

STAFF SUMMARY FOR FEBRUARY 10-11, 2016

32. TRICOLORED BLACKBIRD**Today's Item**Information Action

Possible emergency regulation regarding incidental take of tricolored blackbird, pursuant to FGC sections 240 and 2084.

Summary of Previous/Future Actions

- Warranted candidacy status Dec 10, 2015, San Diego
- **Today's** adoption hearing Feb 10-11, 2016; Sacramento

Background

At its Dec 10, 2015 meeting, FGC determined that listing the tricolored blackbird as a candidate species under the California Endangered Species Act may be warranted. Under Fish and Game Code sections 2074.2 and 2085 the species became a candidate species until the petition is finally acted upon; the prohibition of take applies while the species is a candidate.

At the Dec 2015 meeting, Dairy Cares submitted a petition for an emergency regulation to provide incidental take authority to farmers who agree to protect colonies of tricolored blackbirds nesting in their grain fields during the candidacy period. The proposed regulation also provided incidental take coverage to individuals creating or improving habitat for the species as well as individuals approved by DFW to monitor nesting colonies. Commissioners discussed the proposed emergency regulation and requested that the petitioners work with interested stakeholders from the environmental community to revise the proposed emergency regulation in a manner in which all parties could agree. After the meeting Dairy Cares and the California Farm Bureau Federation worked with Audubon California and Defenders of Wildlife to develop a revised emergency regulation(Exhibit 3).

Significant Public Comments

1. California Farm Bureau Federation (CFBF) recommends revisions to the original petition (Exhibit 2).
2. Center for Biological Diversity recommends revisions to the CFBF revised proposed 2084 regulations (Exhibit 3)

Recommendation

Supports the revised proposed emergency regulations submitted by California Farm Bureau Federation

Exhibits

1. [Petition for emergency regulation from Dairy Cares, received Dec 10, 2015](#)
2. [Letter from Noelle Cremers, CFBF, received Jan 27, 2016](#)
3. [Letter from Lisa Belenky, CBD, received Jan 28, 2016 with proposed edits to the emergency regulation as submitted by CFBF.](#)

STAFF SUMMARY FOR FEBRUARY 10-11, 2016

Motion/Direction

Moved by _____ and seconded by _____ that the Commission finds the following:

A failure to adequately protect the tricolored blackbird would cause serious harm to the general welfare of the citizens of the State of California.

Action is necessary to ensure the protection and immediate conservation of the tricolored blackbird during the upcoming harvest of grain fields planted for silage.

This finding is based on the record before the Commission, generally and specifically the past activity under the Natural Resources Conservation Service program and the timing of the candidacy of the tricolored blackbird in relation to the upcoming harvest.

Moved by _____ and seconded by _____ that the Commission adopts the revised emergency language submitted to the Commission on January 27, 2016 by the California Farm Bureau Federation as an emergency regulation to be codified in Section 749.8.



2015-012

Tracking Number: (Click here to enter text.)

To request a change to regulations under the authority of the California Fish and Game Commission (Commission), you are required to submit this completed form to: California Fish and Game Commission, 1416 Ninth Street, Suite 1320, Sacramento, CA 95814 or via email to FGC@fgc.ca.gov. Note: This form is not intended for listing petitions for threatened or endangered species (see Section 670.1 of Title 14).

Incomplete forms will not be accepted. A petition is incomplete if it is not submitted on this form or fails to contain necessary information in each of the required categories listed on this form (Section I). A petition will be rejected if it does not pertain to issues under the Commission's authority. A petition may be denied if any petition requesting a functionally equivalent regulation change was considered within the previous 12 months and no information or data is being submitted beyond what was previously submitted. If you need help with this form, please contact Commission staff at (916) 653-4899 or FGC@fgc.ca.gov.

SECTION I: Required Information.

