

**FISH AND GAME COMMISSION
STATEMENT OF EMERGENCY
ACTION**

Emergency Action to Add Section 749.3, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Longfin Smelt
(*Spirinchus thaleichthys*) During Candidacy Period

I. Statement of Facts Constituting Need for Emergency Action:

The Fish and Game Commission (“Commission”) is the decision-making body that implements the California Endangered Species Act (“CESA”). As described in greater detail below, CESA authorizes the Commission to establish lists of threatened and endangered species, and to add or remove species from the lists if it finds, upon receipt of sufficient scientific information, that the action is warranted. Pursuant to Section 2084 of the Fish and Game Code (“FGC”), the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while the Department of Fish and Game (Department) and Commission evaluate whether the species should be listed as threatened or endangered under CESA. The Commission has relied on the authority in Section 2084 to permit take of candidate species on five previous occasions: in 1994 for the southern torrent salamander, in 1994 for the coho salmon south of San Francisco, in 1997 and 1998 for the spring-run chinook salmon, in 2000 for coho salmon throughout its range in California, and in 2002 for the Xantus’s murrelet.

On August 14, 2007, the Commission received a petition from The Bay Institute, Center for Biological Diversity, and Natural Resources Defense Council (collectively referred to as “Petitioners”) to take action to list longfin smelt as threatened or endangered under CESA. The petition describes: 1) the record low population abundance in the last four years for the San Francisco Bay-Delta population; 2) new analyses of Bay-Delta population trends over the last 40 years; 3) evidence suggesting reduced genetic integrity of the species; 4) evidence for a significant stock recruitment relationship for the species; and 5) the significant threat posed to the population abundance by water management and Delta exports. The petition also sought action by the Commission to list the longfin smelt on an emergency basis. The Commission denied the request for an emergency action at its October 11, 2007 meeting in Concord.

The Commission referred the petition to the Department on August 21, 2007 for a 90-day review period, as required by FGC Section 2073. The Department determined on November 16, 2007 that there was sufficient information in the petition to indicate that the longfin smelt’s listing may be warranted and, based on that determination, recommended that the Commission accept the petition. As described in the evaluation report, the Department relied on information and data in its files to interpret information in the petition.

On February 7, 2008 the Commission decided to accept the longfin smelt as a candidate species based on the Department's evaluation report, public testimony, and the information in the petition. The petition identifies the following activities as factors in the decline of longfin smelt: reductions in freshwater inflow, loss of larval, juvenile, and adult fish from direct and indirect effects of water diversions and export facilities, competition from non-natives species, and toxic chemicals.

FGC Sections 2080 and 2085, prohibit the take of candidate species, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to FGC Section 2084 or (2) the Department authorizes the take through incidental take permits issued on a project-by-project basis pursuant to FGC 2081. Because the Commission designated the longfin smelt as a candidate species on February 7, 2008, individuals and entities engaged in any activity that may result in incidental take of longfin smelt, including the activities listed above, are at risk of violating the FGC for unauthorized take. In the absence of these regulations, individuals engaged in otherwise lawful research and monitoring, dredging and extraction of sand or gravel resources, or water diversion that may result in take of longfin smelt would have to obtain a permit from the Department in order avoid liability and potential criminal violations of CESA for actions or activities that result in take of the candidate species.

The issuance of individual permits authorizing incidental take is a complicated, lengthy, and expensive process, and the Commission specifically finds that it is not feasible for the Department to issue incidental take permits on a project-by-project basis for the above-referenced activities that will otherwise be prohibited during the longfin smelt's candidacy period. The Department has testified that with the following measures the species will not, in its opinion, become immediately at risk of extinction. For these reasons, adoption of the emergency regulation is necessary to allow the continued export of water for agricultural, municipal and industrial use along with the other specified scientific and commercial activities. These regulations will ensure appropriate interim protections for longfin smelt within the area covered by the petition while the Department conducts a 12-month review of the status of the candidate species.

The Department requests that the Commission take emergency action to add Section 749.3, to Title 14, CCR.

II. Express Finding of Emergency

Pursuant to the authority vested in it by FGC Section 240 and for the reasons set forth above in the "Statement of Facts Constituting Need for Emergency Action," the Commission expressly finds that the adoption of these regulations is necessary for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of these regulations will allow

activities that may affect longfin smelt to continue during the candidacy period, including the diversion and export of water for agricultural, municipal and industrial use, as long as those activities are conducted in a manner consistent with the protections specified in these regulations.

