

FISH AND GAME COMMISSION STATEMENT OF EMERGENCY ACTION

Emergency Action to Add Section 749.7, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Black-backed Woodpecker
(*Picoides arcticus*) During Candidacy Period

I. Introduction

The Fish and Game Commission (“Commission”) is the decision-making body that implements the California Endangered Species Act (“CESA”) (Fish & G. Code, § 2050 et seq.). As described in greater detail below, CESA authorizes the Commission to establish lists of threatened and endangered species, and to add or remove species from those lists if it finds, upon receipt of sufficient scientific information, that the action is warranted. Pursuant to Section 2084 of the Fish and Game Code (“FGC”), the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while the Department of Fish and Game (“Department”) and Commission evaluate whether the species should be listed as threatened or endangered under CESA. The Commission has relied on the authority in Section 2084 to permit take of candidate species on nine previous occasions: in 1994 for the southern torrent salamander; in 1994 for the coho salmon south of San Francisco; in 1997 and 1998 for the spring-run chinook salmon; in 2000 for coho salmon throughout its range in California; in 2002 for the Xantus’s murrelet; in 2008 for the longfin smelt; in 2009 for the California tiger salamander; in 2009 for the Pacific fisher; and in 2010 for the mountain yellow-legged frog.

On December 15, 2011, the Commission considered the adoption of findings designating the Black-backed Woodpecker as a candidate species under CESA. The Commission has prepared this Emergency Action Statement under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) in connection with its subsequent adoption of Section 749.7 of Title 14 of the California Code of Regulations. The Commission’s adoption of Section 749.7 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 of the FGC, Section 749.7 will authorize incidental “take” of the Black-backed Woodpecker during candidacy, subject to certain terms and conditions prescribed by the Commission. (See generally Fish & G. Code, §§ 2080, 2084, 2085, and 86.)

As set forth below, the Commission designated the Black-backed Woodpecker as a candidate species under CESA and finds that adoption of Section 749.7 pursuant to FGC 240 and 2084 constitutes a necessary emergency action by the Commission under the APA. In the absence of this emergency regulation, individuals engaging in activities authorized pursuant to Section 749.7 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. 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 the Black-backed Woodpecker. Without this emergency regulation, prospective permittees, many of whom already have the necessary entitlements to proceed with their approved projects, would be subject to CESA's take prohibition without, by any reasonable measure, an ability to obtain the necessary state authorization during the candidacy period. As a practical matter, activities that result in the take of the Black-backed Woodpecker would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby the Black-backed Woodpecker may or may not be listed as endangered or threatened under CESA. As a result, many projects that are planned or underway that provide great economic and other benefits to the permittees, their employees, their local communities, and the State of California would be postponed during the candidacy period or canceled entirely. The Commission finds this threatened result constitutes an emergency under the APA requiring immediate action, especially against the backdrop of the economic crisis currently faced by the State of California.

II. Background

On October 1, 2010, the Commission received a petition from the John Muir Project of Earth Island Institute and the Center for Biological Diversity to list the Black-backed Woodpecker as an endangered or threatened species under CESA. (Cal. Reg. Notice Register 2010, No. 44-Z, p. 1851.)

III. Facts Constituting the Need for Emergency Action

The APA defines an "emergency" to mean "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code § 11342.545.). To make a finding of emergency, the agency must describe the specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation. (Gov. Code § 11346.1(b)(2).). Some factors an agency may consider in determining whether an emergency exists include: (1) the magnitude of the potential harm, (2) the existence of a crisis situation, (3) the immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken, and (4) whether the anticipation of harm has a basis firmer than simple speculation. The Commission has considered all of these factors and the definition of an emergency provided in the APA, as well as pertinent authority in FGC section 240. Under this latter authority, notwithstanding any other provision of the Fish and Game Code, the Commission may adopt an emergency regulation where doing so is necessary for the immediate conservation,

preservation, or protection of fish and wildlife resources, or for the immediate preservation of the general welfare. The Commission finds that such necessity exists in the present case.

