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Fish and Game Commission



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Wildlife Heritage and Conservation
Since 1870

BOARD OF SUPERVISORS
2015 OCT 26 A 10:20

October 22, 2015

TO ALL INTERESTED AND AFFECTED PARTIES:

This is to provide you with a copy of the notice of proposed regulatory action resulting from the Commission's June 4, 2014, meeting, when it made a finding pursuant to Section 2075.5, Fish and Game Code, that listing the gray wolf as Endangered under the California Endangered Species Act is warranted. The notice of proposed regulatory action will be published in the California Regulatory Notice Register on October 23, 2015.

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

Dr. Eric Loft, Wildlife Branch, Department of Fish and Game, phone (916) 445-0411, has been designated to respond to questions on the substance of the proposed regulations.

Sincerely,


Sheri Tiemann
Associate Governmental Program 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 240, 2070, 2075.5 and 2076.5, of the Fish and Game Code, and to implement, interpret or make specific sections 1755, 2055, 2062, 2067, 2070, 2072.7, 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

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.

NOTICE IS GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be held at the Town and Country Resort & Convention Center, 500 Hotel Circle North, San Diego, California, on December 10, 2015, at 8 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 November 24, 2015, at the address given below, or by e-mail to FGC@fgc.ca.gov. Written comments mailed or e-mailed to the Commission office, must be received before 5:00 p.m. on December 7, 2015. All comments must be received no later than December 10, 2015, at the hearing in San Diego, California. 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, Sonke Mastrup, 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 Sonke Mastrup or Sheri Tiemann (back-up contact) at the preceding address or phone number. **Dr. Eric Loft, Chief of the Wildlife Branch, Department of Fish and Wildlife, phone (916) 445-0411, 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. Circumstances beyond the control of the Commission (e.g., timing of Federal regulation adoption, timing of resource data collection, timelines do not allow, etc.) or changes made to be responsive to public recommendation and comments during the regulatory process may preclude full compliance with the 15-day comment period, and the Commission will exercise its powers under Section 202 of the Fish and Game Code. Regulations adopted pursuant to this section are not subject to the time periods for adoption, amendment or repeal of regulations prescribed in Sections 11343.4, 11346.4 and 11346.8 of the Government Code. 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/Results of the Economic Impact Analysis

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 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." 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 an initial 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.

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, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

FISH AND GAME COMMISSION

Sonke Mastrup
Executive Director

Dated: October 9, 2015