Please be succinct. Responses for Section I should not exceed five pages

1. Person or organization requesting the change (Required)

Name of primary contact person: J.P. Cativiela

Address: Dairy Cares, [REDACTED]

Telephone number: [REDACTED]

Email address: [REDACTED]

2. Rulemaking Authority (Required) - Reference to the statutory or constitutional authority of the Commission to take the action requested: Government Code § 11340.6 (right to petition for regulation), Fish and Game Code § 2084 (authority of Commission to enact regulation), Government Code 11346.1 (authority to enact emergency regulation), Fish and Game Code 240(a) (same).

3. Overview (Required) - Summarize the proposed changes to regulations: The regulation would authorize take of Tricolored Blackbirds in the following limited circumstances: 1) Actions to protect, restore, conserve or enhance habitat; 2) Actions to monitor Tricolored Blackbird colonies; and 3) Harvest of grain crops after delay to protect colonies. The regulation was developed after initial discussions with the Department of Fish and Wildlife (Department).

4. Rationale (Required) - Describe the problem and the reason for the proposed change: Historically Tricolored Blackbirds nested in native flora in or adjacent to wetlands in the Central Valley and elsewhere across the State of California. Concomitant with the loss of wetlands during the 19th and 20th centuries, Tricolored Blackbirds have adapted to nest in varied substrates. Grain fields planted for winter silage on dairy farms provide attractive nesting sites for the species.

Unfortunately, nesting occurs at the same time the crop is scheduled for harvest. For about the past decade, a patchwork of funding sources has been used to pay farmers for the lost crop when they agree to delay harvest until after nesting is complete. In some cases, particularly where funding was unavailable or farmers were not aware of the potential for



funding to offset losses, harvest has occurred before the young fledged. Recently, the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) committed to provide multiple years of funding to support a program to delay harvest of fields in which Tricolored Blackbird colonies have nested. At the same time, Dairy Cares in coordination with other farming interests has initiated an active campaign to educate dairy farmers about the Tricolored Blackbird and the NRCS-funded program. In 2015, through a coordinated effort including NRCS, farming interests, the Department, and Audubon, dairy farmers enrolled in the NRCS program delayed harvest on fields where an estimated 67,000 tricolored blackbirds nested.

NRCS funds compensate the farmer for about 85 percent of the value of the crop lost by the harvest delay. Under the NRCS program, a colony is identified and the area inhabited by the colony is delineated by a biologist. Once the colony is delineated, a buffer is established and the farmer is allowed to harvest only those fields outside the colony site and buffer area. Delaying harvest protects the vast majority of the colony until the birds fledge, but it does not guarantee that no take will occur. In the event the Tricolored Blackbird is designated as a candidate for listing and therefore subject to the regulatory protections provided by the California Endangered Species Act, promulgating a regulation to authorize incidental take provides farmers assurances that if they agree to follow the requirements imposed by NRCS, delay harvest, and protect the colony nesting in their field, they will not be penalized in the event a small number of birds are taken incidental to their beneficial conservation actions in delaying harvest and otherwise lawful agricultural activities.

Emergency Justification:

The following facts provide the basis for emergency action by the Commission under Fish and Game Code § 240(a) and Government Code § 11346.1:

- (1) The harvest management programs administered by NRCS and the Department can be expected to protect tens of thousands of nesting Tricolored Blackbirds provided farmers are incentivized to participate.
- (2) Designation of the Tricolored Blackbird as a candidate for listing under the California Endangered Species Act, should it occur, could inhibit participation in the harvest management programs.
- (3) The 2084 regulation, in combination with funding from NRCS, will provide farmers with a strong incentive to participate.
- (4) Tricolored Blackbird nesting can begin as early as February.
- (5) The Commission's next two scheduled meetings are in February and March 2016.

Under these circumstances, it is only possible to put a 2084 regulation in place to conserve nesting Tricolored Blackbirds and protect farmers that enroll in one of the harvest management programs in 2016 through emergency action. We contend that such action will effectuate the purposes of Fish and Game Code § 2084, and the California Endangered Species Act, more broadly.