Section 749.7 authorizes incidental take of the Black-backed Woodpecker during candidacy for six categories of activities:

- In connection with scientific, education, or management activities.
- In connection with otherwise lawful activities initiated to protect, restore, conserve, or enhance any state or federally threatened or endangered species and its habitat.
- In connection with otherwise lawful activities necessary to prevent, respond to, or suppress wildland fires.
- In connection with otherwise lawful timber harvest activities and operations authorized by the Z'Berg Nejedly Forest Practice Act (Pub. Resources Code, § 4511 et seq.), the Forest Practice Rules of the Board of Forestry, which are found in Chapters 4, 4.5, and 10, of Title 14 of the California Code of Regulations, or other applicable law.

The Commission finds as set forth below that an emergency exists with respect to each of these covered activities.

A. Scientific, Education, or Management Activities

Section 749.7, subdivision (a)(1), authorizes incidental take of the Black-backed Woodpecker for scientific, education, or management activities, including activities authorized through a scientific collecting permit issued by the Department or through a recovery permit issued by a federal wildlife agency. As explained below, the Commission finds that the designation of the Black-backed Woodpecker as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to otherwise lawful scientific, education, or management activities.

Without Section 749.7, subdivision (a)(1), take of the Black-backed Woodpecker for scientific, education, and management purposes would require authorization by the Department through an individual permit or authorization which is often a lengthy, complicated process. For some of the activities authorized by these subdivisions, there is one other unique form of take authorization available, Fish and Game Code section 2081, subdivision (a). Because this form of take authorization still requires "permits or memorandums of understanding (to) authorize individuals...and scientific or educational institutions" to take, it is unlikely that permits under this section could be issued much more quickly than the standard ITP issued by the Department under section 2081, subdivision (b).

Management, education, and scientific activities (including research and monitoring) are critical during this candidacy period. During this period, the Department is expected to prepare a status review for the Black-backed Woodpecker so the Commission can determine if the species should in fact be listed. During this candidacy period the Department needs all of the scientific information that is available to make the most scientifically sound recommendation to the Commission and the Commission to make the most scientifically sound final listing decision. Black-backed Woodpecker studies conducted pursuant to Department issued scientific collecting permits, which could occur throughout the species' range, must be allowed to commence or continue to ensure a complete data set. Many studies operate on a continuous basis and rely on that predictability in coming to scientific conclusions about the data they acquire. In addition, new studies during this period that might be proposed should also be facilitated without delay to fill in any data gaps relevant to the possible listing of the Black-backed Woodpecker. If these activities are not allowed to continue, adequate evaluation and protection of the Black-backed Woodpecker could be severely impaired and the public will be disserved by decisions being made without the best available science.

Adoption of this emergency regulation would minimize the hardships that would be caused by delays in ongoing or new management, education, and scientific activities while providing safeguards to protect the Black-backed Woodpecker, including continued regulatory oversight by the Department pursuant to its authority to condition scientific collecting permits. (See Cal. Code Regs, tit. 14, § 650.) Therefore, the Commission finds that impacts to management, education, and scientific activities caused by designating the Black-backed Woodpecker as a candidate species, constitute an emergency under the APA requiring immediate action.

B. Actions to Protect, Restore, Conserve, or Enhance

Section 749.7, subdivision (a)(2), authorizes take of the Black-backed Woodpecker incidental to otherwise lawful activities where the purpose of the underlying activity is to protect, restore, conserve, or enhance a state or federally threatened or endangered species and its habitat. As explained below, the Commission finds that the designation of the Black-backed Woodpecker as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to otherwise lawful activities to protect, restore, conserve, or enhance state or federally threatened or endangered species and their habitat. The Commission also finds that immediate emergency action to adopt Section 749.7, subdivision (a)(2), is necessary to conserve, preserve, or protect of fish and wildlife resources, and to preserve the general welfare.

