

TITLE 14. Fish and Game Commission
Notice of Proposed Emergency Changes in Regulations

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 200, 202, 205, 240, and 2084, of the Fish and Game Code (FGC) and to implement, interpret or make specific sections 200, 202, 205, 240, 2080, 2084, and 2085 of said Code, proposes to re-adopt Section 749.4, Title 14, California Code of Regulations (CCR), relating to incidental take of California tiger salamander during candidacy period.

Informative Digest/Policy Statement Overview

The sections below describe laws relating to listing species under CESA, the effect of this emergency regulation, a description of related federal law, and a policy statement overview.

A. Laws Related to the Emergency Regulation - Listing under CESA

1. Petition and Acceptance

FGC Section 2070 requires the Commission to establish a list of endangered species and a list of threatened species. Any interested person may petition the Commission to add a species to the endangered or threatened list by following the requirements in Fish and Game Code Sections 2072 and 2072.3. If a petition is not factually incomplete and is on the appropriate form, it is forwarded to the Department for evaluation.

FGC Section 2073.5 sets out the process for accepting for further consideration or rejecting a petition to list a species and, if the petition is accepted, a process for actually determining whether listing of the species as threatened or endangered is ultimately warranted. The first step toward petition acceptance involves a 90-day review of the petition by the Department to determine whether the petition contains sufficient information to indicate that the petitioned action may be warranted. The Department prepares a report to the Commission that recommends rejection or acceptance of the petition based on its evaluation.

FGC Section 2074.2 provides that, if the Commission finds that the petition provides sufficient information to indicate that the petitioned action may be warranted, the petition is accepted for consideration and the species that is the subject of the petition becomes a "candidate species" under CESA. CESA prohibits unauthorized take of a candidate species, just as it prohibits such take of threatened and endangered species, from the time the Commission notifies interested parties and the general public of its acceptance of the petition. FGC Section 86 states "Take" means to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill. Killing of a candidate, threatened, or endangered species under CESA that is incidental to an otherwise lawful activity and not the primary purpose of the activity constitutes take under state law. (*Department of Fish and Game v. Anderson-Cottonwood Irrigation District* (1992) 8 Cal.App.4th 1554; see also "*Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 507 (in the context of a Permit under FGC 2081 subd. (b), the California Supreme Court states, "'take' in this context means to catch, capture or kill," citing FGC, § 86.)).

FGC Section 2085 provides that once the Commission gives notice pursuant to FGC Section 2074.4 that it has designated a species a candidate under CESA, all activities, whether new or ongoing, that cause incidental take of the candidate species are in violation of CESA unless the

take is authorized in regulations adopted by the Commission pursuant to FGC Section 2084 or the Department authorizes the take through the issuance of a Permit under FGC Section 2081 or by other means authorized by CESA.

2. Status Review and Final Action on the Petition

The Commission's acceptance of a petition initiates a 12-month review of the species' status by the Department, pursuant to FGC Section 2074.6. This status review helps to determine whether the species should be listed as threatened or endangered. Unlike the Department's initial evaluation, which focuses largely on the sufficiency of information submitted in the petition, the 12-month status review involves a broader inquiry into and evaluation of available information from other sources. The Commission is required to solicit data and comments on the proposed listing soon after the petition is accepted, and the Department's written status report must be based upon the best scientific information available.

Within 12 months of the petition's acceptance, the Department must provide the Commission a written report that indicates whether the petitioned action is warranted (FGC Section 2074). The Commission must schedule the petition for final consideration at its next available meeting after receiving the Department's report (FGC Section 2075). In its final action on the petition, the Commission is required to decide whether listing the species as threatened or endangered "is warranted" or "is not warranted"; if listing is not warranted in the Commission's judgment, take of the former candidate species is no longer prohibited under CESA (FGC Section 2075.5).

B. Effect of the Emergency Action

Section 749.4, Title 14, CCR regulation would authorize and provide for take of California tiger salamander during its candidacy subject to the following terms and conditions:

(a) Take Authorization

Subject to the terms and conditions prescribed by this section, the Commission authorizes take of California tiger salamander during the candidacy period where such take is incidental to an otherwise lawful activity.

(1) Incidental Take Authorized Pursuant to the Federal Endangered Species Act

Incidental take of California tiger salamander is authorized where such take is consistent with and otherwise authorized pursuant to the Federal Endangered Species Act (16 U.S.C. § 1531 et seq.).

(2) Lake or Streambed Alteration Agreements

Incidental take of California tiger salamander is authorized where: (i) take occurs as the result of an activity covered by a lake or streambed alteration agreement issued by the Department of Fish and Game pursuant to Fish and Game Code section 1602, subdivision (a)(4)(B); (ii) the take occurs only within the area specifically covered by the lake or streambed agreement; and (iii) the agreement holder is in compliance with the terms and conditions prescribed by the agreement at the time incidental take occurs.

(3) Agricultural Activities

Incidental take of California tiger salamander as a result of routine and ongoing agricultural operations on land in an existing agricultural use is authorized as set forth in this paragraph.

(A) For purposes of this paragraph “routine and ongoing agricultural operations” shall have the same meaning as defined by California Code of Regulations, Title 14, section 786.1, subdivision (b), except routine and ongoing agricultural operations shall not include: (i) the conversion of agricultural land to a nonagricultural use, excluding the conversion of land in existing agricultural use to conserve, restore, protect, or enhance fish or wildlife habitat; (ii) the conversion of rangeland or natural lands to more intensive agricultural uses, including but not limited to, the conversion of rangeland or natural lands to permanent crops, dry land farming, row crops, and/or any cultivated row crops unless the alterations to the land were commenced before the candidacy period; (iii) the use of toxic or suffocating gases to control ground-burrowing rodents; (iv) the improvement, upgrade, or construction of new roads; or (v) the intentional introduction into a stock pond of species that may prey on California tiger salamander adults, larvae, or eggs.

