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BOARD OF SUPERVISORS

2009 MAY 11 11:57 AM

STATE OF CALIFORNIA

Fish and Game Commission

May 8, 2009

TO ALL AFFECTED AND INTERESTED PARTIES:

This is to provide you with a copy of the notice of proposed regulatory action resulting from the Commission's March 4, 2009, meeting, when it made a finding pursuant to Section 2075.5, Fish and Game Code, that longfin smelt (*Spirinchus thaleichthys*) warrants listing to threatened species status. The notice of proposed regulatory action will be published in the California Regulatory Notice Register on May 8, 2009.

Please note the date of the public hearing related to this matter and associated deadlines for receipt of written comments.

Ms. Ann Malcolm, General Counsel, Department of Fish and Game, phone (916) 654-3815, has been designated to respond to questions on the substance of the proposed regulations.

Sincerely,


Sheri Tiemann
Staff Services Analyst

Attachment

**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, 2072.7, 2075.5, and 2077, 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

State law (Section 2070, Fish and Game Code) specifies that the Commission shall establish a list of endangered species and a list of threatened species and it shall add or remove species from either list if it finds, upon the receipt of sufficient scientific information, that the action is warranted.

On August 14, 2007, the Commission received a petition to list longfin smelt as threatened or endangered under CESA. Pursuant to the provisions of Section 2074.2 of the Fish and Game Code, the Commission, at its February 7, 2008 meeting, accepted the petition for consideration and made a finding that the petitioned action may be warranted. Pursuant to the provisions of Section 2075.5 of the Fish and Game Code, the Commission, at its March 4, 2009, meeting, made a finding that the petitioned action to list the longfin smelt as threatened is warranted.

The Commission seeks to amend Section 670.5 of Title 14, CCR, to add the longfin smelt to the list of threatened fish (subsection (b)(2)).

In making the recommendation to list the longfin smelt pursuant to the California Endangered Species Act, the Department relied most heavily on the following: (1) longfin smelt is short-lived, (2) introductions of exotic organisms have altered its habitat, distribution, food supply, and possibly abundance, (3) water projects have adversely modified its habitat, distribution, food supply, and probably abundance, and (4) contaminants identified in ambient water samples have periodically adversely affected test organisms and may be affecting longfin smelt abundance. Threats to the longfin smelt population are likely to continue or increase, and several measures of longfin smelt abundance were examined and the Department found that they all indicate that the population has declined substantially.

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 in the Yolo Fliers Club Ballroom, 17980 County Road 94B, Woodland, California, on Thursday, June 25, 2009, 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 June 19, 2009 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 June 22, 2009. All comments must be received no later than June 25, 2009 at the hearing in Woodland, 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 Sherrie Fonbuena at the preceding address or phone number. **Ms. Ann Malcolm, General Counsel, Department of Fish and Game, phone (916) 654-3815, 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:**

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Although the California Endangered Species Act (CESA) does not specifically prohibit the consideration of economic impacts 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.

The CESA listing process essentially involves two stages. During the first stage, the Commission must make a finding on whether or not the petitioned action is warranted. 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 requirements of the Administrative Procedure Act (APA).

The APA, specifically Government Code (GC) sections 11346.3 and 11346.5, requires an analysis of the economic impact of the proposed regulatory action. While GC section 11346.3 requires an analysis of economic impact on businesses and private persons, it

also provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other state laws

Since the finding portion of CESA is silent as to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 may require an economic impacts analysis. While the Commission does not believe this is the case, an 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 the longfin smelt as threatened will entitle it to CESA protection. CESA 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). CEQA requires local governments and private applicants undertaking projects subject to CEQA to consider *de facto* threatened species to be subject to the same requirements under CEQA as though they were already listed by the Commission (CEQA Guidelines, section 15380).

Required mitigation under 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, installation of protective devices such as fencing, protection of additional habitat, imposing flow restrictions 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 project proponent. If the CEQA mitigation measures do not minimize and fully mitigate to the standards of CESA, listing could increase business costs to the extent of any necessary additional measures.

- (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: None.
- (c) Cost Impacts on a Representative Private Person or Business:

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 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 were already listed under CESA.

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 any 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: April 23, 2009

John Carlson, Jr.
Executive Director