Without Section 749.7, subdivision (a)(2), take of the Black-backed Woodpecker incidental to otherwise lawful activities to protect, restore, conserve, or enhance

state or federally threatened or endangered species and their habitat would require authorization by the Department through an individual ITP which is a lengthy, complicated process. Ongoing and planned activities to protect, restore, conserve, or enhance state or federally threatened or endangered species are critical during this candidacy period. The status of many listed species is precarious, and even the slightest delay in initiated or continued implementation of any related conservation actions could adversely affect or otherwise cause further decline of these species. In addition, any further decline in the status of listed species will lead to increased costs to the Department because more resources will be required to get the species to the point where protective measures are no longer necessary. Increased cost will also be shouldered by prospective permittees, who will be charged with funding the mitigation and related monitoring required for the impacts of their project on the species.

Adoption of this emergency regulation would minimize the hardships that would be caused by delays in ongoing or new lawful activities to protect, restore, conserve, and enhance state or federally threatened or endangered species and their habitat. The Commission finds that impacts to activities to protect, restore, conserve, or enhance state or federally threatened or endangered species and their habitat caused by designating the Black-backed Woodpecker as a candidate species, constitute an emergency under the APA requiring immediate action.

C. Wildland Fire Prevention, Suppression and Response

Section 749.7, subdivision (a)(3), authorizes take of the Black-backed Woodpecker incidental to otherwise lawful wildland fire prevention, response, and suppression activities. As explained below, the Commission finds that the designation of the Black-backed Woodpecker as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to fire prevention, response, and suppression activities. The Commission also finds that immediate emergency action to adopt Section 749.7, subdivision (a)(3), is necessary to preserve public health and safety, and the general welfare.

Without Section 749.7, subdivision (a)(3), take of the Black-backed Woodpecker incidental to otherwise lawful fire prevention, response, and suppression activities, would require authorization by the Department through an individual ITP and, as previously stated doing so is a lengthy and complicated process. (There are other means by which take can be authorized under CESA, however they either take longer than individual ITPs or are not likely to be available for use for wildland fire prevention, suppression and response activities.) It is important to note that unlike many other regulatory statutes, CESA does not contain any exemption from the permitting requirements or the take prohibition for emergency situations like fuel (vegetation) control, wildfire suppression, and response. California's fire seasons have recently involved far-ranging

catastrophic wildland fires. The role of the emergency regulation in allowing activities related to fuel (vegetation) control; and fire suppression and response continues to fall squarely within virtually any statutory definition of "emergency," including one of the most narrow--CEQA's definition of an emergency that states it is an activity "involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services." (Pub. Resources Code, § 21080; see also CEQA Guidelines, § 15359.)

The emergency regulation removes impediments to critical wildland fire suppression and response. Delays due to permitting would cause risks to public safety, should fire suppression activities be delayed or cancelled entirely. In addition, there would be grave social and economic harm to the employees and agencies tasked with carrying out the fire suppression activities and the local communities where those activities might be critically needed.

Adoption of this emergency regulation would minimize these hardships. Therefore, the Commission finds that impacts to wildland fire prevention, response, and suppression activities, caused by designating the Black-backed Woodpecker as a candidate species, constitute an emergency under the APA requiring immediate action.

D. Forest Practices and Timber Harvest Activities

Section 749.7, subdivision (a)(4), authorizes incidental take of the Black-backed Woodpecker incidental to otherwise lawful timber harvest activities. As explained below, the Commission finds that the designation of the Black-backed Woodpecker as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to otherwise lawful timber harvest activities and operations. The Commission also finds that immediate emergency action to adopt Section 749.7, subdivision (a)(4), is necessary to preserve the general welfare.

In general, timber harvest review in California is administered by the California Department of Forestry and Fire Protection ("CalFire") pursuant to the Z'Berg Nejedly Forest Practice Act (Pub. Resources Code, § 4511 et seq.). The Forest Practice Rules (Cal. Code Regs., tit. 14, § 895 et seq.) and other applicable law, including the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.).

