

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
INITIAL STATEMENT OF REASONS FOR PROPOSED REGULATORY ACTION

Amend Section 670.2
Title 14, California Code of Regulations
Re: Plants of California Declared to Be Endangered, Threatened or Rare

- I. Date of Initial Statement of Reasons: August 15, 2018
- II. Dates and Locations of Scheduled Hearings:
- (a) Notice Hearing: Date: April 19, 2018
Location: Ventura, CA
- (b) Adoption Hearing: October 18, 2018
Location: Fresno
- III. Description of Regulatory Action:
- (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

On April 19, 2018, at a noticed public meeting, the Fish and Game Commission (“Commission”) found that the petitioned actions to list the Lassics lupine (*Lupinus constancei*) and coast yellow leptosiphon (*Leptosiphon croceus*) as endangered plants under provisions of the California Endangered Species Act (CESA) were warranted. The proposed regulation will add the Lassics lupine and the coast yellow leptosiphon to the list of endangered plants found in Section 670.2, Title 14, California Code of Regulations (CCR), in furtherance of the policy of the State.

The Legislature has declared that certain species of fish, wildlife, and plants are in danger of, or threatened with, extinction and that these species of fish, wildlife, and plants are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this State, and the conservation, protection, and enhancement of these species and their habitat is of statewide concern. It is the policy of the State to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat. Section 670.2 provides a list, established by the Commission, of plants designated as endangered, threatened or rare in California. The Commission has the authority to add or remove species from the list if it finds, upon the receipt of sufficient scientific information, that the action is warranted.

LASSICS LUPINE

On July 19, 2016, the Commission received a petition from Mr. Dave Imper and Ms. Cynthia Elkins from the Center for Biological Diversity to list the Lassics lupine (*Lupinus constancei*) as endangered under provisions of the CESA. (Section 2050, Fish and Game Code, et seq.) The Commission transmitted the petition to the Department of Fish and Wildlife (“Department”) for evaluation. (Cal. Reg. Notice Register 2016, No. 33-Z, p. 1463).

The Department prepared a petition evaluation report which it delivered to the Commission on

December 8, 2016. Based upon information contained in the petition and in relation to other relevant information, the Department recommended to the Commission that there was sufficient information to indicate that the petitioned action may be warranted and that the Commission should accept the petition. During a public meeting on February 8, 2017, the Commission heard the Department's presentation regarding the petition evaluation report and recommendation, as well as public testimony, and determined that the petition contained sufficient information to indicate that the petitioned action may be warranted. The Commission published its Notice of Findings in the California Regulatory Notice Register on February 24, 2017 designating *Lassics lupine* as a candidate species. (Cal. Reg. Notice Register 2017, No. 8-Z, p. 258; see also sections 2068, 2080, and 2085, Fish and Game Code)

Pursuant to Section 2074.6, Fish and Game Code, the Department then prepared a review of the status of *Lassics lupine*, based upon the best scientific information available to the Department. The Department submitted its "*Report to the Fish and Game Commission: Status Review of Lassics Lupine (Lupinus constancei)*" dated January 2018 to the Commission, including a recommendation based upon the best scientific information available that, in the Department's independent judgment, the petitioned action to list *Lassics lupine* as endangered under CESA is warranted.

On April 19, 2018, at a noticed public meeting, the Commission found that the petitioned action was warranted to list the *Lassics lupine (Lupinus constancei)*.

The proposed amendment to Section 670.2 will add the *Lassics lupine* to the list of endangered plants in furtherance of the Commission's finding and the policy of the State.

COAST YELLOW LEPTOSIPHON

On May 25, 2016, the Commission received a petition from Ms. Toni Corelli, cosponsored by the California Native Plant Society (CNPS) seeking action to list coast yellow leptosiphon (*Leptosiphon croceus*) as an endangered plant under provisions of CESA. (Section 2050, Fish and Game Code, et seq.) The Commission transmitted the petition to the Department for evaluation. (Cal. Reg. Notice Register 2016, No. 24-Z, p. 1002.)

