

**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, 240, and 2084, of the Fish and Game Code (FGC) and to implement, interpret or make specific sections 200, 202, 240, 2080, 2084, and 2085 of said Code, proposes to add Section 749.7, Title 14, California Code of Regulations (CCR), relating to incidental take of the Black-backed Woodpecker (*Picoides arcticus*) 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 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 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.

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.

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 Emergency Action," the Commission expressly finds that the adoption of 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. The Commission specifically finds that the adoption of this regulation will allow activities that may affect 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.

Public Comments on Proposed Emergency Regulations

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, 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. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law 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 (OAL), 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 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.

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

Sonke Mastrup
Executive Director

Dated: December 21, 2011