Without Section 749.7, subdivision (a)(4), many existing, already approved, otherwise lawful timber harvest operations in the Black-backed Woodpecker range could not move forward absent additional review and re-approval. Likewise, without Section 749.7, many already-approved, otherwise lawful timber harvest operations and activities would require a project-specific authorization

under CESA from the Department. Yet, the regulatory oversight of timber operations by various public agencies under State law generally requires consideration and protection of various environmental resources and in many instances government approval of individual timber harvest activities requires compliance with CEQA and mitigation of significant environmental impacts to the extent feasible. Therefore, many timber projects that are about to commence or are already underway currently include measures that will reduce the prospect of adverse impacts to, and minimize and mitigate take of the Black-backed Woodpecker. Re-opening and re-negotiating agreements for timber activities to address the Black-backed Woodpecker's legal status as a candidate species and, where necessary, to obtain an ITP or other take authorization under CESA (e.g., FGC section 2835) would unnecessarily delay these already-approved and otherwise lawful timber operations, resulting in undue burden on the Timber Harvest Plan (THP) holder. Without this emergency regulation, many routine and ongoing otherwise lawful timber operations would be delayed while awaiting the necessary State CESA authorization or cancelled entirely. In many cases, the delays would cause THP holders to substantially delay or cancel their projects entirely, resulting in great social and economic harm to the THP holders, their employees, registered professional foresters, the local communities that rely on timber harvest activities, and the State of California.

CalFire review of existing otherwise lawful timber operations, along with project specific CESA permitting by the Department, would also pose a significant burden to these state agencies. Both CalFire and the Department would likely face a sudden and potentially large increase in requests for timber harvest review and related take authorizations under CESA. Neither agency is equipped with appropriate resources to handle and address the likely workload associated with this scenario, creating a significant permitting backlog.

IV. Application of the California Environmental Quality Act

Subdivision (b) of the emergency regulation is different from the previous sections described herein. It is not an additional activity for which take is authorized under the regulation. Subdivision (b) is guidance from the Fish and Game Commission, the entity with responsibility for designating the status of a species under CESA, to other CEQA lead agencies that are reviewing projects that could impact the Black-backed Woodpecker. This guidance is designed to assist lead agencies in their CEQA review by setting out the Commission's expectations as to how this species should be treated under CEQA. This CEQA review may be ongoing or may arise during the candidacy period. The Commission believes that this information is needed as soon as the candidacy period begins so lead agencies will know what measures, if any, are needed to protect the species.

V. Reporting

As discussed in III above, it is vital that during this candidacy period detections and observations of the Black-backed Woodpecker be reported to the Department so it can have the most complete information possible as it prepares its recommendation to the Commission on whether to recommend listing the species, and for the Commission that must make the ultimate decision to list or not.

For these reasons, the immediate adoption of this emergency regulation is necessary to allow numerous projects and activities to continue during the candidacy review period for the Black-backed Woodpecker under CESA. This regulation includes conditions designed to protect the species for all of the activities covered. The Commission believes the activities permitted under this regulation will result in very limited take and will not likely jeopardize the continued existence of the species. The Commission finds, in this respect, that the regulation subject to this determination will ensure appropriate interim protections for the Black-backed Woodpecker while the Department conducts a 12-month review of the status of the candidate species and the Commission makes its final determination regarding listing under CESA.

VI. Express Finding of Emergency

Pursuant to the authority vested in the Commission by FGC Section 240, and for the reasons set forth above, the Commission expressly finds that the adoption of this regulation is necessary for the immediate conservation, preservation, or protection of fish and wildlife resources, or for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of this regulation will allow activities that may affect the Black-backed Woodpecker to continue during the candidacy period as long as those activities are conducted in a manner consistent with the protections specified in this regulation.

VII. Authority and Reference Citations

Authority: FGC Sections 200, 202, 240, and 2084.

Reference: FGC Sections 200, 202, 240, 2080, 2084, and 2085.

VIII. Informative Digest

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 FGC 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. 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 an ITP issued by the Department under CESA the California Supreme Court stated, "'take' in this context means to catch, capture or kill").)