III. Authority and Reference Citations

Authority: FGC Sections 200, 202, 205, 240, and 2084.
Reference: FGC Sections 200, 202, 205, 240 and 2084.

IV. Informative Digest

The sections below describe laws relating to listing species under CESA, the effect of these emergency regulations, a description of related federal law, and a policy statement overview.

A. Laws Related to the Emergency Regulations - Listing under CESA

1. Petition and Acceptance

FGC Section 2070 requires the Commission to establish a list of endangered species and a list of threatened species. Any interested person may petition the Commission to add a species to the endangered or threatened list by following the requirements in Fish and Game Code Sections 2072 and 2072.3. If a petition is not factually incomplete and is on the appropriate form, it is forwarded to the Department for evaluation.

FGC Section 2073.5 sets out the process for accepting or rejecting a petition to list a species and, if the petition is accepted, a process for actually determining whether listing of the species as threatened or endangered is ultimately warranted. The first step toward petition acceptance involves a 90-day review of the petition by the Department to determine whether the petition contains sufficient information to indicate that the petitioned action may be warranted. The Department prepares a report to the Commission that recommends rejection or acceptance of the petition based on its evaluation.

FGC Section 2074.2 provides that, if the Commission finds that the petition provides sufficient information to indicate that the petitioned action may be warranted, the petition is accepted for consideration and the species that is the subject of the petition becomes a "candidate species" under CESA. CESA prohibits unauthorized take of a candidate species, just as it prohibits such take of threatened and endangered species, from the time the Commission notifies interested parties and the general public of its acceptance of the petition. FGC Section 86 states "Take" means to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill. Killing of a candidate, threatened, or endangered species under CESA that is incidental to an otherwise lawful activity

and not the primary purpose of the activity constitutes take under state law. (Department of Fish and Game v. Anderson-Cottonwood Irrigation District (1992) 8 Cal.App.4th 1554.)

FGC Section 2085 provides that once the Commission gives notice pursuant to FGC Section 2074.4 that it has designated a species a candidate under CESA, all activities, whether new or ongoing, that cause incidental take of the candidate species are in violation of the prohibition on unauthorized take of listed or candidate species found in FGC Section 2080 unless the take is authorized in regulations adopted by the Commission pursuant to FGC Section 2084 or the Department authorizes the take through the issuance of an incidental take permit under FGC Section 2081 or by other means authorized by CESA.

2. Status Review Final Action on the Petition

The Commission's acceptance of a petition initiates a 12-month review of the species' status by the Department, pursuant to FGC Section 2074.6. This status review helps to determine whether the species should be listed as threatened or endangered. Unlike the Department's initial evaluation, which focuses largely on the sufficiency of information submitted in the petition, the 12-month status review involves a broader inquiry into and evaluation of available information from other sources. The Commission is required to solicit data and comments on the proposed listing soon after the petition is accepted, and the Department's written status report must be based upon the best scientific information available.

Within 12 months of the petition's acceptance, the Department must provide the Commission a written report that indicates whether the petitioned action is warranted (FGC Section 2074). The Commission must schedule the petition for final consideration at its next available meeting after receiving the Department's report (FGC Section 2075). In its final action on the petition, the Commission is required to decide whether listing the species as threatened or endangered "is warranted" or "is not warranted"; if listing is not warranted in the Commission's judgment, take of the former candidate species is no longer prohibited under CESA (FGC Section 2075.5).

B. Effect of the Emergency Action

Section 749.3, Title 14, CCR regulations would authorize and provide for take of longfin smelt during its candidacy subject to the following terms and conditions:

- (1) Research and Monitoring
 - (A) Take of longfin smelt by Department personnel in the course of research and monitoring is authorized pursuant to Section 783.1(c), Title 14, CCR.
 - (B) Take of longfin smelt in the course of research and monitoring by public agencies and private parties is authorized subject to the following:

1. For ongoing research, a written, detailed project proposal describing objectives, methods (gear, sampling schedules and locations), efforts to minimize adverse effects to the species, and estimated level of take of the species shall be provided to the Regional Manager of the Bay Delta Region at the address specified in (iv) below within 45 days of this regulation becoming effective.
 2. For research which has not yet commenced, a written, detailed project proposal describing objectives, methods (gear, sampling schedules and locations), efforts to minimize adverse effects to the species, and estimated level of take of the species shall be provided to the Regional Manager at the address specified in (iv) below.
 3. The research or monitoring may commence once the Department issues written concurrence that the research and monitoring activities conducted are consistent with the Department's research and monitoring programs and are sufficient to protect longfin smelt. The Department may specify additional terms and conditions for the protection of longfin smelt and the reporting of all data collected to the Department.
 4. Regional Manager, Bay Delta Region, 7329 Silverado Trail, Napa, CA 94558 -- (707) 944-5500.
- (C) Notwithstanding the foregoing, at the discretion of the Department, research and monitoring activities not addressed by the above procedures may receive separate authorizations for take of longfin smelt pursuant to Fish and Game Codes Section 2081.

(2) Dredging and Extraction of Sand or Gravel Resources

Take of longfin smelt incidental to otherwise lawful dredging or extraction of sand or gravel resources in a stream or river is authorized for the longfin smelt candidacy period provided that any activity already required to monitor and report the take of any fish species to the Department or a federal wildlife agency also include the following information: the date, location and number of any longfin smelt taken during the candidacy period. A copy of the report shall be mailed to: Regional Manager, Bay Delta Region, 7329 Silverado Trail, Napa, CA 94558 -- (707) 944-5500.

(3) Local Water Diversions

Incidental take of longfin smelt resulting from diversion of water by any local agency, private party, or the State Water Project North Bay Aqueduct or Suisun Marsh facilities, is authorized during the candidacy period, subject to the following conditions:

- (A) Existing unscreened diversions may continue in operation through the candidacy period. Upon any future determination by the commission that longfin smelt shall be added to the list of threatened or endangered

species, incidental take for such diversions must be authorized under Fish and Game Code Section 2081(b) or, if longfin smelt become listed pursuant to Section 1533 of Title 16 of the United States Code, be determined exempt from the permitting requirement under Fish and Game Code Section 2080.1.

- (B) Diversions approved and constructed after the effective date of this section shall be screened and shall use the Department of Fish and Game Fish Screening Criteria for delta smelt (*Hypomesus transpacificus*) in Exhibit A as the fish screening criteria for longfin smelt.
- (C) Existing fish screens that are repaired, upgraded, or reconstructed during the candidacy period must screen for longfin smelt by meeting the Department of Fish and Game Fish Screening Criteria for delta smelt in Exhibit A.
- (D) Any activity already required to monitor and report the take of any fish species to the Department or a federal wildlife agency shall also include the following information: the date, location and number of any longfin smelt taken during the candidacy period. A copy of the report shall be mailed to: Regional Manager, Bay Delta Region, 7329 Silverado Trail, Napa, CA 94558 -- (707) 944-5500.

(4) State Water Project and Federal Central Valley Project Export Facilities

In *Natural Resources Defense Council v. Kempthorne* (Kempthorne), the United States Eastern District Court issued an Interim Remedial Order Following Summary Judgment and Evidentiary Hearing which required specific limitations on the joint operations of the State Water Project (SWP) and the Federal Central Valley Project (CVP) in order to prevent the extinction of delta smelt until a new delta smelt biological opinion is issued by the United States Fish and Wildlife Service (FWS). The court has directed FWS to issue its new opinion by September 15, 2008. When the new biological opinion is issued, the *Kempthorne* requirements will terminate. The *Kempthorne* requirements are triggered by environmental conditions and the presence of specific delta smelt life stages and are focused on minimizing the negative entrainment effects caused when the combined export pumping of the SWP, operated by the Department of Water Resources (DWR) and the CVP, operated by the U.S. Department of the Interior, Bureau of Reclamation (Reclamation) reverses the flow in Old and Middle River (OMR). A series of *Kempthorne* OMR flow requirements began in late-December 2007 and will continue until June 20, 2008, sequentially targeting adult delta smelt during migration prior to spawning, spawning delta smelt, larvae and juveniles.

The Commission recognizes that there are statistical correlations between negative OMR flows and take of different longfin smelt life stages, as there are for delta smelt. There is substantial overlap in the periods when the two species are taken by the SWP and CVP. However, adult longfin smelt can be taken a month or more earlier than delta smelt (potentially in December).

