

STATE OF CALIFORNIA  
FISH AND GAME COMMISSION  
INITIAL STATEMENT OF REASONS FOR REGULATORY ACTION  
(Pre-publication of Notice Statement)

Add Section 749.9, Title 14, California Code of Regulations,  
Re: Special Order Relating to Incidental Take of  
Tricolored Blackbird (*Agelaius tricolor*) During Candidacy Period

I. Date of Initial Statement of Reasons: August 3, 2017

II. Dates and Locations of Scheduled Hearings:

- |     |                     |           |                  |
|-----|---------------------|-----------|------------------|
| (a) | Notice Hearing:     | Date:     | October 11, 2017 |
|     |                     | Location: | Atascadero       |
| (b) | Discussion Hearing: | Date:     | December 6, 2017 |
|     |                     | Location: | San Diego        |
| (c) | Adoption Hearing:   | Date:     | February 8, 2018 |
|     |                     | Location: | Sacramento       |

III. Description of Regulatory Action:

- (a) Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:

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 Fish and Game Code 2084, the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while the Department of Fish and Wildlife (Department) and Commission evaluate whether the species should be listed as threatened or endangered under CESA.

On October 8, 2014, the Commission received a petition from the Center for Biological Diversity to take emergency action to list the tricolored blackbird (*Agelaius tricolor*) as endangered under CESA. On December 3, 2014, the Commission listed tricolored blackbird as endangered through emergency regulations that expired on June 30, 2015. In the interim, the Department prepared and submitted to

the Commission a petition evaluation as required by CESA. (Fish & G. Code, § 2073.5(a).) The Commission received the Department's petition evaluation at its April 9, 2015, meeting and on June 11, 2015, the Commission made a decision that listing tricolored blackbird as endangered was not warranted. On August 19, 2015, the Center for Biological Diversity submitted a new petition to the Commission to list the tricolored blackbird as an endangered species. On December 10, 2015, the Commission considered the adoption of findings designating the tricolored blackbird as a candidate species under CESA. Findings were published on January 8, 2016, initiating the development of a status review report by the Department to inform the listing decision. (Fish & G. Code, §§ 2074.2(e)(2), 2074.6; Cal. Reg. Notice Register 2016, No. 2-Z, p. 57.) On December 8, 2016, the Commission approved the Department's request for a six month extension to complete its report on the status of tricolored blackbird. This six month extension will further delay final resolution of the tricolored blackbird final listing decision, which cannot occur until after the Commission receives the Department's completed status review report pursuant to Fish and Game Code Sections 2074.6 and 2075.

The Commission prepared a Statement of Emergency Action as required by the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) on February 19, 2016 in connection with its subsequent adoption of Section 749.8 of Title 14 of the California Code of Regulations (CCR). The Commission's adoption of Section 749.8 as an emergency action under APA was based, in part, on authority provided by Fish and Game Code sections 399 and 2084. Pursuant to Fish and Game Code Section 2084, Section 749.8 authorized incidental "take" of tricolored blackbird during candidacy, subject to certain terms and conditions prescribed by the Commission (See generally Fish & G. Code, §§ 86, 2080, 2084, and 2085). On February 16, 2017, the Commission proposed a second Statement of Emergency Action and re-adopted regulations to authorize incidental take of tricolored blackbird as Section 749.9 of Title 14, CCR. This emergency regulation expired on September 6, 2017.

The adoption of Section 749.9 pursuant to Fish and Game Code sections 399 and 2084 constitutes a necessary action by the Commission under the APA. In the absence of this regulation, individuals engaging in activities authorized pursuant to Section 749.9 would need to obtain an incidental take permit (ITP; Fish & G. Code, § 2081(b)) or other authorization from the Department on a project-by-project basis to avoid potential criminal liability for violating CESA. Issuing 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 tricolored blackbird.