The Department prepared a petition evaluation report which it delivered to the Commission on September 26, 2016. Based upon information contained in the petition and in relation to other relevant information, the Department recommended to the Commission that there was sufficient information to indicate that the petitioned action may be warranted and that the Commission should accept the petition. During a public meeting on December 8, 2016, the Commission heard the Department's presentation regarding the petition evaluation report and recommendation and determined that the petition contained sufficient information to indicate that the petitioned action may be warranted. The Commission published its Notice of Findings in the California Regulatory Notice Register on December 23, 2016, designating coast yellow leptosiphon as a candidate species. (Cal. Reg. Notice Register 2016, No. 52-Z, p. 2197; see also sections 2068, 2080, and 2085, Fish and Game Code)

Pursuant to Section 2074.6, Fish and Game Code, the Department then prepared a review of the status of coast yellow leptosiphon, based upon the best scientific information available to the Department. The Department submitted its "*Report to the Fish and Game Commission: Status Review of Coast Yellow Leptosiphon (Leptosiphon croceus)*" dated December 2017 to

the Commission, including a recommendation based upon the best scientific information available that, in the Department's independent judgment, the petitioned action to list coast yellow leptosiphon as endangered under CESA is warranted.

On April 19, 2018, at a noticed public meeting, the Commission found that the petitioned action was warranted to list the coast yellow leptosiphon (*Leptosiphon croceus*).

The proposed amendment to Section 670.2 will add the coast yellow leptosiphon to the list of endangered plants in furtherance of the Commission's finding and the policy of the State.

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

Authority: Sections 1904 and 2070, Fish and Game Code.

Reference: Sections 1755, 1904, 2062, 2067, 2070, 2072.7 and 2075.5, Fish and Game Code.

(c) Specific Technology or Equipment Required by Regulatory Change: None.

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

[Petition to List the Lassics Lupine \(*Lupinus constancei*\) as Endangered under the California Endangered Species Act](#) (Imper and Elkins, July 15, 2016).

[Report to the Commission, "Evaluation of the Petition from Mr. David Imper and Ms. Cynthia Elkins to List Lassics Lupine \(*Lupinus constancei*\) as an Endangered Species under the California Endangered Species Act"](#) (Department of Fish and Wildlife, December, 2016).

[Report to the Commission, "Status Review of Lassics Lupine \(*Lupinus constancei*\)"](#) (Department of Fish and Wildlife, January 2018).

[Petition to list Coast Yellow Leptosiphon \(*Leptosiphon croceus*\) as Endangered under the California Endangered Species Act](#) (Corelli, May 23, 2016).

[Report to the Commission, "Evaluation of the Petition from Ms. Toni Corelli and the California Native Plant Society to list Coast Yellow Leptosiphon \(*Leptosiphon croceus*\) as an Endangered Species under the California Endangered Species Act"](#) (Department of Fish and Wildlife, September 2016).

[Report to the Commission, "Status Review of Coast Yellow Leptosiphon \(*Leptosiphon croceus*\)"](#) (Department of Fish and Wildlife, December 2017).

(e) Efforts to Avoid Unnecessary Duplication or Conflicts with Federal Regulations:

The Commission has reviewed existing federal regulations contained in the Code of Federal Regulations addressing the same issues as the proposed regulations, including federal regulations governing the listing of species pursuant to the federal Endangered Species Act. Those regulations are found in Title 50 of the Code of Federal Regulations. Lassics lupine and coast yellow leptosiphon are not federally listed as threatened or

endangered (50 C.F.R. § 17.12). The Commission considered whether the proposed regulations duplicate or conflict with federal regulations and has concluded that the proposed regulations do not duplicate or conflict with the federal regulations because neither Lassics lupine nor coast yellow leptosiphon are protected as a threatened or endangered species under federal regulations.

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

The Commission received the Department's status review reports for Lassics lupine and coast yellow leptosiphon at its February 8, 2018 meeting, after which both status review reports were posted on the Commission and Department websites, and the Commission solicited public testimony at its April 19, 2018 meeting. As required by Fish and Game Code Section 2074.4, the Department notified interested parties of the proposed listings and requested data and comments on the petitions for Lassics lupine and coast yellow leptosiphon. Comments received are included in the status review reports referenced above under Section III (d).

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

No alternatives were identified.

