

**FISH AND GAME COMMISSION
REQUEST FOR SECOND READOPTION OF EMERGENCY
REGULATIONS**

Emergency Action to Readopt Section 749.4, Title 14, CCR,
Re: Special Order Relating to Incidental Take of California tiger salamander
(*Ambystoma californiense*) During Candidacy Period

Request for Readoption of Emergency Regulation:

The Fish and Game Commission (“Commission”) requests to readopt Section 749.4, Title 14, California Code of Regulations (“CCR”) [Office of Administrative Law (OAL) file numbers 2009-0213-01E and 2009-0817-01EE]. The Findings of Emergency for OAL file 2009-0213-01E containing the following information: Statement/Finding of Emergency; Authority and Reference Citations; Informative Digest; Fiscal Impact Statement; Standard Form 399, is hereby 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 California tiger salamander, while the Department of Fish and Game (“Department”) focuses its efforts on further evaluating the status of California tiger salamander.

Emergency Regulation in Effect to Date:

On February 5, 2009, the Commission accepted a petition to list California tiger salamander as threatened or endangered under the California Endangered Species Act [“CESA”; Fish and Game Code (“FGC”), Section 2050 et seq.], thereby designating the California tiger salamander a candidate species. On that same date, the Commission adopted an emergency regulation pursuant to FGC Section 2084 to provide coverage for the take of California tiger salamander during its candidacy period (“2084 regulation”). The 2084 regulation was approved by OAL and became effective on February 23, 2009. Pursuant to Government Code (“GC”) Section 11346.1, subdivisions (e) and (h), emergency regulations are effective for 180 days. OAL may approve two readoptions, each for a period not to exceed 90 days. On August 6, 2009, the Commission readopted the emergency regulation with minor modifications. The readopted emergency regulation was approved by OAL and became effective August 24, 2009. (See OAL File 2009-0817-01EE.) In the absence of a second readoption, the 2084 regulation will expire on November 24, 2009.

Statement of Emergency:

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, in the absence of a 2084 regulation, individuals engaged in otherwise lawful activities including activities authorized under the Federal Endangered Species Act, activities

covered by a lake or streambed alteration agreement issued by the Department of Fish and Game pursuant to FGC Section 1602, subdivision (a)(4)(B), and routine and ongoing agricultural activities on land in an existing agricultural use that may result in take of California tiger salamander would have to obtain a permit from the Department in order to avoid liability and potential criminal violations of CESA for actions or activities that result in take of the candidate species.

The issuance of individual permits authorizing incidental take can be a complicated, lengthy, and expensive process, and the Commission finds that it is not feasible for the Department to issue incidental take permits on a project-by-project basis for the above-referenced activities that will otherwise be prohibited during the California tiger salamander's candidacy period. The Department has determined that, with the measures outlined in the readopted 2084 regulation, the species will not become immediately at risk of extinction. For these reasons, readoption of the 2084 regulation is necessary to allow the activities described above. This regulation will ensure appropriate interim protections for California tiger salamander within the area covered by the petition while the Department continues its 12-month review of the status of the candidate species.

Given that the emergency circumstances that necessitated the original 2084 regulation are continuing and unchanged, the Commission requests that the previous Finding of Emergency and Supplement to Statement of Emergency Action be incorporated to supplement this justification.

Compliance with Readoption Criteria

(1) Same or Substantially Equivalent:

Pursuant to GC Section 11346.1, subdivision (h), the text of a readopted regulation must be the "same or substantially equivalent" to the text of the original emergency regulation. The language for the readopted 2084 emergency regulation (OAL File 2009-0817-01EE) is substantially equivalent to the language of the original 2084 emergency regulation (OAL File 2009-0213-01E). The text of both regulations provide coverage for the take of California tiger salamander subject to certain conditions for the following activities: activities authorized under the Federal Endangered Species Act, activities covered by a lake or streambed alteration agreement issued by the Department of Fish and Game pursuant to FGC Section 1602, subdivision (a)(4)(B), and routine and ongoing agricultural activities on land in an existing agricultural use. Minor technical modifications were made to the text of the original 2084 regulation to provide clarification and became law during the previous readoption, effective August 24, 2009. Specifically, in OAL File 2009-0817-01EE, language in subdivision (a)(2)(ii) was modified to clarify that under Section 749.4, subdivision (a)(2), take may only occur within an area specifically covered by a lake or streambed agreement. The text of the proposed second readopted 2084 regulation is identical to the text of the first readopted 2084 regulation in OAL File 2009-0817-01EE.

(2) Substantial Progress:

GC Section 11346.1, subdivision (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 complied with this requirement by proceeding with due diligence to determine whether or not listing the California tiger salamander as a threatened or endangered species is warranted. The Commission’s forthcoming final decision regarding the status of the California tiger salamander obviates the need for permanent 2084 measures.

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” (FGC Section 2075.5). This determination immediately follows the conclusion of the 12-month review of the species’ status by the Department (FGC Section 2074.6). After that point, the species is either protected under CESA by virtue of its listed status or is no longer protected under CESA because it is not listed and is no longer a candidate for listing.

If the Commission decides that listing the California tiger salamander “is warranted,” the former candidate species then becomes a listed species and all activities resulting in take of California tiger salamander currently covered by the 2084 regulation will require an Incidental Take Permit (ITP) pursuant to FGC Section 2081 or another form of take coverage. ITPs are authorized for certain activities if specified criteria are met, including minimization and full mitigation of the impacts of the take. ITPs are issued on a project-by-project basis to ensure the mitigation and minimization measures are narrowly tailored to the individual project and protective of the species covered.

If the Commission decides that listing the California tiger salamander “is not warranted,” take of the former candidate species would no longer be prohibited under CESA. Absent protected status, no mechanism would be needed to authorize take of California tiger salamander.

In summary, the Commission has complied with this requirement by diligently pursuing its determination of whether or not listing of California tiger salamander is warranted. The inherent temporary nature of a 2084 regulation makes pursuing its permanent status unnecessary.