SECTION II: Optional Information

5. **Date of Petition:** December 10, 2015 (in the event the Commission takes action to designate the Tricolored Blackbird a candidate for listing under the California Endangered Species Act).
6. **Category of Proposed Change**
- Sport Fishing
 - Commercial Fishing
 - Hunting
 - Other, please specify: Incidental Take Regulation for Tricolored Blackbirds, if designated as a candidate for listing under the California Endangered Species Act.
7. **The proposal is to:** (To determine section number(s), see current year regulation booklet or <https://govt.westlaw.com/calregs>)
- Amend Title 14 Section(s): Click here to enter text.
 - Add New Title 14 Section(s): 749.8
 - Repeal Title 14 Section(s): Click here to enter text.
8. **If the proposal is related to a previously submitted petition that was rejected, specify the tracking number of the previously submitted petition** Click here to enter text.
Or Not applicable.
9. **Effective date:** If applicable, identify the desired effective date of the regulation.
If the proposed change requires immediate implementation, explain the nature of the emergency: February 15, 2016. Tricolored blackbirds typically start nesting in the southern San Joaquin Valley in late February to early March. Tricolored Blackbirds have adapted their nesting to utilize both native and non-native habitat, including farm fields typically associated with working dairy farms. The nesting period typically coincides with planned harvest and this regulation is needed to provide incidental take to farmers who agree to delay harvest to protect a Tricolored Blackbird colony, but still have a risk of incidental take from their ongoing farming activities. A regulation adopted pursuant to Fish and Game Code § 2084 is necessary to protect farmers who are providing habitat and agreeing to protect nesting Tricolored Blackbirds.
10. **Supporting documentation:** Identify and attach to the petition any information supporting the proposal including data, reports and other documents: See Attachment A – Proposed 2084 Regulation for Incidental Take of Tricolored Blackbird (*Agelaius tricolor*) During Candidacy Period.
11. **Economic or Fiscal Impacts:** Identify any known impacts of the proposed regulation change on revenues to the California Department of Fish and Wildlife, individuals, businesses, jobs, other state agencies, local agencies, schools, or housing: If enacted by the Commission, the proposed 2084 regulation would have positive economic impacts and contribute to the conservation of the Tricolored Blackbird. The regulation would have positive economic impacts because it would incentivize farmers to participate in the NRCS program described above or a similar program administered by the Department. In 2015, there were approximately 200 acres of dairy silage fields that provided nesting habitat for Tricolored



blackbirds. NRCS was able to provide payments to farmers who agreed to delay the harvest of their fields until after the nesting season ended. These payments reduced losses (due to the decline in value of the crop) associated with delayed harvest from approximately \$190,000 to approximately \$20,000.

Absent the 2084 regulation, enrollment in the NRCS program may decline. Furthermore, farmers may elect to plant lower value crops that do not provide nesting habitat for the Tricolored Blackbird thereby decreasing available nesting habitat; farmers may harvest their crop early before onset of the nesting season, which would decrease the value of the crop and also decrease available nesting habitat; or farmers may risk harvesting their crop even if Tricolored Blackbird are present. The first two of these outcomes have adverse economic impacts.

Adopting a regulation providing incidental take coverage for farmers participating in harvest delay programs will incentivize participation in these programs thereby reducing economic impacts as described above. As important if not more so, adopting regulation will contribute to the conservation of the Tricolored Blackbird during the period the species is a candidate for listing.

12. Forms: If applicable, list any forms to be created, amended or repealed:

[Click here to enter text.](#)

SECTION 3: FGC Staff Only

Date received: [Click here to enter text.](#)

FGC staff action:

- Accept - complete
- Reject - incomplete
- Reject - outside scope of FGC authority

Date petitioner was notified of receipt of petition and pending action: _____
Tracking Number

Meeting date for FGC consideration: _____

FGC action:

- Denied by FGC
- Denied - same as petition _____
Tracking Number
- Granted for consideration of regulation change

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Attachment A – Proposed 2084 Regulation for Incidental Take of Tricolored Blackbird (*Agelaius tricolor*) During Candidacy Period

This regulation authorizes take as defined by Fish and Game Code section 86, of Tricolored Blackbird (*Agelaius tricolor*), in the limited circumstances described below, subject to certain terms and conditions, during the species' candidacy under the California Endangered Species Act (Fish and Game Code, Section 2050 et seq.).

