

**FISH AND GAME COMMISSION
STATEMENT OF EMERGENCY ACTION
FOR RE-ADOPTION OF EMERGENCY REGULATIONS**

Emergency Action to Re-adopt Section 749.6, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Mountain-Yellow Legged Frog
(*Rana muscosa* and *Rana sierrae*) During Candidacy Period

I. Request for Approval of Re-adoption of Emergency Regulation

The Fish and Game Commission (Commission) requests to re-adopt Section 749.6, Title 14, California Code of Regulations (CCR) [Office of Administrative Law (OAL) file number 2010-0930-03 E] without modification. The Findings of Emergency for this file (Attachment A), which contain the following information: Statement/Finding of Emergency; Authority and Reference Citations; Informative Digest; Fiscal Impact Statement; and Standard Form 399 are incorporated by reference. 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 Mountain yellow-legged frog (MYLF), while the Department of Fish and Game (Department) focuses its efforts on further evaluating the status of MYLF.

II. Emergency Regulation in Effect to Date

On September 15, 2010, the Commission determined that the listing of MYLF may be warranted. (Cal. Reg. Notice Register 2010, No. 40-Z, p. 1601 (October 1, 2010).) The Commission's determination designates MYLF as a candidate species under the California Endangered Species Act (CESA). On September 15, 2010, the Commission adopted an emergency regulation pursuant to Fish and Game Code (FGC) section 2084 to allow incidental take of MYLF during its candidacy period subject to specified conditions. (Cal. Reg. Notice Register 2010, No. 43-Z, p. 1782 (October 22, 2010).) The emergency regulation was approved by OAL and became effective on October 11, 2010. Pursuant to Government Code (GC) sections 11346.1(e) and (h), emergency regulations are effective for 180 days. OAL may approve two re-adoptions, each for a period not to exceed ninety days. In the absence of re-adoption, the current 2084 regulation will expire on April 12, 2011.

III. Statement of Emergency

The Commission has prepared this Emergency Action Statement under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) in connection with its request to OAL to approve the re-adoption of section 749.6 of Title 14 of the California Code of Regulations (CCR). The Commission's adoption, and requested re-adoption, of section 749.6 as an emergency action under the APA is based, in part, on authority provided by FGC sections 240 and 2084. Pursuant to the latter section, the emergency regulation adopted by the Commission,

section 749.6, authorizes incidental “take” of MYLF during candidacy, subject to certain terms and conditions prescribed by the Commission. (See generally Fish & G. Code, §§ 86, 2080, 2084, 2085.)

As set forth above, the Commission designated MYLF as a candidate species under CESA and found that adoption of section 749.6 pursuant to FGC sections 240 and 2084 constituted a necessary emergency action by the Commission under the APA. If the emergency regulation is not re-adopted, individuals engaging in activities authorized pursuant to section 749.6 would need to obtain an incidental take permit (ITP) or other authorization from the Department on a project-by-project basis to avoid potential criminal liability for violating CESA should take occur. The issuance of individual ITPs authorizing incidental take is a complicated and lengthy process, and the Commission finds specifically that it is not feasible for the regulated community to obtain, and the Department to issue, ITPs or other authorizations on a project-by-project basis for the numerous activities that would otherwise be prohibited during the candidacy period for MYLF. Without re-adoption of the emergency regulation, prospective permittees, by any reasonable measure, would be subject to CESA’s take prohibition without an ability to obtain the necessary state authorization during the candidacy period. As a practical matter, activities that result in the take of MYLF would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby MYLF may or may not be listed as endangered or threatened under CESA. As a result, many projects that are planned or underway that may provide economic, scientific, conservation, and/or other benefits to the State of California, its residents and their communities, and the State’s natural resources would be postponed during the candidacy period or canceled entirely. The Commission finds this threatened result constitutes an emergency under Fish and Game Code section 240 and the APA requiring immediate action, especially against the backdrop of the economic crisis currently faced by the State of California.

Given that the emergency circumstances that necessitated the original 2084 regulation are continuing and unchanged, the Commission requests that the previous Finding of Emergency (Attachment A) previously incorporated by reference into this document be used to supplement this justification.

IV. Re-adoption Criteria

1) Same or Substantially Equivalent

Pursuant to GC section 11346.1(h), the text of a re-adopted regulation must be the “same or substantially equivalent” to the text of the original emergency regulation. The proposed language for the re-adopted 2084 emergency regulation is the same as the language of the original 2084 emergency regulation. As no changes have been made to the text of Section 749.6, Title 14, CCR, this requirement has been met.

(2) Substantial Progress

GC section 11346.1(h) specifies that the emergency rulemaking agency must demonstrate that it is making “substantial progress and has proceeded with due diligence” to comply with the standard rulemaking provisions. The Commission has not technically complied with this requirement because a standard rulemaking is not necessary in this particular circumstance and this 2084 regulation is not the appropriate mechanism to authorize take of a threatened or endangered species absent statutory authority.

A 2084 regulation is an appropriate mechanism to authorize take for “candidate” species. Pursuant to FGC sections 2080 and 2085, take of a candidate species is prohibited, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to FGC section 2084 or (2) the Department authorizes the take through incidental take permits issued on a project-by-project basis pursuant to FGC section 2081. Therefore a 2084 regulation is an appropriate mechanism to authorize take of a candidate species. However, a species is only a “candidate” until the Commission decides whether listing the species as threatened or endangered “is warranted” or “is not warranted.” (Fish & G. Code § 2075.5.) This determination immediately follows the conclusion of the 12-month review of the species’ status by the Department. (Id. § 2074.6.) After the Commission makes the determination that listing the species is or is not warranted, a 2084 regulation is no longer appropriate because the species is no longer a candidate for listing. At that point, the species is either protected under CESA as a listed species or is no longer protected under CESA because it is not listed and is no longer a candidate for listing.

If the Commission determines that listing the MYLF “is warranted,” the former candidate species will become a listed species and the persons conducting activities currently covered by the 2084 regulation that take MYLF will be required to obtain an Incidental Take Permit (ITP) pursuant to FGC section 2081(b). ITP’s are authorized for certain activities only if specified criteria are met including minimization and full mitigation of the impacts of the take. ITP’s are issued on a project-by-project basis to ensure the mitigation and minimization measures are narrowly tailored to the individual project and completely protective of the species. Given that persons conducting activities that will take MYLF will be required to obtain an ITP, which will contain tailored measures to mitigate the impacts of the take, adoption of this 2084 regulation as permanent is not necessary because the MYLF will be protected under CESA and its provisions as a listed species.

If the Commission decides that listing the MYLF “is not warranted,” take of the former candidate species will no longer be prohibited under CESA. Absent protected status, no mechanism would be needed to authorize take of MYLF. In that circumstance, adoption of this 2084 regulation as permanent is unnecessary.

A standard rulemaking is not necessary to authorize take of MYLF regardless. As discussed above, if the MYLF is listed it will be protected under CESA as a listed species independent of this 2084 regulation. If the MYLF is not listed, no authorization will be needed for a take. The Commission is currently proceeding with due diligence in accordance with its statutory duties to determine whether or not the listing of MYLF is warranted and the inherent temporary nature of a 2084 regulation makes pursuing its permanent status unnecessary.