

STATE OF CALIFORNIA  
DEPARTMENT OF FISH AND GAME  
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION  
(Pre-publication of Notice Statement)

Add Section 681  
Title 14, California Code of Regulations  
Re: Bird Nest Regulations

I. Date of Initial Statement of Reasons: June 16, 2015

II. Dates and Locations of Scheduled Hearings:

(a) Public Hearing:                      Date: September 28, 2015  
  Time: 10:00 am – 11:30 am  
  Location: Resources Auditorium  
  Resources Building  
  1416 9th Street  
  Sacramento, CA 95814

III. Description of Regulatory Action:

(a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

**Background**

In 1909, the Legislature adopted Section 637 of the California Penal Code (CPC) to prohibit the take of some, though not all, wild birds. Game birds and species regarded as potential nuisances were excluded from the prohibition. Subsection 637(f), CPC, included the following text, “Every person who shall within the State of California take or needlessly destroy, or attempt to take or destroy the nests or eggs of any bird protected by this code, or have such nests or eggs in his possession, except as permitted by this code is guilty of a misdemeanor.” The apparent reasons for this statute were to protect birds that were being exploited for eggs for domestic consumption, nest and egg collection by private parties, educational institutions and for the millinery trade.

As of 1957, the Legislature had integrated the CPC into Fish and Game Code (FGC) Section 3503, which read “It is unlawful to take, possess, or needlessly destroy the nest or eggs of any game bird or nongame bird”. Current FGC Section 3503 reads “It is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by this code or any regulation made pursuant thereto”.

In 1985, the Legislature added FGC Section 3503.5 as part of a comprehensive approach to regulate falconry. Section 3503.5 has not been amended, and it reads “It is unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds of prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted thereto”.

For years, the California Department of Fish and Wildlife (Department) has considered various approaches to pragmatically implement these laws. The Department has involved various stakeholders who brought different experiences and perspectives to the dialogue. Through this outreach, combined with past Department implementation of the statutes, the Department has developed a clear understanding of the challenges these prohibitions present to agriculture, forestry, the building industry, transportation agencies, utilities and others, as well as the concerns held by environmental and conservation organizations regarding the extent to which different interpretations of these statutes present risks to nesting birds.

The Department’s ongoing interaction with its stakeholders helped clarify our approach regarding the most reasonable interpretation of these statutes that implements the Legislature’s intent and balances stakeholder concerns with the Department’s conservation mission. As a result, the Department developed Title 14, California Code of Regulations (CCR), regulations that formalize the interpretations that the Department has traditionally followed in making California Environmental Quality Act (CEQA) recommendations, permit conditions and enforcement practices for implementing the FGC statutes.

### **Present Regulations**

No existing regulations have been adopted in Title 14, CCR, to provide regulatory clarification or any exceptions to the requirements in FGC sections 3503 and 3503.5.

### **Proposed Regulations**

This regulatory proposal will provide needed clarity and improve enforceability of the prohibitions in FGC sections 3503 and 3503.5, which have been subject to multiple interpretations by Department staff, CEQA practitioners, stakeholders, and the general public. The proposed regulations define terminology, specify several exceptions to the prohibitions where other laws prevail, and describe the Department’s approach as a responsible or lead agency under CEQA, as that statute relates to conserving populations of bird species. The following

subsections for Section 681 are proposed as new provisions in Title 14, CCR:

Subsection 681(a), Title 14, CCR, provides the purpose and scope of the proposed regulations to implement FGC sections 3503 and 3503.5 and Public Resources Code Section 21083, and further describes the Department's consultation role in the CEQA regarding FGC sections 3503 and 3503.5.

The information provides stakeholders and the general public with necessary detail to improve understanding of the FGC statutes and Title 14, CCR, regulations.