(a) Take Authorization.

The Commission authorizes the take of Tricolored Blackbird during the candidacy period subject to the terms and conditions herein.

(1) Actions to Protect, Restore, Conserve or Enhance Habitat.

Take of Tricolored Blackbird incidental to otherwise lawful activity, where the purpose of the activity is to protect, restore, conserve, or enhance habitat for a species designated as an endangered, threatened, or candidate species under state or federal law.

(2) Actions to Monitor Tricolored Blackbird Breeding Colonies.

Take of Tricolored Blackbird incidental to efforts to monitor active Tricolored Blackbird breeding colonies, including entering colonies to perform walking transects. Only trained observers who are approved by the Department will be authorized to engage in such monitoring.

(3) Harvest of Grain Crops After Delay to Protect Colonies.

Take of Tricolored Blackbird incidental to harvest of grain fields and related agricultural activities is authorized where harvest has been delayed to protect the Tricolored Blackbird colony as part of a harvest management program. The harvest management program shall include measures identified in the document "California Department of Fish and Wildlife (Department) Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015." The individual seeking authorization shall receive written or verbal authorization of participation in the harvest management program from the Natural Resources Conservation Service, the Department, or individuals approved by the Department.

(b) Reporting.

Any person, individual, organization, or public agency, or their agents, for which incidental take of Tricolored Blackbirds is authorized pursuant to subdivision (a), shall report observations and detections of Tricolored Blackbird colonies, including take, to the Department of Fish and Wildlife on a semi-annual basis during the candidacy period. Observations, detections, and take shall be reported pursuant to this subdivision to the Department of Fish and Wildlife, Wildlife Branch. Information reported to the Department pursuant to this subdivision shall include as

available: a contact name; the date and location (GPS coordinate preferred) of the observation, detection, or take; and details regarding the animal(s) observed.

(c) Additions, Modifications or Revocation.

- (1) Incidental take of Tricolored Blackbird from activities not addressed in this section may be authorized during the candidacy period by the Commission pursuant to Fish and Game Code section 2084, or by the Department on a case-by-case basis pursuant to Fish and Game Code section 2081, or other authority provided by law.
- (2) The Commission may modify or repeal this regulation in whole or in part, pursuant to law, if it determines that any activity or project may cause jeopardy to the continued existence of Tricolored Blackbird.



CALIFORNIA FARM BUREAU FEDERATION

GOVERNMENTAL AFFAIRS DIVISION

1127-11TH STREET, SUITE 626, SACRAMENTO, CA 95814 · PHONE (916) 446-4647

January 27, 2016

California Fish and Game Commission
1416 9th Street, Room 1320
Sacramento, CA 95814

RE: Possible adoption of emergency action regarding special order relating to incidental take of tricolored blackbird during candidacy period, pursuant to Fish and Game Code Section 2084 (Add Section 749.8, Title 14, CCR)

Dear Commissioners:

On December 10, 2015 Dairy Cares submitted a petition requesting adoption of a regulation pursuant to authority granted to the Fish and Game Commission (Commission) by Fish and Game Code Section 2084. This requested regulation, if adopted, would provide incidental take authority to farmers who agree to protect colonies of Tricolored blackbirds nesting in their grain fields during the candidacy period. The proposed regulation also provided incidental take coverage to individuals creating or improving habitat for the species as well as individuals approved by the Department of Fish and Wildlife (Department) to monitor nesting colonies.

Commissioners discussed the proposed regulation at the December Commission meeting and requested that the petitioners work with interested stakeholders from the environmental community to revise the proposed regulation in a manner in which all parties could agree. Dairy Cares and the California Farm Bureau Federation (Farm Bureau) worked with Audubon California and Defenders of Wildlife to develop amendments to the proposed 2084 regulation that Dairy Cares and Farm Bureau can support and the environmental organizations do not oppose.

