

STAFF SUMMARY FOR OCTOBER 11-12, 2023

5. SAN BERNARDINO KANGAROO RAT**Today's Item**Information Action

Consider ratifying findings on the decision to list San Bernardino kangaroo rat (*Dipodops merriami parvus*) as endangered under the California Endangered Species Act (CESA).

Summary of Previous/Future Actions

- Received petition March 15, 2019
- Determined petitioned action may be warranted, August 7-8, 2019
initiating Department's one-year status review
- Determined listing is warranted February 16-17, 2022
- **Today consider adopting findings** **October 11-12, 2023**

Background

In March 2019, the Commission received a petition from the Endangered Habitats League to list San Bernardino kangaroo rat as endangered under CESA. At its August 2019 meeting, the Commission determined that the listing may be warranted and subsequently provided notice regarding protected, candidate species status for San Bernardino kangaroo rat. The notice prompted the Department's status review of the species as required by California Fish and Game Code Section 2074.6.

The Commission received the Department's status review report in December 2021. In February 2022, pursuant to Section 2075.5 of the Fish and Game Code, the Commission determined that listing San Bernardino kangaroo rat as endangered is warranted. Section 2075.5 of the Fish and Game Code requires that the Commission adopt written findings to support that decision.

Commission staff developed a draft notice of findings for the Commission consideration (Exhibit 1).

Significant Public Comments (N/A)**Recommendation**

Commission staff: Under a motion to adopt the consent calendar, adopt the proposed findings for the decision to list San Bernardino kangaroo rat as endangered under CESA.

Exhibits

1. [Draft notice of findings, dated September 19, 2023](#)

Motion

Moved by _____ and seconded by _____ that the Commission adopts the staff recommendations for items 3 through 5 on the consent calendar.

California Fish and Game Commission
DRAFT Notice of Findings for
San Bernardino Kangaroo Rat
(*Dipodomys merriami parvus*)

September 19, 2023

NOTICE IS HEREBY GIVEN that the California Fish and Game Commission (Commission), at a meeting on February 16-17, 2022, found pursuant to California Fish and Game Code Section 2075.5, that the information contained in the petition to list the subspecies San Bernardino kangaroo rat (*Dipodomys merriami parvus*) and other information in the record before the Commission, warrants adding San Bernardino kangaroo rat to the list of endangered species under the California Endangered Species Act (CESA) (Fish and Game Code, Section 2050 et seq.). (See also California Code of Regulations, Title 14, Section 670.1, subsection (i))

NOTICE IS ALSO GIVEN that, at its October 11-12, 2023, meeting, the Commission adopted the following findings outlining the reasons for its determination.

I. Background and Procedural History

Petition History

On March 15, 2019, the Endangered Habitats League submitted a petition to the Commission to list the San Bernardino kangaroo rat as endangered under CESA. The Commission reviewed the petition for completeness, and pursuant to Section 2073 of the California Fish and Game Code, referred the petition to the California Department of Fish and Wildlife (Department) on March 22, 2019 for evaluation. The Commission gave public notice of receipt of the petition on April 12, 2019 (California Regulatory Notice Register 2019, No. 15-Z, p.575). The Department transmitted to the Commission the Department's petition evaluation on May 20, 2019, and on June 12, 2019, the Commission formally received the Department's petition evaluation.

At its August 7-8, 2019 meeting, the Commission determined that listing may be warranted, and subsequently provided notice regarding the San Bernardino kangaroo rat 's candidate species status (California Regulatory Notice Register 2019, No. 34-Z, p. 1182).

Status Review Overview

The Commission's action designating San Bernardino kangaroo rat as a candidate species triggered the Department's process for conducting a status review to inform the Commission's decision on whether to list the species.

On November 19, 2021, the Department transmitted to the Commission the Department's report to the Commission, *Report to the Fish and Game Commission A Status Review of the San Bernardino kangaroo rat (Dipodomys merriami parvus) in California*, dated November 17, 2021. On December 15, 2021, the Commission formally received the Department's status review report during a public meeting. On February 17, 2022, the Commission found that the information contained in the petition to list San Bernardino kangaroo rat and other information in the record before the Commission warranted listing San Bernardino kangaroo rat as an endangered species under CESA.

Species Description

Kangaroo rats are notable for their bipedal locomotion, ability to subsist in dry habitats without drinking water, and external fur-lined cheek pouches used to carry seeds from foraging areas to cache locations. Kangaroo rats have relatively large heads, large hind feet, and long tufted tails, which help provide balance and agility while hopping.

The San Bernardino kangaroo rat is one of 19 subspecies of Merriam's kangaroo rat (*Dipodomys merriami*) and one of three subspecies occurring in southern California. The San Bernardino kangaroo rat occurs only in California and its geographic range does not overlap with the range of the other Merriam's kangaroo rat subspecies.

Information in the record indicates that the San Bernardino kangaroo rat is sufficiently different from the other subspecies to potentially warrant taxonomic designation as a full species.

The fur on its back, sides, and head is faintly yellow, with an overwash of dusky brown and with white fur on its belly and legs. The tail has dark brown stripes running along the dorsal and ventral surface, with whitish fur on the sides of the tail. The tail has a tuft of longer fur at its end. There are four toes on each hind foot, which distinguishes it from other similar sized kangaroo rats within its range, which have five toes on the hind feet.

II. Statutory and Legal Framework

The Commission, as established by the California State Constitution, has exclusive statutory authority under California law to designate endangered, threatened, and candidate species under CESA. (California Constitution, Article IV, Section 20, subdivision (b); Fish and Game Code Section 2070.) The CESA listing process for this species began in the present case with the submittal of the petition to the Commission. The regulatory and legal process that ensued is described in some detail in the preceding section, along with related references to the Fish and Game Code and controlling regulations. The CESA listing process generally is also described in some detail in published appellate case law in California, including:

- Natural Resources Defense Council v. California Fish and Game Commission (1994) 28 Cal.App.4th 1104;
- Mountain Lion Foundation v. California Fish and Game Commission (1997) 16 Cal.4th 105;
- California Forestry Association v. California Fish and Game Commission (2007) 156 Cal.App.4th 1535;
- Center for Biological Diversity v. California Fish and Game Commission (2008) 166 Cal.App.4th 597;
- Central Coast Forest Association v. California Fish and Game Commission (2017) 2 Cal. 5th 594;
- Central Coast Forest Association v. California Fish and Game Commission (2018) 18 Cal.App. 5th 1191; and
- Almond Alliance of California v. California Fish and Game Commission (2022) 79 Cal.App. 5th 337.

The “is warranted” determination stems from Commission obligations established by Fish and Game Code Section 2075.5. Under the provision, the Commission is required to make one of two findings for a candidate species at the end of the CESA listing process; namely, whether listing a species is warranted or is not warranted. Here, the Commission made the finding under Section 2075.5(e)(2) that listing is warranted.

The Commission was guided in making its determinations by statutory provisions and other controlling law. The Fish and Game Code, for example, defines an endangered species under CESA as “a native species or subspecies of a bird, mammal, fish, amphibian, reptile or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease” (Fish and Game Code Section 2062). Similarly, the Fish and Game Code defines a threatened species under CESA as “a native species or subspecies of a bird, mammal, fish, amphibian, reptile or plant that, although not presently threatened with extinction, is likely to become an endangered species in the foreseeable future in the absence of the special protection and management efforts required by this chapter” (*Id.*, Section 2067).

The Commission also considered Title 14, Section 670.1, subsection (i)(1)(A), of the California Code of Regulations in making its determination. The provision provides, in pertinent part, that the Commission will list the species or subspecies as endangered or threatened under CESA if the Commission determines that its continued existence is in serious danger or is threatened by any one or any combination of the following factors:

1. Present or threatened modification or destruction of its habitat,
2. overexploitation,
3. predation,
4. competition,
5. disease, or
6. other natural occurrences or human-related activities.

Fish and Game Code Section 2070 provides similar guidance, providing that the Commission shall add or remove species from the list of endangered and threatened species under CESA only upon receipt of sufficient scientific information that the action is warranted. Similarly, CESA provides that it is the policy of the state, not specific to the Commission per se, that all state agencies, boards, and commissions shall seek to conserve endangered and threatened species and shall utilize their authority in furtherance of the purposes of CESA (Fish and Game Code Section 2055). The statutory guidance does not compel a particular determination by the Commission in the CESA listing context. Nevertheless, “[l]aws providing for the conservation of natural resources’ such as the CESA are of great remedial and public importance and thus should be construed liberally.” (*California Forestry Association v. California Fish and Game Commission*, supra, 156 Cal.App.4th at pp. 1545-1546, citing *San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 601; Fish and Game Code sections 2051, 2052.)

Finally, in considering the six identified factors, CESA and controlling regulations require the Commission to actively seek and consider related input from the public and any interested party (see, e.g., *Id.*, sections 2071, 2074.4, 2078; California Code of Regulations, Title 14, Section 670.1, subdivision (h)). The related notice obligations and public hearing opportunities

before the Commission are also considerable (Fish and Game Code sections 2073.3, 2074, 2074.2, 2075, 2075.5, 2078; California Code of Regulations, Title 14, Section 670.1, subdivisions (c), (e), (g), (i); see also California Government Code Section 11120 et seq.). The referenced obligations are in addition to the requirements prescribed for the Department in the CESA listing process, including an initial evaluation of the petition, a related recommendation regarding candidacy, and a review of the candidate species' status, culminating with a report and recommendation to the Commission as to whether listing is warranted based on the best available science (Fish and Game Code sections 2073.4, 2073.5, 2074.4, 2074.6; California Code of Regulations, Title 14, Section 670.1, subdivisions (d), (f), (h)).

III. Factual and Scientific Bases for the Commission's Final Determination

The factual and scientific bases for the Commission's determination that designating San Bernardino kangaroo rat as an endangered species under CESA is warranted are set forth in detail in the Commission's record of proceedings, including the petition; the Department's petition evaluation report; the Department's status review report; written and oral comments received from members of the public, the regulated community, tribal entities, and the scientific community; and other evidence included in the Commission's record of proceedings, which is incorporated herein by reference.

The Commission determines that the continued existence of San Bernardino kangaroo rat in the State of California is in serious danger by one or a combination of the following factors as required by the California Code of Regulations, Title 14, Section 670.1, subsection (i)(1)(A):

1. Present or threatened modification or destruction of its habitat,
2. overexploitation,
3. predation,
4. competition,
5. disease, or
6. other natural occurrences or human-related activities.

The Commission also determines that the information in the Commission's record constitutes the best scientific information available and establishes that designating San Bernardino kangaroo rat as an endangered species under CESA is warranted. Similarly, the Commission determines that San Bernardino kangaroo rat is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease.

The items highlighted here and detailed in the following section represent only a portion of the complex issues aired and considered by the Commission during the CESA listing process for San Bernardino kangaroo rat. Similarly, the issues addressed in these findings represent some, but not all, of the evidence, issues, and considerations affecting the Commission's final determination. Other issues aired before and considered by the Commission are addressed in detail in the record before the Commission.

Background

The Commission bases its “is warranted” finding for San Bernardino kangaroo rat most fundamentally on modification or destruction of habitat as well as the other listing factors identified below.

Threats

San Bernardino kangaroo rat is endangered due to:

- present or threatened modification or destruction of its habitat (See, e.g., Department’s status review report at 34-37 and 65, and references cited therein), and
- other natural occurrences or human-related activities, particularly:
 - small population size (see, e.g., Department’s status review report at 37-40 and 66, and references cited therein),
 - population genetics factors (see, e.g., Department’s status review report at 40-42 and 66, and references cited therein), and
 - climate change (see, e.g., Department’s status review report at 50-52 and 67, and references cited therein).

The Commission finds these factors to result in a significant threat to the continued existence of San Bernardino kangaroo rat as explained in the Department’s status review report. This finding and the Department’s explanation are supported by the whole of the record before the Commission.

IV. Final Determination by the Commission

The Commission has weighed and evaluated the information for and against designating San Bernardino kangaroo rat as an endangered species under CESA, including scientific and other general evidence in the petition; the Department’s petition evaluation report; the Department’s status review report; the Department’s related recommendations; written and oral comments received from members of the public, the regulated community, various public agencies, and the scientific community; and other evidence included in the Commission’s record of proceedings.

Based upon the evidence in the record, the Commission has determined that the best scientific information available indicates the continued existence of San Bernardino kangaroo rat is in serious danger by present or threatened modification or destruction of the species’ habitat, predation, competition, disease, or other natural occurrences or human-related activities, where such factors are considered individually or in combination (see generally, California Code of Regulations, Title 14, Section 670.1, subdivision (i)(1)(A); Fish and Game Code sections 2062, 2067). The Commission determines that there is sufficient scientific information to indicate that designating San Bernardino kangaroo rat as an endangered species under CESA is warranted, and that with adoption and publication of these findings San Bernardino kangaroo rat, for purposes of its legal status under CESA, shall be listed as endangered.