Because longfin smelt typically spawn earlier, the larvae may be present earlier as well (potentially in February). Consequently, concurrent take of both delta smelt and longfin smelt may include different life stages and magnitudes and Kempthorne requirements keyed to delta smelt presence may not match longfin smelt timing. The following measures will protect longfin smelt during the candidacy period when OMR limits required under *Kempthorne* for delta smelt may not be in effect or adequately protective. The Commission therefore authorizes take of longfin smelt incidental to the coordinated operations of the SWP and CVP export facilities in accordance with the following OMR limits, or the OMR limits set in *Kempthorne*, whichever are more protective:

- (A) Monitoring for the presence of adult (≥ 85 mm Fork Length (FL)) and larval longfin smelt (< 20 mmFL) shall be achieved as follows:
1. For adults by standard field sampling intervals, methods and locations of the Fall Midwater Trawl Survey, the San Francisco Bay Study Survey and the Spring Kodiak Trawl Survey.
 2. For larvae, by initiating the 20mm Survey beginning in the first two weeks of March and conducting single tows at sampling locations 405, 411, 418, 602, 501, 504, 519, 508, 513, 520, 703, 704, 706, 707, 711, 716, 705, 801, 802, 804, 809, 812, 815, 901, 902, 906, 910, 912, 914, 915, 918, 919; In the last two weeks in March the full 20mm Survey will begin using standard survey protocol, sampling three tows per sampling location at all 41 standard locations.
 3. DWR and Reclamation shall ensure that smelt collected at the SWP and the CVP, respectively, are preserved in formalin or ethanol, labeled with the date and location of collection, and transferred to the Department's Bay-Delta Region Stockton office within two business days to the attention of Marty Gingras for a determination of sex and reproductive status (i.e., egg stage or spent). Identification of any larval longfin smelt collected at either facility shall be reported within one business day to Marty Gingras at the Department's Bay-Delta Region Stockton office. The Department may modify the requirements of this subsection with the mutual agreement of DWR and Reclamation for the SWP and the CVP, respectively.
- (B) Commencing on the effective date of this regulation, DWR and Reclamation shall protect spawning, larval, and juvenile longfin smelt by jointly operating the CVP and SWP to achieve a daily average net upstream (reverse) OMR flow (as computed for *Kempthorne* compliance) between 750 and 5,000 cfs on a seven-day running average beginning when longfin smelt spawning is indicated by: (i) the presence of spent female longfin smelt (≥ 85 mm FL) in the Spring Kodiak Trawl (stations 809, 812, 815, 902, 906, 910, 912, 914, 915 on Exhibit B) or in the San Francisco Bay Study Otter Trawl or Midwater Trawl surveys (stations 863, 864, 865 on Exhibit C), all of which are located east or south of Jersey

Point in the San Joaquin River, or south Delta channels or at either the SWP or CVP fish salvage facilities or (ii) when larval longfin smelt (<20mm FL) are detected in the 20mm Survey (stations 809, 812, 815, 901, 902, 906, 910, 912, 914, 915, 918 on Exhibit D) east or south of Jersey Point in the San Joaquin River or in south Delta channels or at the SWP or CVP fish salvage facility.

The specific biological flow objective within this range shall be set by the Department, after consultation with the FWS, DWR and Reclamation, to be determined on a weekly basis and based upon a Longfin Smelt Risk Assessment Matrix (LSRAM)(Exhibit E) to be refined by the Department in consultation with FWS, DWR, and Reclamation and the best available scientific and commercial information concerning the distribution and status of longfin smelt. The LSRAM is patterned after the Delta Smelt Risk Assessment Matrix only modified to reflect longfin smelt biology and life stages and available information. This action is suspended during any time: (i) the three-day average of flow in the Sacramento River at Freeport exceeds 80,000 cfs and is resumed when the three-day average Delta outflow falls below 40,000 cfs and adult or larval longfin smelt are again detected east or south of Jersey Point as described above, or (ii) the Vernalis Adaptive Management Plan is being implemented (31 days, typically in mid-April to mid-May). This action shall continue until, in the reasonable discretion of the Department, after consultation with the FWS, DWR, and Reclamation, the longfin smelt entrainment risk at each facility is abated, or June 20, 2008 whichever occurs first.