Subsection 681(b), Title 14, CCR, defines terminology used in the statutes and proposed regulations. The terms used in FGC sections 3503 and 3503.5 are subject to varied interpretation and application depending on the experience, background and views of the individual or entity. The key terms subject to these various interpretations, i.e., *take*, *possess*, *needlessly*, *destroy*, *nest*, and *native bird* are discussed in the following outline:

1. "Take" is a well-defined term in the context of hunting and fishing. The word "take" becomes ambiguous when it is applied to an inanimate object such as a nest because the existing regulatory definition for the word "take" does not lend itself to a non-living entity.
2. Similarly, the word "possess" is reasonably clear in the context of hunting and fishing, but the word may also apply when human activity makes a nest unavailable to birds, for example by installation of some exclusionary structure, even if the nest remains in place.
3. The word "needlessly," in common usage is subject to varied interpretations. Most proposals and actions to take, possess or destroy nests or eggs occur because the proponent believes they had a need to do so. Others may dispute the merit of that need.
4. Similarly, the word "destroy" can be used to characterize the complete obliteration of a nest or eggs. However, some lesser physical change may, or may not, have the same ultimate effect by degrading a nest to such a condition that it no longer serves the purpose intended by the birds.
5. A nest can be a structure constructed by birds, or a site used by

birds without modifying the site in any way other than occupying it. Some individuals argue that the surrounding habitat is part of the nest and that the spatial limits of the nest may be quite large. Others believe that after reproduction is complete, the location where reproduction occurred remains a nest into the future, regardless of whether it is reused in any particular time frame. For enforcement of the statute, a clear definition of what is considered a nest, and for how long, is required.

6. The term “native bird” is defined as any bird species determined by the Department to occur naturally in California as a resident, regular migrant or occasional migrant species.

Definitions for these words and terms are necessary to provide stakeholders and the general public a better understanding of key terms in order to fully comply with the FGC and regulations, as well as to ensure that the regulations are clear and legally enforceable.

Subsection 681(c), Title 14, CCR, lists the exceptions to the proposed regulations. These exceptions do not affect the Department’s authority pursuant to any other provision of the FGC or State compliance with federal regulations.

The exceptions are necessary to reduce possible conflict between the proposed regulations and other Department authorities in State statutes and federal regulations.

Subsection 681(d), Title 14, CCR, provides the CEQA Thresholds of Significance to determine the potential significance of impacts related to the take, possession, needless destruction or destruction of native bird nests, eggs, or birds of prey.

These thresholds provide lead agencies, stakeholders and the general public with sufficient detail to understand and comply with CEQA regulations in addition to the FGC statutes and Title 14, CCR, regulations.

### **Benefits of the Proposed Regulations**

The proposed regulations provide clarity to words and terms, which can and have been, interpreted in various ways by stakeholders, the general public and Department staff. Department scientists and wardens regularly advise the public on compliance with the prohibitions and enforce the statutes when violations occur.

The definitions in the proposed regulations are generally consistent with

past interpretations by Department scientists and wardens. However, these regulations provide a standard for general application that will provide for consistent interpretation, will efficiently use Department staff resources, and will enhance enforcement.

The proposed regulations provide several exceptions to the prohibitions where other regulatory mechanisms serve similar purposes, thereby reducing redundant legal requirements. One exception to the prohibitions is for emergencies, which are already defined in the Public Resources Code. This provides a pragmatic and reasonable recognition of extenuating circumstances.

(b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Sections 3503 and 3503.5, Fish and Game Code; and Section 21083 Public Resources Code.

Reference: Sections 1601, 1602, 1603, 1611, 1614, 2000, 3511, Fish and Game Code; and Sections 4629.6(c), 21060.3, 21083, and 21166, Public Resources Code.

(c) Specific Technology or Equipment Required by Regulatory Change:

None.

(d) Identification of Reports or Documents Supporting Regulation Change:

None.

(e) Public Discussions of Proposed Regulations Prior to Notice Publication:

Development of these proposed regulations occurred following numerous meetings with potentially affected entities, including governmental organizations, businesses and their lobbying organizations and non-governmental environmental organizations. These discussions were conceptual in that various approaches were discussed and each party had an opportunity to provide their views and experience.