CESA's take prohibition applies to candidate species pursuant to FGC Section 2085 upon public notice by the Commission of its finding that sufficient information exists to indicate the petitioned action may be warranted. Upon publication of such notice in the California Regulatory Notice Register, take of candidate species is prohibited absent authorization as provided in the FGC. Following such notice, 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 an ITP or other means available under 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. (Fish & G. Code, § 2074.6.) The Commission must schedule the petition for final consideration at its next available meeting after receiving the Department's report. (*Id.*, § 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. (*Id.*, § 2075.5.)

B. Effect of the Emergency Action

Section 749.7 of Title 14 of the California Code of Regulations would authorize take, as defined by Fish and Game Code section 86, of the Black-backed Woodpecker during its candidacy subject to the following terms and conditions:

(a) Take Authorization.

Based upon the above finding, the Commission authorizes the take of the Black-backed Woodpecker during the candidacy period subject to the terms and conditions herein.

(1) Scientific, Education or Management Activities.

Take of the Black-backed Woodpecker incidental to scientific, education, or management activities is authorized.

(2) Actions to Protect, Restore, Conserve or Enhance.

Take of the Black-backed Woodpecker incidental to otherwise lawful activities initiated to protect, restore, conserve or enhance a state or federally threatened or endangered species and its habitat is authorized.

(3) Wildland Fire Response and Related Vegetation Management.

Take of the Black-backed Woodpecker incidental to otherwise lawful wildland fire prevention, response, and suppression activities, including related vegetation

management, is authorized. For purposes of this authorization, vegetation or fuels management activity shall mean an activity to reduce hazardous fuels and prevent or reduce the risk of wildland fires authorized or otherwise permitted by the Z'Berg Nejedly Forest Practice Act (Public Resources Code, Section 4511 et seq.), the Forest Practice Rules of the Board of Forestry, which are found in Chapters 4, 4.5, and 10, of Title 14 of the California Code of Regulations, the Wildland Fire Protection and Resources Management Act of 1978 (Public Resources Code, Section 4461-4480), the California Forest Improvement Act of 1978 (Public Resources Code, Section 4790 et seq.), the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), or other applicable law.

(4) Forest Practices and Timber Harvest.

Take of the Black-backed Woodpecker incidental to otherwise lawful timber operations is authorized. For purposes of this authorization, an otherwise lawful timber operation shall mean a timber operation authorized or otherwise permitted by the Z'Berg Nejedly Forest Practice Act (Public Resources Code, Section 4511 et seq.), the Forest Practice Rules of the Board of Forestry, which are found in Chapters 4, 4.5, and 10, of Title 14 of the California Code of Regulations, or other applicable law.

(b) Application of the California Environmental Quality Act.

Consistent with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), if a state or local agency determines that an activity identified in subdivision (a) will result in a significant impact on the Black-backed Woodpecker, the agency should not approve the activity as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant impact on the Black-backed Woodpecker. (See Pub. Resources Code, § 21002.) Measures or project changes required as part of a state or local agency authorization to address significant impacts on the Black-backed Woodpecker may include measures to conserve the species, including avoidance or preservation of habitat attributes relied on by the species. Voluntary measures to aid in the conservation of the Black-backed Woodpecker shall also be encouraged.

(c) Reporting.

Any person, individual, organization, or public agency for which incidental take of the Black-backed Woodpecker is authorized pursuant to subdivision (a) shall report observations and detections of the Black-backed Woodpecker, including take, to the Department of Fish and Game on a semi-annual basis during the candidacy period. Observations, detections, and take of the Black-backed Woodpecker pursuant to this subdivision for the previous six months shall be reported by the first day of March and the first day of September, respectively, during the candidacy period for the Black-backed Woodpecker. Observations, detections, and take shall be reported pursuant to this subdivision to the Department of Fish and Game, Wildlife Branch, Attn: Black-backed Woodpecker Observations, 1812 Ninth St., Sacramento, CA 95811, or by email submission to wildlifestrategy@dfg.ca.gov. Information reported to the Department pursuant to this subdivision shall include as available: a contact name; the date and location (GPS coordinates preferred) of the observation, detection, or take; and details regarding the animal(s) observed.

(d) Additions, Modifications, or Revocation.

(1) Incidental take of the Black-backed Woodpecker 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 the Black-backed Woodpecker.