(B) For purposes of this paragraph “agricultural use” shall mean the use of land for the purpose of producing an agricultural commodity for a personal or commercial purpose.

(b) Additions, Modification, or Revocation

(1) Incidental take of California tiger salamander 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 as provided by law, including modification or repeal based on a determination that any activity or project may cause jeopardy to the continued existence of California tiger salamander.

C. Existing, Comparable Federal Regulations or Statutes

The Federal Endangered Species Act (FESA) (16 U.S.C. Section 1531 et seq.) includes a listing process that is comparable to the listing process under CESA. California tiger salamander is listed as an endangered species under FESA in Santa Barbara and Sonoma Counties and threatened in other parts of central California.

FESA Section 4(d) (16 USC Section 1533 (d)) is similar in some respects to Section 2084. Section 4(d) authorizes the National Marine Fisheries Service (NMFS) or the United States Fish and Wildlife Service (FWS) to issue protective regulations prohibiting the take of species listed as threatened. These regulations, also called “4(d) rules,” may include any or all of the prohibitions that apply to protect endangered species and may include exceptions to those

prohibitions. The 4(d) rules give the NMFS and the FWS the ability to craft comprehensive regulations to apply to particular activities that may result in a take of a threatened species, in a manner similar to the Commission's authority to prescribe terms and conditions pursuant to Section 2084 during the species' candidacy period.

Similarly, the Migratory Bird Treaty Act provides for protection of migratory birds with a definition of "take" which includes all portions of the FGC Section 86 definition of "take". In addition, the Act provides for the Secretary of the Interior to adopt regulations determining the extent to which "take" will be allowed.

D. Policy Statement Overview

The objective of this regulation is to allow specified activities to continue on an interim basis, subject to the measures in the regulation designed to protect California tiger salamander, while the Department focuses its efforts on further evaluating the status of the species. The Department's evaluation of the species during the candidacy period will result in the status report described in Section A.2 above. The status report provides the basis for the Department's recommendation to the Commission before the Commission takes final action on the petition and decides whether the petitioned action is or is not warranted.

The regulations as proposed in strikeout-underline format are attached to this notice. Notice of the proposed action shall be posted on the Fish and Game Commission website at <http://www.fgc.ca.gov>.

Section 240 Finding

Pursuant to the authority vested in it by FGC Section 240 and for the reasons set forth in the attached "Statement of Facts Constituting Need for Emergency Action," the Commission expressly finds that the adoption of these regulations is necessary for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of these regulations will allow activities that may affect California tiger salamander to continue during the candidacy period as long as those activities are conducted in a manner consistent with the protections specified in these regulations.

Public Comments on Proposed Emergency Regulations

The Commission readopted this emergency regulation at its November 4, 2009 meeting.

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (OAL), the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. It is anticipated that the emergency regulation will be filed with the OAL on or about November 12, 2009. After submission of the proposed emergency to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

In order to be considered, public comments on proposed emergency regulations must be submitted in writing to the Office of Administrative Law, 300 Capitol Mall, Room 1250,

Sacramento, CA 95814; AND to the Fish and Game Commission, 1416 Ninth Street, Room 1320, Sacramento, CA 95814, or via fax to (916) 653-5040 or via e-mail to fgc@fgc.ca.gov. Comments must identify the emergency topic and may address the finding of emergency, the standards set forth in sections 11346.1 and 11349.1 of the Government Code and Section 240 of the Fish and Game Code. Comments must be received within five calendar days of filing of the emergency regulations. Please refer to OAL's website (www.oal.ca.gov) to determine the date on which the regulations are filed with OAL.

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) Costs/Savings in Federal Funding to the State:

The Commission has determined that adoption of Section 749.4, Title 14, CCR as an emergency regulation pursuant to FGC Section 2084, will not result in costs or savings in federal funding to the State.

(b) Nondiscretionary Costs/Savings to Local Agencies:

The Commission has determined that adoption of Section 749.4, Title 14, CCR as an emergency regulation pursuant to FGC Section 2084, will likely provide cost savings to local agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take by Permit on a project-by-project basis which is both time-consuming and costly to local agencies seeking take authorization.

(c) Programs Mandated on Local Agencies or School Districts:

The Commission has determined that the adoption of Section 749.4 Title 14, CCR as an emergency regulation does not impose a mandate on local agencies or school districts.

(d) 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; and

(e) Effect on Housing Costs:

The Commission has determined that the adoption of Section 749.4, Title 14, CCR as an emergency regulation will not result in any cost to any local agency or school district for which Government Code sections 17500 through 17630 require reimbursement and will not affect housing costs.

(f) Costs or Savings to State Agencies

The Commission has determined that adoption of Section 749.4, Title 14, CCR as an emergency regulation pursuant to FGC Section 2084, will likely provide cost savings to state agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take by Permit on a project-by-project basis which is both time-consuming and costly for both the Department in processing and authorizing Permits and other state agencies seeking take authorization.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business. The Commission has drafted the regulations in Plain English pursuant to Government Code sections 11342.580 and 11346.2(a)(1).

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 action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

FISH AND GAME COMMISSION

Dated: November 5, 2009

John Carlson, Jr.
Executive Director