be subject to the same protection under CEQA as though they are already listed by the Commission in Section 670.5 of Title 14, CCR (CEQA Guidelines, Section 15380).

- (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; Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:

If the potentially significant economic impact identified above occurs, there could be an adverse impact on new or existing jobs, an adverse impact on creation of new businesses or elimination of existing businesses, and an adverse impact on business expansion. The magnitude of these impacts will depend on the extent to which commercial activities result in take of gray wolf, and the costs of minimizing and mitigating for that take. The Commission does not anticipate benefits to the health and welfare of California residents or to worker safety. The Commission anticipates benefits to the environment by protecting the gray wolf under CESA.

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

A representative private person or business may experience economic impacts as described in section (a) above.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

As a project applicant, a state agency may realize costs associated with projects involving the incidental take of gray wolf as described in section (a) above.

The proposed regulatory change is not expected to significantly affect federal funding to the State, but there could be an increase in the likelihood that State and federal land and resource management agencies would allocate funds to the State for protection and recovery actions.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

As a project applicant, a local agency may realize costs associated with projects involving the incidental take of gray wolf as described in section (a) above.

(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, Government Code:

None.

(h) Effect on Housing Costs:

None.

Updated Informative Digest/Policy Statement Overview

Section 670.5 of Title 14, CCR, provides a list, established by the California Fish and Game Commission (Commission), of animals designated as endangered or threatened in California. The Commission has the authority to add or remove species from this list if it finds that the action is warranted.

At its June 4, 2014 meeting in Fortuna, California, the Commission made a finding that gray wolf warrants listing pursuant to the California Endangered Species Act (CESA). Specifically, the Commission determined that gray wolf (*Canis lupus*) should be listed as an endangered species.

The Commission therefore proposes to amend Section 670.5 of Title 14, CCR, to add gray wolf to the list of endangered species.

This proposal is based upon the documentation of threats to gray wolf to the point that it meets the criteria for listing by the Commission as set forth in the CESA. The Commission is fulfilling its statutory obligation in making this proposal which, if adopted, would afford gray wolf in California with the recognition and protection available under CESA.

EVALUATION OF INCOMPATIBILITY WITH EXISTING REGULATIONS:

Section 20, Article IV, of the State Constitution specifies that the Legislature may delegate to the Commission such powers relating to the protection and propagation of fish and game as the Legislature sees fit. The Legislature has delegated to the Commission the power to establish a list of endangered species and a list of threatened species (Fish and Game Code Section 2070). Commission staff has searched the CCR and has found that the proposed regulation is neither inconsistent nor incompatible with existing state regulations.

UPDATE

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action.

At its December 10, 2015 meeting in San Diego, the Commission adopted the regulations as originally proposed.