(b) No Change Alternative:

If the regulation change is not adopted, the Lassics lupine and coast yellow leptosiphon will have no formal State legal status, the positions they held prior to the filing of petitions to list these species. The no change alternative is inconsistent with the Commission's determinations at its April 19, 2018 meeting that listing the species as endangered is warranted pursuant to Fish and Game Code Section 2075.5.

(c) Consideration of Alternatives:

In view of information currently possessed, 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 purposes 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. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

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:

While the statutes of CESA 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.

Listing under CESA is 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 are in apparent conflict with Section 11346.3, which is activated by the rulemaking component of CESA.

Since the finding portion of CESA is silent to consideration of economic impact, it is possible that subdivision (a) of Section 11346.3 does not exclude the requirement for 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 Lassics lupine and coast yellow leptosiphon as endangered will subject them to the provisions of CESA. CESA prohibits take and possession except as may be permitted by the Department, the Native Plant Protection Act, or the California Desert Native Plants Act.

Endangered status for Lassics lupine and coast yellow leptosiphon 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 endangered species to be subject to the same requirements under CEQA as though they were already listed by the Commission in Section 670.2 (CEQA Guidelines, Section 15380). Lassics lupine and coast yellow leptosiphon have been recognized as rare plants in California for several decades, qualifying them for protection under CEQA Guidelines Section 15380.

Required mitigation as a result of lead agency actions 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, establishing new populations, installation of protective devices such as fencing, protection of additional habitat, 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 proponent. If the mitigation measures required by the CEQA lead agency do not minimize and fully mitigate to the standards of CESA, listing could increase business costs by requiring measures beyond those required by CEQA.

Although compliance with CESA could result in some additional costs for projects that affect State-listed species, the distributions of Lassics lupine and coast yellow leptosiphon are very restricted. Furthermore, Lassics lupine only occurs on land that is under federal jurisdiction. It is unlikely that there will be many significant actions affecting the species that will be subject to the application of CESA or CEQA. Coast yellow leptosiphon is restricted to one small population on a single sea bluff. Therefore, designating Lassics lupine and coast yellow leptosiphon as endangered is unlikely to have any 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 Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:

The Commission does not anticipate that there will be 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 as a result of the designation of Lassics lupine and coast yellow leptosiphon as endangered. The entire distribution of Lassics lupine is limited to two small and remote populations located entirely on federal land managed by the U.S. Forest Service. Coast yellow leptosiphon is restricted to one small population on a single sea bluff. Because of these localized distributions, adding Lassics lupine and coast yellow leptosiphon to the list of endangered species under CESA is unlikely to affect the creation or elimination of jobs or businesses within the State as a whole.

The Commission does not anticipate benefits to the health and welfare of California residents or to worker safety.

The Commission anticipates benefits to the State's environment by the protection of Lassics lupine and coast yellow leptosiphon.

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

Designation of Lassics lupine and coast yellow leptosiphon as endangered is unlikely to have any cost impacts on a representative private person or business. The entire distribution of Lassics lupine is limited to two small and remote populations located entirely on federal land managed by the U.S. Forest Service. Because Lassics lupine

only occurs on land that is under federal jurisdiction and coast yellow leptosiphon is restricted to one small population on a single sea bluff, it is unlikely that there will be any actions affecting the species that will be subject to the application of CESA or CEQA, or that will result in any cost impacts on a representative private person or business.

Furthermore, designation of threatened or endangered status, per se, would not necessarily result in any significant cost to private persons or entities undertaking activities that were subject to CEQA. CEQA presently 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 are already listed by the Commission in Section 670.2, Title 14, CCR. (CEQA Guidelines, Section 15380)

Any added costs should be more than offset by savings that would be realized through the informal consultation process available to private applicants under CESA. The process would allow conflicts to be resolved at an 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, Government Code:

None.

(h) Effect on Housing Costs:

None.

VII. Economic Impact Assessment

The APA process requires an analysis of the proposed regulatory action's economic impact to assess that impact and avoid unnecessary or unreasonable regulatory requirements. Government Code Section 11346.3, subdivision (a), provides that agencies shall satisfy economic assessment requirements only to the extent that the requirements do not conflict with other State laws. Further, Section 11346.3, subdivision (e), states that "[r]egulatory impact analyses shall inform the agencies and the public of the economic consequences of regulatory choices, not reassess statutory policy."

The Commission's determination pursuant to CESA is governed by scientific considerations. "The Commission shall add or remove species from either [the endangered or threatened species] list if it finds, upon the receipt of sufficient scientific information pursuant to this article, that the action is warranted" (Section 2070, Fish and Game Code). The Commission shall list the subject species if it determines that its continued existence is in serious danger or is threatened by any one or any combination of enumerated biological factors. (Section 670.1(i)(1)(A), Title 14, CCR)

CESA is silent as to consideration of the economic impacts, and caselaw states that the Commission's decisions are based on science, not economics. (*Natural Resources Defense Council v. Cal. Fish & Game Comm'n* (1994) 28 Cal.App.4th 1104, 1118, fn. 11.) This caselaw reflects the fact that CESA was drafted in the image of the federal Endangered Species Act. (*Id.* at 1117-1118.) The federal act specifically prohibits consideration of possible economic impacts during the listing or delisting process. (50 C.F.R. § 424.11(b))

The Legislature additionally declares a statutory policy in Section 2051, Fish and Game Code, that species of fish, wildlife and plants that are in danger of or threatened with extinction "are of ecological, educational, historical, recreational, esthetic, economic, and scientific value to the people of this state, and the conservation, protection, and enhancement of these species and their habitat is of statewide concern."

The Commission's findings pursuant to CESA are final decisions that are subject to judicial review. (Section 2076, Fish and Game Code.) Once the Commission has made a finding that the petitioned action is warranted, it must initiate a rulemaking process under the APA to make a corresponding regulatory change. (Section 2075.5(e)(2), Fish and Game Code.)

The following analysis of the likely economic impact of the proposed regulatory change on businesses and private individuals provides information to the public and agencies, as contemplated by Government Code Section 11346.3, subdivision (e), and serves a basic purpose of the APA process. (See *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal. 4th 557, 568.) Consistent with the APA, this analysis does not reassess the policy set forth in the Fish and Game Code and exercised by the Commission in its listing determination. The Commission believes that this analysis fully meets the intent and language of both statutory programs.

(a) Effects of the regulation on the creation or elimination of jobs within the State:

The Commission does not anticipate that there will be any impacts on the creation or elimination of jobs in California as a result of the designation of Lassics lupine and coast yellow leptosiphon as endangered. The entire distribution of Lassics lupine is limited to two small and remote populations located entirely on federal land managed by the U.S. Forest Service. Coast yellow leptosiphon is restricted to one small population on a single sea bluff. Because of these localized distributions, adding Lassics lupine and coast yellow leptosiphon to the list of endangered species under CESA is unlikely to affect the creation or elimination of jobs within the State as a whole.

Designation of Lassics lupine and coast yellow leptosiphon as an endangered species will subject them to the provisions of CESA. CESA prohibits the take, import, export,

possession, purchase and sale of listed species except as provided by the Fish and Game Code. Lassics lupine and coast yellow leptosiphon have been subject to CESA's take prohibition since the Commission designated them as candidate species on February 24, 2017, and December 23, 2016, respectively.

Prior to listing, where an activity was a project subject to public agency review and approval under CEQA, impacts to Lassics lupine and coast yellow leptosiphon would have been evaluated as part of the CEQA lead agency's mandatory consideration of a project's impacts to biological resources. The intensity of that evaluation was heightened by the non-regulatory designation of Lassics lupine and coast yellow leptosiphon as California Rare Plant Rank 1B plants, and also heightened when Lassics lupine and coast yellow leptosiphon became candidates for listing.

Project costs arising from CEQA compliance typically include, but are not limited to, purchase of off-site habitat, development and implementation of management plans, establishment of new populations, protection of additional habitat, and long-term monitoring of mitigation sites. Public agencies might also require additional actions should the mitigation measures fail, resulting in added expenditures by the project proponent.

If a project subject to CEQA were to affect Lassics lupine or coast yellow leptosiphon, and the mitigation measures required by a public agency for purposes of CEQA did not minimize and fully mitigate project effects on the species as required for the Department to issue an incidental take permit pursuant to CESA, additional compliance costs may arise as a result of the listing. Because the take prohibition for both candidate and listed species is the same, such costs would not be increased by the act of adding Lassics lupine and coast yellow leptosiphon to the endangered species list.

- (b) Effects of the regulation on the creation of new businesses or the elimination of existing businesses within the State:

The Commission does not anticipate that there will be any impacts on the creation of new businesses or the elimination of existing businesses within the State as a result of the designation of Lassics lupine and coast yellow leptosiphon as endangered. The entire distribution of Lassics lupine is limited to two small and remote populations located entirely on federal land managed by the U.S. Forest Service. Coast yellow leptosiphon is restricted to one small population on a single sea bluff. Because of these localized distributions, adding Lassics lupine and coast yellow leptosiphon to the list of endangered species under CESA is unlikely to have any effect on the creation of new businesses or the elimination of existing businesses within the State.

- (c) Effects of the regulation on the expansion of businesses currently doing business within the State:

The Commission does not anticipate that there will be any impacts on the expansion of businesses currently doing business within the State as a result of the designation of Lassics lupine and coast yellow leptosiphon as endangered. The distributions of Lassics lupine and coast yellow leptosiphon are highly restricted. Because of this localized distribution, adding Lassics lupine and coast yellow leptosiphon to the list of endangered species under CESA is unlikely to have any effect on the expansion of businesses currently doing business within the State.

- (d) Benefits of the regulation to the health and welfare of California residents:

Lassics lupine and coast yellow leptosiphon are of ecological, educational, historical, recreational, esthetic, cultural, and scientific value to the people of this State. The conservation, protection, and enhancement of the species and their habitat will benefit the health and welfare of California residents.

- (e) Benefits of the regulation to worker safety:

The proposed regulation will not affect worker safety because it does not address working conditions.

- (f) Benefits of the regulation to the State's environment:

As discussed above, the Legislature has identified the conservation, protection and enhancement of endangered species and their habitat as an issue of statewide concern and has recognized these species' value, including their economic value. Improved conditions in Lassics lupine and coast yellow leptosiphon habitat resulting from take avoidance and species enhancement efforts could also be expected to result in improved conditions for other species that are critical to the economy, as well as improvements to water quality and other environmental resources.

Informative Digest/Policy Statement Overview

Section 670.2, Title 14, California Code of Regulations (CCR), provides a list, established by the California Fish and Game Commission (Commission), of plants designated as endangered, threatened or rare in California. The Commission has the authority to add or remove species from this list if it finds that the action is warranted.

As required by Fish and Game Code Section 2075.5, subdivision (e)(2), the Commission must initiate proceedings in accordance with the Administrative Procedure Act to amend Section 670.2 to add Lassics lupine (*Lupinus constancei*) and coast yellow leptosiphon (*Leptosiphon croceus*) to the list of endangered plants.

In making the recommendation to list Lassics lupine pursuant to the California Endangered Species Act, the California Department of Fish and Wildlife (Department) identified the following primary threats: (1) predation and herbivory; (2) climate change; (3) vegetation encroachment; (4) the vulnerability of small populations; and (5) fire. More detail about the current status of Lassics lupine can be found in the Report to the Fish and Game Commission, "Status Review of Lassics lupine (*Lupinus constancei*)" (Department of Fish and Wildlife, January 2018).

In making the recommendation to list coast yellow leptosiphon pursuant to the California Endangered Species Act, the Department identified the following primary threats: 1) recent and ongoing development and land-use changes; 2) impacts from invasive plant species; 3) erosion; 4) human activities such as trampling; and 5) the vulnerability of small populations. More detail about the current status of coast yellow leptosiphon can be found in the Report to the Fish and Game Commission, "Status Review of Coast Yellow Leptosiphon (*Leptosiphon croceus*)" (Department of Fish and Wildlife, December 2017).

The proposed regulation will benefit the environment by protecting Lassics lupine and coast yellow leptosiphon as endangered plants.

Commission staff has searched the California Code of Regulations and has found that the proposed regulation is neither inconsistent nor incompatible with existing State regulations. No other State entity has the authority to list threatened and endangered species.