C. Existing, Comparable Federal Regulations or Statutes

The Federal Endangered Species Act (FESA) (16 U.S.C. § 1531 et seq.) includes a listing process that is comparable to the listing process under CESA, except that take of a candidate species is not prohibited under FESA. The Black-backed Woodpecker is not listed as an endangered or threatened species under FESA.

FESA Section 4(d) (16 U.S.C. § 1533 (d)) is similar in some respects to FGC Section 2084. Section 4(d) authorizes the Service or the National Marine Fisheries Service (NMFS) 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 Service

and NMFS the ability to craft comprehensive regulations to apply to particular activities that may result in take of a threatened species in a manner similar to the Commission's authority to prescribe terms and conditions pursuant to FGC Section 2084 during the species' candidacy period. Here, no 4(d) rules have been promulgated, because the "warranted but precluded" finding by the Service did not yet effectuate the designation of the Black-backed Woodpecker as a federally listed threatened or endangered species.

D. Policy Statement Overview

The objective of this emergency regulation is to allow specified activities to continue on an interim basis, subject to the measures in the regulation designed to protect the Black-backed Woodpecker, pending final action by the Commission under CESA related to the proposed listing. The Department's evaluation of the species during the candidacy period will result in the status report described in Section VIII.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.

IX. Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements governing the adoption of emergency regulations pursuant to FGC section 240. The Commission held a public hearing on this regulation on December 15, 2011, and the above finding that this regulation is necessary for the immediate conservation, preservation, or protection of fish and wildlife resources, and for the immediate preservation of the general welfare meets the requirements of section 240.

X. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the emergency regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

(a) Costs/Savings in Federal Funding to the State:

The Commission has determined that the adoption of Section 749.7 of Title 14 of the California Code of Regulations 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 749.7 of Title 14 of the California Code of Regulations 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 of the Black-backed Woodpecker on a project-by-project basis, which is both time-consuming and costly to local agencies seeking take authorization. Without this emergency regulation, many routine and ongoing otherwise lawful timber operations on land already managed for timber harvest would be delayed or cancelled entirely, as would vegetation management, wildfire suppression and response and research and monitoring while awaiting the necessary CESA authorization. These delays and cancellations would cause great economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California.

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

The Commission has determined that the adoption of Section 749.7 of Title 14 of the California Code of Regulations 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; Government Code; and

(e) Effect on Housing Costs:

The Commission has determined that the adoption of Section 749.7 of Title 14 of the California Code of Regulations 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 749.7 of Title 14 of the California Code of Regulations 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 of the Black-backed Woodpecker on a project-by-project basis, which is both time-consuming and costly for both the Department in processing and authorizing such take, as well as to state agencies seeking take authorization.

Absent adoption of the emergency regulation, state and local agencies, and the regulated community will bear the timing and process costs associated with project-by-project permitting by the Department. Regulations implementing CESA contemplate a roughly six month review by the Department for proposed ITPs. Appropriate CEQA review for individual ITPs also affects the timing of permits issued by the Department. (Cal. Code Regs., tit. 14, §§ 783.3, 783.5.)

The number and timing of permits issued by the Department is also a product of economic conditions, the State of California's ongoing fiscal crises, and the resources actually available to the Department to administer the permitting program.

CalFire, for example, with its mandate to prevent, respond, and suppress wildland fires would avoid timing and processing costs for individual ITPs with the adoption of Section 749.7. In some instances, the need for and the timing and process costs associated with individual ITPs could delay important prevention and suppression activities. That could lead, in turn, to a greater number and intensity of wildland fires, and greater overall cost for prevention, response, and suppression activities by CalFire.

Additionally, reopening existing ITPs, in addition to participating in review and issuance of new ITPs in the Black-backed Woodpecker's range, would pose a significant burden on CalFire, local agencies, and the Department. Without this emergency regulation, many routine and ongoing otherwise lawful timber operations on land already managed for timber harvest would be delayed or cancelled entirely while awaiting the necessary State CESA authorization. These delays and cancellations could cause significant economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California.