Historically, tricolored blackbirds nested in native flora in or adjacent to wetlands in the Central Valley and elsewhere across the State of California. Concomitant with the loss of wetlands during the 19th and 20th centuries, tricolored blackbirds have adapted to nest in varied substrates. For example, grain fields planted for winter silage on dairy farms provide attractive nesting sites for the species; unfortunately, nesting occurs at about the same time the crops are scheduled for harvest.

For the past two decades, a patchwork of funding sources has been used to pay farmers when they agree to delay harvest until after tricolored blackbird nesting is complete. In some cases, particularly where funding was unavailable or farmers were not aware of the potential for funding to offset losses, harvest has occurred before the young fledged. Recently, the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) committed to provide multiple years of funding to support a program to delay harvest of fields in which tricolored blackbird colonies have nested. At the same time, Dairy Cares, an organization composed of dairy businesses across California, in coordination with other farming interests has initiated an active campaign to educate dairy farmers about tricolored blackbird and the NRCS-funded program. In 2016, through a coordinated effort including NRCS, farming interests, the Department, and Audubon California, dairy farmers enrolled in the NRCS program delayed harvest on fields where an estimated 67,000 tricolored blackbirds nested.

NRCS funds compensate a farmer for about 85 percent of the value of a crop affected by a harvest delay. Under the NRCS program, a colony is identified and the area inhabited by the colony is delineated by a biologist. Once the colony is delineated, a buffer is established and the farmer is allowed to harvest only those fields outside the colony site and buffer area. Delaying harvest protects the vast majority of the colony until the birds fledge, but it does not guarantee that no take will occur. The tricolored blackbird was designated as a candidate for listing, and is therefore subject to the regulatory protections provided by CESA. Promulgating a regulation to authorize incidental take provides farmers assurances that if they agree to follow the requirements imposed by NRCS, delay harvest, and protect the colony nesting in their field, they will not be penalized in the event a small number of birds are taken incidental to their beneficial conservation actions in delaying harvest and otherwise lawful agricultural activities.

The harvest management programs administered by NRCS and the

Department can be expected to protect tens of thousands of nesting tricolored blackbirds, provided farmers are incentivized to participate. However, the designation of the tricolored blackbird as a candidate for listing under CESA could inhibit participation in the harvest management programs. This regulation, in combination with funding from NRCS, will provide farmers with a strong incentive to participate in the harvest management program.

Tricolored blackbird nesting can begin as early as February. The timing of this nesting relative to the listing determination requires that a regulation be in place to conserve nesting tricolored blackbirds and protect farmers that enroll in one of the harvest management programs in 2018. Such action will effectuate the purposes of Fish and Game Code Section 2084 and CESA more broadly. Absent this regulation, enrollment in the NRCS program may decline. Furthermore, farmers may elect to plant lower value crops that do not provide nesting habitat for tricolored blackbird, thereby decreasing available nesting habitat; farmers may harvest their crop early before onset of the nesting season, which would decrease the value of the crop and also decrease available nesting habitat; or farmers may risk harvesting their crop even if tricolored blackbird are present.

Without this 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 tricolored blackbird would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby tricolored blackbird 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.

### **Proposed Regulations**

Section 749.9 authorizes incidental take of the tricolored blackbird during candidacy for three categories of activities:

- (1) Actions to protect, restore, conserve or enhance habitat.
- (2) Actions to monitor tricolored blackbird breeding colonies.

- (3) Harvest of grain crops under a harvest management program to protect colonies.

The regulation authorizes take, as defined by Fish and Game Code Section 86, of tricolored blackbird in the limited circumstances described below subject to certain terms and conditions, during the species' candidacy under CESA.

(a) Take Authorization.

(1) Actions to Protect, Restore, Conserve, or Enhance Habitat.

Subdivision 749.9(a)(1), authorizes take of the tricolored blackbird incidental to otherwise lawful activity, where the purpose of the activity is to protect, restore, conserve, or enhance habitat for a species designated as an endangered, threatened, or candidate species under state or federal law. Without Section 749.9, subdivision (a)(1), take of the tricolored blackbird incidental to otherwise lawful activities to protect, restore, conserve, or enhance habitat for a species designated as an endangered, threatened, or candidate species under state or federal law 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 habitat 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 conserve species populations to the extent where protective measures are no longer necessary. Increased cost will also be shouldered by prospective permittees, who will be charged with funding mitigation and related monitoring required for impacts of their projects on the species.