- (C) Notwithstanding the foregoing, this regulation shall not prevent DWR or Reclamation from taking any action in operating the projects that is reasonably necessary to protect human health or safety of the public, including, but not limited to, any act or omission reasonably necessary to protect the structural integrity of any SWP or CVP facility.
- (D) In the event DWR receives a permit from the Department pursuant to Fish and Game Code Section 2081, which governs the take of longfin smelt, those requirements under Section 749.3(a)(4) which apply to DWR shall be superseded by the terms of such permit.
- (E) This emergency regulation shall be in effect for 180 days. It does not contain measures to protect pre-spawning longfin smelt or their larvae after June 20, 2008 from the effects of project operations, which effects could occur as early as late November or early December 2008. If this regulation is extended, operational requirements for this December – February period may be added by amending this regulation prior to expiration or extension.

C. Existing, Comparable Federal Regulations or Statutes

The Federal Endangered Species Act (FESA)(16 U.S.C. Section 1531 et seq.) includes a listing process that is comparable to the listing process under CESA.

Petitioners submitted a petition to the FWS to list the longfin smelt under FESA at the same time they submitted a petition to the Department. The FWS has not taken action on the petition.

FESA Section 4(d) (16 USC Section 1533 (d)) is similar in some respects to Section 2084 of FGC. Section 4(d) authorizes the National Marine Fisheries Service (NMFS) or the FWS to issue protective regulations prohibiting the take of species listed as threatened. These regulations, also called “4(d) rules,” may include any or all of the prohibitions that apply to protect endangered species and may include exceptions to those prohibitions. The 4(d) rules give the NMFS and the FWS the ability to craft comprehensive regulations to apply to particular activities that may result in a take of a threatened species, in a manner similar to the Commission’s authority to prescribe terms and conditions pursuant to Section 2084 during the species candidacy period.

Similarly, the Migratory Bird Treaty Act provides for protection of migratory birds with a definition of “take” which includes all portions of the FGC Section 86 definition of “take”. In addition, the Act provides for the Secretary of the Interior to adopt regulations determining the extent to which “take” will be allowed.

D. Policy Statement Overview

The objective of these regulations is to allow specified activities to continue on an interim basis, subject to the measures in the regulations designed to protect longfin smelt, while the Department focuses its efforts on further evaluating the status of the species. The Department's evaluation of the species during the candidacy period will result in the status report described in Section IV.A.2 above. The status report provides the basis for the Department's recommendation to the Commission before the Commission takes final action on the petition and decides whether the petitioned action may or may not be warranted.

V. Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements for its emergency regulations found at FGC Section 240. A public hearing on these regulations was held on February 7, 2008, and the above finding that these regulations are necessary for the immediate preservation of the general welfare meets the requirements of Section 240.

VI. 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 Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States;
- (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; and,
- (c) Cost Impacts on a Representative Private Person or Business:

The Commission has determined that adoption of Section 749.3, Title 14, CCR as an emergency regulation pursuant to FGC Section 2084 allows continued scientific research and monitoring; dredging, gravel and sand extraction; and deliveries of water for agricultural municipal, industrial, and residential use during the longfin smelt candidacy, subject to specified terms and conditions. The Commission has determined that this emergency regulation will prevent potentially significant local and statewide adverse impacts that might result from the disruption of water deliveries and other activities. In the absence of this emergency regulation private persons and business could be required to obtain individual take permits for longfin smelt, on a project-by-project basis during the candidacy period and would have to cease existing on-going activities pending receipt of a CESA authorization or be at risk of enforcement actions including fines and other penalties.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State; and,
- (e) Nondiscretionary Costs/Savings to Local Agencies:

The Commission has determined that adoption of Section 749.3, Title 14, CCR as an emergency regulation pursuant to FGC Section 2084 will provide cost savings to the state and local agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take by permit on a project-by-project basis for the Department of Water Resources, affected local water agencies, and others.

- (f) Programs Mandated on Local Agencies or School Districts:

The Commission has determined that the adoption of Section 749.3, Title 14, CCR as an emergency regulation does not impose a mandate on local agencies or school districts.

- (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; and
- (h) Effect on Housing Costs:

The Commission has determined that the adoption of Section 749.3, Title 14, CCR as an emergency regulation will not result in any cost to any local agency or school district for which Government Code sections 17500 through 17630 require reimbursement and will not affect housing costs.