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Fish and Game Commission

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6/25/14

June 17, 2014

TO ALL INTERESTED AND AFFECTED PARTIES:

This is to provide you with a copy of the notice of proposed regulatory action relative to Section 786.9, Title 14, California Code of Regulations, relating to take of rare plants, which will be published in the California Regulatory Notice Register on June 20, 2014.

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

Mr. Craig Martz, Regulations Unit Manager, Department of Fish and Wildlife, telephone number (916) 653-4674, 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 Section 1907 of the Fish and Game Code and to implement, interpret or make specific sections 1900, 1906, 1908, 1910, 1912 and 1913 of said Code, proposes to add Section 786.9, Title 14, California Code of Regulations, relating to take of rare plants.

Informative Digest/Policy Statement Overview

The California Fish and Game Commission (Commission) has not yet adopted regulations to be implemented by the California Department of Fish and Wildlife (Department) to govern the take, possession, propagation, transportation, exportation, importation, or sale of rare or endangered plants under the authority of the Native Plant Protection Act (NPPA), (Fish & Game Code subsection (a) of Section 1907). Although the Department may permit the take of threatened and endangered plants under the California Endangered Species Act (CESA) and other statutes, the Department does not have the ability to permit take, possession, propagation, transportation, exportation, importation, or sale of rare plants.

There are 64 species, subspecies and varieties of plants that have been designated as rare by the Commission. The proposed regulation will allow the Department to permit the take, possession, propagation, transportation, exportation, importation, or sale of rare plants using the same procedures and subject to the same conditions in Section 783 *et seq.*, Title 14, California Code of Regulations (CCR), relating to incidental take permits; in Section 786 *et seq.*, Title 14, CCR, relating to Voluntary Local Programs; in Fish and Game Code Section 2800 *et seq.* relating to Natural Community Conservation Plans; or in Fish and Game Code Section 2089.2 *et seq.* relating to Safe Harbor Agreements. The proposed regulation will allow the person or entity seeking the take authorization to select which one of the four programs listed above that they would like to use. The proposed regulation will also allow the Department to permit the take, possession, propagation, transportation, exportation, importation or sale of rare plants for scientific, educational or management purposes pursuant to either Fish and Game Code subsection (a) of Section 2081 or Fish and Game Code Section 1002 *et seq.* and Section 650 *et seq.*, Title 14, CCR, at the Department's discretion.

The NPPA prohibits take, possession or sale of endangered or rare native plants (Fish & Game Code Section 1908), but includes exceptions for some activities, and the proposed regulation will not change or limit those existing exceptions. The proposed regulation also includes a "grandfather" provision for plans, permits, or other agreements that may have inadvertently authorized rare plant impacts in the past, and make such authorizations effective as of the day they were approved.

The proposed regulation will promote the purpose of the NPPA and intent of the Legislature to preserve, protect and enhance endangered or rare native plants of California by allowing the Department to permit the incidental take of rare plants where the take is minimized and fully mitigated or using the other mechanisms provided in the proposed regulation that will provide for protection, enhancement, conservation or other benefits to rare plants. The proposed regulation will provide more options, more certainty and less liability for the regulated community when it comes to completing projects, because the regulation will provide a way to undertake activities that are now prohibited because they may involve take, possession, propagation, transportation, exportation, importation or sale of rare plants. The proposed regulation will ensure that there is no confusing regulatory overlap that would require obtaining different permits with different standards and requirements under CESA and the NPPA for the same activity. The Department needs the ability to write scientific, educational, or management permits for rare plants to facilitate important scientific research and important conservation and management activities to

help prevent the extinction of rare plants.

The Commission has reviewed its own regulations and finds that the proposed regulation is neither inconsistent nor incompatible with existing state regulations. The Commission has searched the CCR and finds no other state agency regulations pertaining to the take of rare plants. Eighteen plants that are designated by California as rare are also designated as threatened, endangered or candidates under the federal Endangered Species Act (ESA), however the proposed regulation is neither inconsistent nor incompatible with existing federal regulations.