Adoption of this regulation would minimize the hardships that would result from delays in ongoing or new lawful activities to protect, restore, conserve, and enhance the habitat of state or federally threatened or endangered species (including the tricolored blackbird). The Commission finds that impacts to activities to protect, restore, conserve, or enhance habitat of state or federally threatened or endangered species caused by designating the tricolored blackbird as a candidate species requires immediate action.

(2) Actions to Monitor Tricolored Blackbird Breeding Colonies.

Section 749.9, subdivision (a)(2), authorizes take of tricolored blackbird incidental to efforts to monitor active tricolored blackbird breeding colonies, including entering colonies to perform walking transects. Only trained observers approved by the Department will be authorized to engage in such monitoring.

Without Section 749.9, subdivision (a)(2), the necessary monitoring would not occur to ensure the protection and immediate conservation of tricolored blackbird during the upcoming harvest of grain fields planted for silage. Department guidance suggests that walking survey transects through a portion of the colony could be used to estimate the nesting stage of breeding colonies and inform decisions necessary to comply with subsection (a)(3).

### (3) Harvest of Grain Crops under a Harvest Management Program to Protect Colonies.

Section 749.9, subdivision (a)(3), authorizes take of tricolored blackbird incidental to harvest of grain fields and related agricultural activities where the individual participates in a harvest management program administered by the Natural Resources Conservation Service (NRCS), or harvest management program administered or approved by the Department. The harvest management program shall include the establishment of a buffer zone and harvest date as described under Topics 1 and 2 in the document "California Department of Fish and Wildlife (Department) Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015" (adopted on March 19, 2015 and available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=99310&inline>) . An individual seeking authorization for take incidental to harvest of grain fields and related agricultural activities shall receive written confirmation of participation in the harvest management program and must obtain specific authorization for the timing of harvest and related agricultural activities from NRCS, the Department, or a biologist authorized by the Department or NRCS before proceeding with any harvest activities that take tricolor blackbirds

Without Section 749.9, subdivision (a)(3), enrollment in the NRCS program may decline, which is necessary to ensure the protection and immediate

conservation of the tricolored blackbird during the upcoming harvest of grain fields planted for silage.

(b) Reporting.

Section 749.9, subdivision (a)(2), requires that any person, individual, organization, or public agency, or their agents, for which incidental take of tricolored blackbirds is authorized pursuant to subdivision (a)(1) or (a)(3), shall report observations and detections of tricolored blackbird colonies, including take, to the Department's Wildlife Branch by August 1 during the candidacy period.

As discussed in III above, it is vital that during this candidacy period detections and observations of the tricolored blackbird are reported to the Department so the Department can base its recommendation to the Commission on whether listing tricolored blackbird is warranted on the most complete information possible.

(c) Additions, Modifications or Revocation.

Incidental take of tricolored blackbird 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.

This subdivision is necessary to clarify that subdivision (a)(1)-(3) are not the only ways in which incidental take may be allowed and that other avenues for authorizing the take of tricolored blackbird are not precluded by the language.

(b) Authority and Reference Sections from Fish and Game Code for Regulation:

Authority: Section(s) 200, 265, 399, and 2084, Fish and Game Code.

Reference: Section(s) 200, 265, 399, 2080, 2084, and 2085, Fish and Game Code.

(c) Specific Technology or Equipment Required by Regulatory Change:

None.

(d) Identification of Reports or Documents Supporting Regulation Change:

None.

(e) Public Discussions of Proposed Regulations Prior to Notice Publication:

No public meetings are being held prior to the notice publication. The 45-day comment period provides adequate time for review of the proposed amendments.

IV. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulation Change:

No alternatives were identified by or brought to the attention of Commission staff that would have the same desired regulatory effect.