No public meetings are being held prior to the notice publication. The 45-day comment period provides adequate time for review of the proposed amendments.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

In the course of developing these regulations, the Department evaluated different potential approaches, which included:

1. CEQA Review: The Department considered an alternative whereby any take or possession which occurred would be exempted from the statutory prohibitions if the Department had provided recommendations to the lead agency during the course of CEQA review, and the lead agency had adopted those recommendations as enforceable conditions. This concept was rejected for a combination of reasons, which included: 1) most activities subject to the statutory prohibitions do not require CEQA compliance; 2) Department staff resources are insufficient to review most CEQA projects; and 3) monitoring the implementation by CEQA lead agencies is not feasible with existing staff levels.
2. Permitting Program: The Department considered a “permitting program” alternative that would provide exceptions to the prohibitions under a permit system with specific requirements to minimize and mitigate impacts. This concept was rejected due to the related challenges of establishing a permit fee structure, a CEQA compliance strategy for individual permits, and increased need for State budget and personnel authority.
3. Broad Exceptions to Prohibitions: The Department considered an alternative that restricted the prohibitions to only those species whose populations are at risk in California. This approach would maintain the prohibitions for threatened or endangered species and bird species of special concern. This concept was rejected because it does not meet the intent of the statutes and the related compliance with CEQA would require significant expenditures of staff time and funding.

(b) No Change Alternative:

If no regulatory action occurs, Fish and Game Code sections 3503 and 3503.5 will continue to have varied interpretations and applications throughout the State depending on the experience, background and biases of the individual, or entity. The lack of regulatory clarity will continue to make it difficult for the Department to enforce these statutes and the public will continue to be confused and uncertain on how to comply with the statutory

requirements.

(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 proposed regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

V. Economic Impact Assessment:

(a) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, 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 because it will not create any new requirements.

Reviewing the Department's past implementation and enforcement of the FGC 3503 and 3503.3 statutes combined with outreach to potentially affected entities, including governmental organizations, businesses and their lobbying organizations and non-governmental environmental organizations, the Department developed a clear understanding of the challenges these statutory prohibitions presented to agriculture, forestry, the building industry, transportation agencies, utilities and others, as well as the concerns held by environmental and conservation organizations regarding the extent to which different interpretations of these statutes present risks to nesting birds.

The Department's ongoing interaction with its stakeholders helped clarify our approach regarding the most reasonable interpretation of these statutes that implements the Legislature's intent and balances stakeholder concerns with the Department's conservation mission. As a result, the Department developed the proposed regulations to formalize the interpretations that the Department has traditionally followed in making California Environmental Quality Act (CEQA) recommendations, permit conditions and enforcement practices for implementing the FGC statutes.

(b) Effects of the Regulation on the Creation or Elimination of Jobs Within the State:

The proposed regulatory action is not anticipated to create or eliminate jobs within the state because it will not create any new requirements. The proposed regulations are intended to formalize the interpretations that the Department has traditionally followed in making CEQA recommendations, permit conditions and enforcement practices for implementing the FGC statutes.

(c) Effects of the Regulation on the Creation of New Businesses or the Elimination of Existing Businesses Within the State:

The proposed regulatory action is not anticipated to create new businesses or eliminate existing businesses within the state because it will not create any new requirements. The regulations are intended to formalize the interpretations that the Department has traditionally followed in making CEQA recommendations, permit conditions and enforcement practices for implementing the FGC statutes.

(d) Effects of the Regulation on the Expansion of Businesses Currently Doing Business Within the State:

The proposed regulatory action is not anticipated to induce the expansion of businesses currently doing business within the state because it will not create any new requirements. The regulations are intended to formalize the interpretations that the Department has traditionally followed in making CEQA recommendations, permit conditions and enforcement practices for implementing the FGC statutes.

(e) Benefits of the Regulation to the Health and Welfare of California Residents:

The Department anticipates benefits to the health and welfare of California residents through more uniform application of statutes regulating the take and possession of bird nests, eggs and birds of prey as a result of the proposed action.

(f) Benefits of the Regulation to Worker Safety:

The Department does not anticipate substantial benefits to worker safety as a result of the proposed action.

(g) Benefits of the Regulation to the State's Environment:

The proposed regulations should benefit the state's environment by clarifying and increasing consistency in the application of nest regulations



in the state.

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

The Department does not anticipate increased cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

(i) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None.

(j) Nondiscretionary Costs/Savings to Local Agencies: None.

(k) Programs Mandated on Local Agencies or School Districts: None.

(l) 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.

(m) Effect on Housing Costs: None.