The language agreed upon by all parties is attached. The revisions provide clarity as to what actions are necessary to protect nesting colonies in order for a farmer to receive incidental take coverage under the regulation. The revisions also clarify what monitoring information participants must provide to the Department. We are pleased that all parties were able to come to agreement on this important regulation that will provide regulatory protection for farmers who agree to protect Tricolored Blackbirds in their grain fields. Should you have any questions, please contact Noelle G. Cremers (916/446-4647 or ncremers@cfbf.com).

Sincerely,

A handwritten signature in cursive script that reads "Noelle G. Cremers".

Noelle G. Cremers
Director, Natural Resources and Commodities

CC: Charlton H. Bonham, Director, Department of Fish and Wildlife

January 27, 2016
Page 2

Mike Lynes, Policy Director, Audubon California

J.P. Cativiela, President, Cogent Consulting and Communications, Representing Dairy
Cares

Paul Sousa, Director of Environmental Services and Regulatory Affairs, Western United
Dairymen

Attachment A – Proposed 2084 Regulation for Incidental Take of Tricolored Blackbird (*Agelaius tricolor*) During Candidacy Period

This regulation authorizes take as defined by Fish and Game Code section 86, of Tricolored Blackbird (*Agelaius tricolor*), in the limited circumstances described below, subject to certain terms and conditions, during the species' candidacy under the California Endangered Species Act (Fish and Game Code, Section 2050 et seq.).

(a) Take Authorization.

The Commission authorizes the take of Tricolored Blackbird during the candidacy period subject to the terms and conditions herein.

(1) Actions to Protect, Restore, Conserve or Enhance Habitat.

Take of Tricolored Blackbird incidental to otherwise lawful activity, where the purpose of the activity is to protect, restore, conserve, or enhance habitat for a species designated as an endangered, threatened, or candidate species under state or federal law.

(2) Actions to Monitor Tricolored Blackbird Breeding Colonies.

Take of Tricolored Blackbird incidental to efforts to monitor active Tricolored Blackbird breeding colonies, including entering colonies to perform walking transects. Only trained observers who are approved by the Department will be authorized to engage in such monitoring.

(3) Harvest of Grain Crops Under Harvest Management Program to Protect Colonies

Take of Tricolored Blackbird incidental to harvest of grain fields and related agricultural activities is authorized where an individual participates in a harvest management program administered by the Natural Resource Conservation Service (NRCS), the Department, or individuals approved by the Department, which shall include the establishment of a buffer zone and harvest date as described in the document "California Department of Fish and Wildlife (Department) Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015" (adopted on March 19, 2015 and available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=99310&inline>). The individual seeking authorization for take incidental to harvest of grain fields and related agricultural activities shall receive written confirmation of participation in the harvest management program and specific authorization for the timing of harvest and related agricultural activities from the Natural Resource Conservation Service, the Department, or a biologist authorized by the Department or NRCS.

(b) Reporting.

Any person, individual, organization, or public agency, or their agents, for which incidental take of Tricolored Blackbirds is authorized pursuant to subdivision (a)(1) and (a)(3), shall report observations and detections of Tricolored Blackbird colonies, including take, to the Department

of Fish and Wildlife, Wildlife Branch, by August 1st during the candidacy period. Information reported to the Department pursuant to this subdivision shall include: a contact name; the date and location (GPS coordinate preferred) of the colony or take; colony size; colony outcome; and details regarding the animal(s) observed. Colony outcome means whether the colony was abandoned or whether young in a colony fledged. Any person, individual, organization, or public agency, or their agents seeking incidental take authorization pursuant to subdivision (a)(3), shall report their participation in an approved harvest management program to the Department prior to grain harvest.

(c) Additions, Modifications or Revocation.

- (1) Incidental take of Tricolored Blackbird from activities not addressed in this section may be authorized during the candidacy period by the Commission pursuant to Fish and Game Code section 2084, or by the Department on a case-by-case basis pursuant to Fish and Game Code section 2081, or other authority provided by law.
- (2) The Commission may modify or repeal this regulation in whole or in part, pursuant to law, if it determines that any activity or project may cause jeopardy to the continued existence of Tricolored Blackbird.



