Re: Fish & Game Commission’s Legal Authority to Modify Trapping License Fees without Commission Petition Process – Public Forum, February 8, 2017, FGC Meeting

Dear President Sklar, Executive Director Termini, Fish & Game Commissioners, Director Bonham, and Deputy Director Lehr,

On December 4, 2015, the Center for Biological Diversity (“the Center”) and Project Coyote submitted Petition No. 2015-009 regarding raising commercial trapping license fees to the levels necessary for the full recovery of the reasonable administrative and implementation costs of the trapping program incurred by the Commission and Department of Fish and Wildlife (“the Department”) in compliance with section 4006(c) of the California Fish and Game Code (“FGC”) and SB 1148 (Pavley). This statutory mandate became effective in January 2013, yet the Commission has failed to raise fees to comply with this law, resulting in four years of unlawful noncompliance with this unambiguous mandate. As explained in the petition and our subsequent comment letters and public testimony, expeditious action on the trapping fee petition is necessary if the Commission is to remedy its ongoing violation of law related to trapping fees. A continued illegal subsidy of commercial fur trapping will not be tolerated by the public, and certainly should not be tolerated by the Commission.

I. The Commission and Department have taken scant action on the one-year old petition

More than one year after the submission of the petition, it appears that the Commission and Department have made little to no progress on the petition process. The Commission accepted the petition at the February 2016 Commission meeting and subsequently referred the Petition to the Department for further analysis at the April 2016 Commission meeting.

On May 18, 2016, the Center’s Brendan Cummings and Jean Su met with Director Bonham, Deputy Director Lehr, Mr. Craig Martz, and Ms. Karen Miner to discuss the petition. There, Deputy Director Lehr stated that the estimated schedule of the petition process would be as follows: the rulemaking
package would be introduced to the Commission in spring 2017, and a desired effective date of the rule would be July 2017, prior to the start of the 2017 trapping season. According to one of the documents received in the Public Records Act request, the Department aimed to begin work in August or September of 2016 on the rulemaking package.

On December 5, 2016, the Center’s Brendan Cummings and Jean Su again met with Deputy Director Lehr, Deputy Chief David Bess, and Wildlife Branch Chief T.O. Smith to discuss the petition. Deputy Director Lehr informed the Center that no progress had been made on this petition since it was referred to the Department in April 2016. Both the Department and Commission’s lack of action on the petition is further evidenced by their responses to Public Records Act requests that the Center submitted to both bodies seeking documents related both to the petition and FGC 4006(c) since its 2013 effective date. The Department returned a handful of records, two of which were the same notes from the May 18, 2016 meeting and notes from a prior meeting in preparation for that meeting. The Commission also did not provide any further documents in response to a PRA request.

Further, at the December 5, 2016 meeting, Deputy Director Lehr stated that the schedule of introducing a rulemaking package in the spring of 2017 with the idea of formalizing a rule by summer 2017 would not be possible, and it was not clear if the rulemaking could be completed in 2017 at all. He also stated the Department’s overwhelming workload given its resources. While we understand and certainly empathize with the Department’s hardworking staff, we emphasize that the trapping fees issue is a statutorily mandated duty that the Commission has failed to comply with for a total of four years to date. As we believe we have exercised patience and exhausted efforts to communicate with and support Department and Commission staff, we ask the Commission and Department to prioritize legal compliance with this mandate for 2017.

II. The Commission possesses the legal authority to adjust license fees without undergoing a formal rulemaking process

To avoid any further delay perpetuating unlawful inactivity and to conserve Department and Commission resources, we urge the Commission to exercise its legal authority and set the trapping license fees without engaging in the regulation rulemaking process. The setting of trapping license fees pursuant to FGC § 4006(c) does not require engaging in a regulatory adoption process under the Fish & Game Code. First, to be clear, the Center and Project Coyote submitted the petition in December 2015 under the advice of outgoing Commission President Jack Bayliss as a way to put the item on the Commission’s agenda of activity, but we do not agree that setting license fees under FGC § 4006(c) requires a regulatory adoption process.

Second, FGC § 4006(c) gives the Commission the independent legal authority to raise trapping fees without engaging in any regulatory rulemaking process. In enacting SB 1148 effective January 1, 2013, as codified in FGC § 4006, the California Legislature directed the Commission to raise trapping license fees as follows (emphasis added):

“The commission shall adjust the amount of the fees specified in subdivision (a), as necessary, to fully recover, but not exceed all reasonable administrative and implementation costs of the department and the commission relating to those licenses.”