NOTICE IS GIVEN that any person interested may present statements, orally or in writing, relevant to this action at a hearing to be at the Hilton San Diego Mission Valley 901 Camino Del Rio South, San Diego, California, on Wednesday, August 6, 2014, at 8:00 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 July 24, 2014 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 July 31, 2014. All comments must be received no later than August 6, 2014 at the hearing in San Diego. 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 at the preceding address or phone number. **Craig Martz, Regulations Unit Manager, Department of Fish and Wildlife, phone (916) 653-4674, 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/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 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. This regulation will permit greater certainty and flexibility for business pursuits.

(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:

The Commission does not anticipate any impacts on the creation or elimination of jobs, the creation of new business, the elimination of existing businesses or the expansion of businesses in California. In situations where take of rare plants was otherwise not allowed by law, the regulation will provide a mechanism for take that was otherwise unavailable, thereby increasing certainty and flexibility for businesses in California in situations where a rare plant could be taken by a project. The proposed regulation will not require a permit or other authorization for rare plants where the take is otherwise allowed by law, and therefore will not place an additional burden on business in those situations.

The Commission anticipates benefits to the health and welfare of California residents from better protection of the State's natural resources. The Commission does not anticipate any benefits to worker safety from the proposed regulation. The Commission anticipates benefits to the environment through better regulation of the take of rare plants by the Department, and the ability of the Department to permit important research, conservation, and management actions for rare plants.

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

In some situations where rare plants are present the proposed regulation will eliminate a barrier to pursuing the highest value use of land. The permit and mitigation costs to a representative private person or business would likely be offset by the increased returns on project that would have previously been prohibited due to the presence of a rare plant. For example, if a permit were to be issued to take, possess, propagate, transport, export, import or sell rare plants for activities that are not allowed by the NPPA exemptions (Fish & Game Code subsections (b) and (c) of Section 1907, Section 1912, and Section 1913.) by the same procedures and subject to the same conditions as an incidental take permit pursuant to Fish and Game Code subsection (b) of Section 2081, applying for and complying with such a permit would mean that the representative private person or business would have to minimize and fully mitigate the take allowed by the permit, and ensure adequate funding to conduct the minimization and full mitigation. This minimization and full mitigation could involve habitat restoration, the purchase and management of compensatory habitat, or the purchase of credits from an approved mitigation bank. The costs of complying with such a permit would vary depending upon the extent of the take being permitted, the extent and quality of the habitat being removed or disturbed, and other site specific factors.

To quantify the cost to an applicant to comply with a rare plant permit issued by the Department using the same procedures and conditions as in Fish and Game Code subsection (b) of Section 2081, the Department reviewed incidental take permits that were issued by the Department for threatened and endangered plant species from 2000 to present. The Department's records for many of these permits show that a security was required or other financial information was provided. The Department's records indicate that the average security or other cost for compliance with an incidental take permit that covers at least one threatened or endangered plant species is approximately $879,000 per permit; however many of these permits also cover animal species, so the Department assumed that each species covered by an incidental take permit contributed equally to its cost. Therefore the average cost for the threatened and endangered plant species' contribution to an incidental take permit is approximately $531,000.

However, because a representative private person or business could continue to avoid conducting any of the activities that are currently prohibited by the NPPA, they would not necessarily incur any additional costs that may be associated with obtaining and complying with authorization to take, possess, propagate, transport, export, import or sell rare plants provided by the proposed regulation.

Since 2000 there have been an average of 4 incidental take permits issued by the Department per year that cover at least one threatened or endangered plant species. There are approximately 42 percent as many rare plants (64) as there are threatened and endangered plants (154). Applying this proportion to the average annual number of incidental take permits covering at least one threatened or endangered plant species we estimate that approximately 1.7 incidental take permits covering at least one rare plant could be issued per year. Because incidental take permits often cover multiple different species, this does not necessarily indicate that 1.7 additional permits will be issued per year.

(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, 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: