

testimony, and accepted the petition. On December 22, 2006, the Commission published a Notice of Findings in the California Regulatory Notice Register declaring the brown pelican a candidate species for delisting, thereby starting the one year status review process.

Based on the status review, the Department recommended to the Commission that the brown pelican be delisted from endangered status under CESA. However, the brown pelican is also a “fully protected species”, pursuant to Fish and Game Code Section 3511(b)(2). Therefore, whether or not the species is delisted pursuant to CESA, the legal prohibition on “take” of the species, as defined in Fish and Game Code section 86, remains in place and there will be no change in the protections afforded the species pursuant to the Fish and Game Code.

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

Authority: Sections 2070 and 2075.5, Fish and Game Code.

Reference: Sections 1755, 2055, 2062, 2067, 2070, 2074.6, 2075.5 and 2077 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 delist the California brown pelican (Endangered Species Recovery Council, May 17, 2006). Report to the California Fish and Game Commission, “Evaluation of Petition: Request of the Endangered Species Recovery Council to Delist the California Brown Pelican” (Department of Fish and Game, October 3, 2006). Report to the California Fish and Game Commission, “Status Review of the California Brown Pelican (*Pelecanus occidentalis californicus*) in California” (Department of Fish and Game, December 2007). A negative declaration for the delisting action was prepared by the Department, and was made available on August 5, 2008 through the State Clearinghouse, and via notice to California county clerk offices for a 30 day public review period. The environmental document was also noticed on the Department’s web page and via newspapers. No comments were received by the Department on the proposed action.

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

The Commission will hear public testimony at its November 13, 2008 meeting, prior to publication of the notice. The Commission, at its October 2, 2008 meeting in Santa Rosa, received the Department’s update on the status of the Negative Declaration and was scheduled to receive public

testimony on the petition to delist California brown pelican (*Pelecanus occidentalis californicus*) as an endangered species; however, there were no public speakers. Public testimony was previously taken at the Commission meeting in Santa Monica on December 7, 2006, when the Commission received the Department's petition evaluation report and recommendation, and accepted the petition. Additional public input opportunity was provided at the Commission's meeting of March 7, 2008 in Stockton when the status review report was presented. Letters on the subject delisting were received by the Commission and these letters are included in the status review report referenced above under section III (d).

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Downlist to Threatened:

The Commission could exercise its discretion and downlist the brown pelican to a threatened species under CESA. The Department addressed this option in the status review, however because nesting population numbers and productivity of brown pelicans have been increasing in California, and because recent nesting occurred on new and historic sites in 2006 (Middle Anacapa and Prince Island, respectively), Threatened status is not warranted at this time.

In spite of known threats, the breeding population of brown pelicans in California has increased substantially, and productivity has increased. Additionally, nesting sites are under generally-protective National Park Service ownership or management, and some roost sites have received management attention.

(b) Decline to Delist (No Change Alternative):

If the Commission determines that delisting is not warranted, the brown pelican will remain endangered, the position it held prior to the petition filing.

Relative to the regulatory standard for endangered status, the brown pelican does not currently face the same imminent threats as other endangered species with habitat loss/fragmentation, population decline, and predation as major threats (e.g., marbled murrelets (*Brachyramphus marmoratus*)). Retaining endangered status is problematic under the regulatory standard given the steady population increase of brown pelicans that has been underway for some time, and given NPS habitat management authority. If the brown pelican was delisted, and if the population trend suddenly began to decline, they could be petitioned for re-listing under CESA.

Additionally, because the brown pelican is and would remain fully-protected pursuant to Fish and Game Code Section 3511, the prohibition on take contained in Fish and Game Code Section 86 would continue to apply to the species (take is allowed under permit only for scientific research, or for efforts to recover fully-protected, threatened, or endangered species).

(c) Consideration of Alternatives:

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the regulation is proposed or would be as effective and less burdensome to the affected private persons than the proposed regulation.

V. Mitigation Measures Required by Regulatory Action:

An initial study and negative declaration were prepared pursuant the California Environmental Quality Act. This analysis resulted in the conclusion that 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:

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.

Although the statutes of the California Endangered Species Act (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 or delisting process.

CESA is basically 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.

Delisting of the brown pelican will remove the subspecies from the provisions of CESA. However, this delisting action 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 CEQA because the brown pelican will remain protected under additional provisions as described below.

- (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:

None.

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

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. Delisting the brown pelican will not result in any significant cost to private persons or businesses undertaking activities subject to CEQA and may result in a cost savings to such persons and

businesses.

- (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:

None.

- (h) Effect on Housing Costs:

None.

Informative Digest/Policy Statement Overview

The Department of Fish and Game recommends that the Commission amend Subsection (a)(5) of Section 670.5 of Title 14, CCR, to delete the California Brown Pelican (*Pelecanus occidentalis californicus*) from the list of endangered birds.

In making the recommendation to delist the brown pelican pursuant to CESA, the Department relied most heavily on the following: 1) The breeding population size of the brown pelican in the Channel Islands has increased from 1969 to the present, after the banning of DDT, and now exceeds the five-year mean 3,000 pair standard noted in the recovery plan (current Channel Islands population size for 2006 is roughly 8,500 breeding pairs); 2) Brown pelicans have gradually expanded their nesting sites in the Channel Islands to former breeding sites, and numbers on Santa Barbara Island have increased substantially since 2001; 3) Productivity has increased to 0.7 and now meets or exceeds the five-year mean 0.7 standard noted in the recovery plan for downlisting; 4) Relative to the five-year mean standard for fledged young in the recovery plan, brown pelicans at West Anacapa Island have achieved the 2,700 fledgling standard for delisting 9 times from 1997-2005; 5) In spite of known threats (*i.e.*, oil spills, human disturbance, starvation events, domoic acid poisoning, fish hook/line mortality), the breeding population of brown pelicans in California has increased substantially; and 6) nesting sites are under generally-protective NPS ownership or management. If delisted, the brown pelican will remain a fully protected species under Fish and Game Code section 3511(b)(2).