*Working through science, law and creative media to secure a future for all species,
great or small, hovering on the brink of extinction.*

VIA ELECTRONIC MAIL

January 28, 2016

Fish and Game Commissioners
c/o Michael Yaun, Acting Executive Director
1416 Ninth Street, Room 1320
Sacramento, CA 95814
fgc@fgc.ca.gov

Re: Comments re Item 32. February 11, 2016 Agenda: Possible adoption of emergency action regarding special order relating to incidental take of tricolored blackbird during candidacy period, pursuant to Fish and Game Code Section 2084 (Add Section 749.8, Title 14, CCR)

Dear Commissioners and Acting Executive Director Yaun,

I am writing on behalf of the Center for Biological Diversity (“Center”) regarding the possible adoption of emergency action regarding special order relating to incidental take of tricolored blackbird during candidacy period, pursuant to Fish and Game Code Section 2084 (Add Section 749.8, Title 14, CCR) and the revised proposed language submitted to the Commission by Dairy Cares on January 27, 2016.

The Center appreciates the proposed changes in the language that would clarify the scope of any take authorization under section (a)(3) for harvesting activities and improve the reporting requirements in section (b). However, the Center remains concerned that the language in section (a)(3) is overly broad and vague regarding what constitutes a qualifying “Harvest management program.” The language in section (a)(3) appears to anticipate that additional programs might be set up and/or administered by NRCS, the California Department of Fish and Wildlife (“Department”), or by “individuals approved by the Department.” However, there is no express requirement that any new program be approved by the Department and no indication of what process would be used by the Department to approve “individuals” to administer such a program that itself had not been approved by the Department. Any program that is not directly administered by NRCS, or administered or approved by the Department, should not only be required to comply with a minimum buffer zone, as described in Department Staff Guidance, but should also be required to obtain Department approval for harvest dates based on review of the observation data and application of the criteria in the Department Staff Guidance and the Department’s expertise and experience. Careful oversight of any new programs is needed to ensure that take of the species is appropriately avoided and minimized. Alternatively, the Center suggests that the simplest solution is to limit the qualifying “harvest management programs” to those that are directly administered by NRCS or administered or approved by the Department.

Section (a)(3) fails to clearly state that no take can be authorized unless “[t]he individual seeking authorization for take incidental to harvest of grain fields and related agricultural activities” first obtains “specific authorization for the timing of harvest and related agricultural activities from the Natural Resource Conservation Service, the Department, or a biologist authorized by the Department or NRCS”.

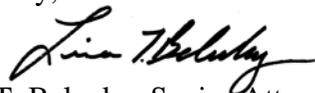
The Center suggests that the simplest way to remedy these shortcomings and adequately protect the Tricolored blackbird from excessive take is to limit the Harvest Management Programs that can provide a take exemption to programs directly administered by NRCS or those administered or approved by the Department and to require that written authorization for harvesting activities is obtained before any such activities proceed.

Suggested Changes to the language:

- (3) Harvest of Grain Crops Under Harvest Management Program to Protect Colonies. Take of Tricolored Blackbird incidental to harvest of grain fields and related Agricultural activities is authorized where an individual participates in a harvest management program administered by the Natural Resource Conservation Service (NRCS), **or harvest management program administered or approved by the Department, or individuals approved by the Department,** which shall include the establishment of a buffer zone and harvest date as described in the document “California Department of Fish and Wildlife (Department) Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015” (adopted on March 19, 2015 and available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=99310&inline>). The individual seeking authorization for take incidental to harvest of grain fields and related agricultural activities shall receive written confirmation of participation in the harvest management program and **must obtain** specific authorization for the timing of harvest and related agricultural activities from the Natural Resource Conservation Service, the Department, or a biologist authorized by the Department or NRCS **before proceeding with any harvest activities that take tricolor blackbirds.**

Please do not hesitate to contact me if you have any questions about the issues raised in these comments.

Sincerely,



Lisa T. Belenky, Senior Attorney
Center for Biological Diversity
1212 Broadway, Suite 800
Oakland, CA 94612
lbelenky@biologicaldiversity.org