## **Informative Digest/Policy Statement Overview**

For many years, the California Department of Fish and Wildlife (Department) has considered various approaches to pragmatically implement the prohibitions in Fish and Game Code sections 3503 and 3503.5 related to nesting birds and birds of prey. The Department involved various stakeholders who brought different experiences and perspectives to the dialogue. Through this outreach, combined with past Department implementation of the statutes, the Department has developed a clear understanding of the challenges these prohibitions present to agriculture, forestry, the building industry, transportation agencies, utilities and others, as well as the concerns held by environmental and conservation organizations regarding the extent to which different interpretations of the statutes present risks to nesting birds.

The Department's ongoing interaction with our stakeholders helped clarify the Department's approach regarding the most reasonable interpretation of these statutes that implements the Legislature's intent and balances stakeholder concerns with the Department's conservation mission. As a result, the Department developed Title 14, California Code of Regulations (CCR), regulations that formalize the interpretations that the Department has traditionally followed in making California Environmental Quality Act (CEQA) recommendations, permit conditions and enforcement practices for implementing the FGC statutes.

### **Proposed Regulations**

Subsection 681(a), Title 14, CCR, provides the purpose and scope of the proposed regulations to implement FGC sections 3503 and 3503.5 and Public Resources Code Section 21083 and further describes the Department's consultation role in the CEQA regarding FGC sections 3503 and 3503.5. The information provides stakeholders and the general public with necessary detail to improve understanding of the FGC statutes and Title 14, CCR, regulations.

Subsection 681(b), Title 14, CCR, defines terminology used in the statutes and proposed regulations. The terms used in FGC sections 3503 and 3503.5 are subject to varied interpretation and application depending on the experience, background and views of the individual, or entity. These definitions are necessary to provide stakeholders and the general public a better understanding of key terms in order to fully comply with the FGC and regulations, as well as to ensure that the regulations are clear and legally enforceable.

Subsection 681(c), Title 14, CCR, lists the exceptions to the proposed regulations. These exceptions do not affect the Department's authority pursuant to any other provision of the FGC or State compliance with federal regulations. The exceptions are necessary to reduce possible conflict between the proposed regulations and other Department authorities in State statutes and regulations.

Subsection 681(d), Title 14, CCR, provides the CEQA Thresholds of Significance to determine the potential significance of impacts related to the take, possession, needless destruction or destruction of native bird nests, eggs, or birds of prey. These thresholds provide lead agencies, stakeholders and the general public with sufficient detail to understand and comply with CEQA regulations along with the FGC statutes and Title 14, CCR, regulations.

### **Benefits of the Proposed Regulations**

The proposed regulations provide clarity to terms that are subject to diverse interpretations by stakeholders, the general public and Department staff. Department scientists and wardens regularly advise the public on compliance with the prohibitions and enforce the statutes when violations occur.

The definitions in the proposed regulations are generally consistent with past interpretations by Department scientists and wardens. However, these regulations provide a standard for general application that will provide for consistent interpretation, will efficiently use Department staff resources, and will enhance enforcement.

The proposed regulations provide several exceptions to the prohibitions where other regulatory mechanisms serve similar purposes, thereby reducing redundant legal requirements. One exception to the prohibitions is for an emergency, which word is already defined in the Public Resources Code. This exception provides a pragmatic and reasonable recognition of extenuating circumstances.

### **Evaluation of Incompatibility with Existing Regulations**

The Department has searched the CCR for any other regulations governing the take, possession, or needless destruction of nests, eggs or birds of prey.

The Board of Forestry and Fire Protection (Board) has promulgated rules that provide general and specific protection measures for nest sites of several specific bird species that the Board has formally designated as “Sensitive” species. The Board regulations generally provide more protection for habitat surrounding the nest than do these proposed regulations.

Various sections of the Fish and Game Code, and related regulations in Title 14, regulate the take of wildlife, including candidate, threatened or endangered species. These draft regulations are specifically written to be compatible with those authorities and, in some cases, provide exceptions to otherwise stated prohibitions where take is authorized in accordance with those authorities.

The Department has concluded that the proposed regulations are neither inconsistent nor incompatible with existing State regulations. As the State’s trustee agency for fish and wildlife, the Department has the primary authority to promulgate regulations

regarding the protection of nesting birds and birds of prey.