This statutory authority is the same authority the Commission exercises to raise license fees for inflation purposes. The Commission already exercises such authority to adjust for inflation without undergoing a rulemaking process or requiring submission of a petition. As trapping license fees are governed by FGC § 4006, FGC § 4006(a) sets a base level fee for trapping licenses and requires the Department to increase that fee based on federal inflation statistics pursuant to FGC § 713. Under this regime, trapping license fees have increased from $45 several decades ago to $117.16 for the 2015-2016 license year. In addition
to the inflation-related increases contemplated by FGC §§ 4006(a) and 713, FGC § 4006(c) requires that fees also be adjusted to recover the costs of the Department and Commission in managing the trapping program. Read together, these provisions show that a similar process of setting fees applies to both statutory provisions, giving the Commission legal authority to set fees without undergoing a process of regulation adoption.

Second, the law is clear that fee setting is not a regulation that requires adoption through a regulatory process. According to FGC § 207, only those regulations made pursuant to sections 203 and 205 of the Fish & Game Code are required to undergo the regulatory adoption process, which includes, among other things, that any regulation undergo a series of no fewer than three meetings for the commission’s consideration, review, and adoption. Trapping license fees are squarely outside of the scope of FGC § 205, which are regulations as to fish, amphibian and reptiles, as well as FGC § 203, which are regulations as to birds and mammals that relate to any of the following:

“(a) Establish, extend, shorten, or abolish open seasons and closed seasons.
(b) Establish, change, or abolish bag limits and possession limits.
(c) Establish and change areas or territorial limits for their taking.
(d) Prescribe the manner and the means of taking.
(e) Establish, change, or abolish restrictions based upon sex, maturity, or other physical distinctions.”

Setting trapping license fees does not fall into any of these categories, and is thereby exempt from undergoing a formal regulation adoption process.¹

Even more, FGC § 1050 also supports that raising fees as mandated under FGC § 4006(c) does not require a regulatory petition process. According to FGC § 1050(d), “[w]henever this code does not . . . specify the amount of a fee to be collected . . . the commission may establish a fee or amount thereof by regulation” (emphasis added). The provision then goes on to define that any fees “established by the commission shall be in an amount sufficient to recover all reasonable administrative and implementation costs of the department and commission relating to the program within regard to which the fee is paid.” In contrast to those unknown, un-established fees described in FGC § 1050(d), FGC § 4006(c) defines exactly what the amount of the trapping license fee should be—the amount that can “fully recover” “all reasonable administrative and implementation costs of the department and the commission relating to those licenses”—thereby excluding the trapping license fee from undergoing any discretionary regulatory process as provided in FGC § 1050. Under FGC § 1050(d), it is discretionary as to whether the Commission uses the regulatory process to establish fees generally, but such process does not apply to fees that are already established (in this case, mandated by the Legislature in FGC § 4006(c)).

III. The Legislature intended for the Commission to efficiently raise fees to allow the Department to carry out its public trust responsibilities

The intent of the Legislature also supports the Commission’s expeditious action to raise license fees without undergoing a laborious regulation process. FGC § 710.5 explicitly states that “[i]t is the intent of the Legislature that, to the extent feasible, the department should continue to be funded by user fees,” but that the “department’s revenues have been limited due to a failure to maximize user fees . . . .” The

¹Of course, if the Commission determines that even with a fee increase the program will not likely be self-funding and therefore not compliant with the cost-recovery mandate of § 4006(c), the Commission must expeditiously move forward with regulations that would terminate the commercial trapping program itself. However, the fact that complete closure of the trapping program would require changes in regulations does not absolve the Commission from complying with the non-regulatory mandate of § 4006(c) to increase trapping fees absent such regulations.
“principal causes” of the department’s inadequate funding “have been the fixed nature of the [D]epartment’s revenues in contrast with the rising costs resulting from inflation” and “the increased burden on the department to carry out its public trust responsibilities,” which taken together has “prevented proper planning and manpower allocation” and has resulted in “inadequate wildlife and habitat conservation and wildlife protection programs.” FGC § 710. These statements by the Legislature, memorialized in the Fish & Game Code, articulate the policy rationale for passing these fee adjustment regulations. Given the Legislature’s stated intent to resolve the inadequacy of funding in order to empower the Department to protect our public trust resources, it is imperative that the Commission and Department act expeditiously to adjust license fees. Where statute does not require raising fees to undergo regulatory processes, the intent of the Legislature serves as a further mandate to drive Commission and Department action forward to raise trapping license fees.

Overall, we look forward to the Commission’s swift action to remedy an ongoing legal violation by increasing trapping license fees without undergoing the regulation process.

Thank you for your consideration. If you have any questions, please feel free to contact us directly.

Sincerely,

Jean Su
Associate Conservation Director & Staff Attorney
Center for Biological Diversity
1212 Broadway Street, Suite 800
Oakland, California 94612
(510) 844-7139
jsu@biologicaldiversity.org

Camilla Fox
Executive Director
Project Coyote
P.O. Box 5007
Larkspur, CA 94977
(415) 945-3232
cfox@projectcoyote.org