(b) No Change Alternative:

The no change alternative would result in no take authorization for habitat protection during the candidacy period. Absent this regulation, enrollment in the NRCS program may decline. Furthermore, farmers may elect to plant lower value crops that do not provide nesting habitat for tricolored blackbird, thereby decreasing available nesting habitat; farmers may harvest their crop early before onset of the nesting season, which would decrease the value of the crop and also decrease available nesting habitat; or farmers may risk harvesting their crop even if tricolored blackbird are present.

(c) Consideration of Alternatives: In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the proposed regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

V. Mitigation Measures Required by Regulatory Action:

The proposed regulatory action will have no negative impact on the environment; therefore, no mitigation measures are needed.

VI. 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) Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. Farmers that participate in the NRCS program were compensated for about 85 percent of the value of a crop lost by harvest delay. The late harvest silage crop may retain a portion of its full value after the tricolored blackbird have vacated the affected acreage.

- (b) Impact on the Creation or Elimination of Jobs Within the State, the Creation of New Businesses or the Elimination of Existing Businesses, or the Expansion of Businesses in California; Benefits of the Regulation to the Health and Welfare of California Residents, Worker Safety, and the State's Environment:

The Commission does not anticipate impact on the creation or elimination of jobs within the state. The proposed action is not anticipated to exert significant impact on the creation of new businesses, the elimination of existing businesses or the expansion of businesses in California because the proposed action does not introduce new costs. No impact on the Health and Welfare of California Residents, or Worker Safety are anticipated. The State's Environment should benefit by the improved management of tricolored blackbirds.

- (c) Cost Impacts on a Representative Private Person or Business:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

NRCS compensates a farmer for about 85 percent of the value of a crop affected by harvest delay. The late harvest silage crop may retain a portion of its full value after the tricolored blackbirds have vacated the affected acreage. The funds compensate for 85 percent of the fullest crop value or \$633.99 per acre. The proposed regulation would permit farmers that participate in the NRCS program to avoid costs that could be incurred in the event of the incidental take of tricolored blackbird. Farmers may be able to retain some crop value (greater than the NRCS 85 percent compensation value) from the delayed harvest and also avoid take penalties and processing costs.

- (d) Costs or Savings to State Agencies or Costs/Savings in Federal Funding

to the State:

The Commission has determined that the proposed regulation will likely provide cost savings to state agencies in an undetermined amount. In the absence of the proposed regulation, the Department would have to authorize take of the tricolored blackbird 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.

(e) Nondiscretionary Costs/Savings to Local Agencies:

The Commission has determined that adoption of the proposed regulation will likely provide cost savings to local agencies in an undetermined amount. In the absence of the proposed regulation, the Department would have to authorize take of the tricolored blackbird on a project-by-project basis, which is both time-consuming and costly to local agencies seeking take authorization. These delays and cancellations may cause great economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California.

(f) Programs Mandated on Local Agencies or School Districts: None.

(g) 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: None.

(h) Effect on Housing Costs: None.

VII. Economic Impact Assessment:

Without the proposed 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 tricolored blackbird would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby tricolored blackbird 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.

NRCS funds compensate a farmer for about 85 percent of the value of a crop affected by a harvest delay. Under the NRCS program, a colony is identified and the area inhabited by the colony is delineated by a biologist. Once the colony is

delineated, a buffer is established and the farmer is allowed to harvest only those fields outside the colony site and buffer area. The tricolored blackbird was designated as a candidate for listing, and is therefore subject to the regulatory protections provided by CESA. Promulgating a regulation to authorize incidental take provides farmers assurances that if they agree to follow the requirements imposed by NRCS, delay harvest, and protect the colony nesting in their field, they will not be penalized in the event a small number of birds are taken incidental to their beneficial conservation actions in delaying harvest and otherwise lawful agricultural activities.

The NRCS program provides compensation at \$636.99 per acre of tricolored blackbird occupied land for delaying the harvest of silage crops. Farmers are funded for approximately 85% of the peak crop value. Farmers may be able to reap some value from the late harvest of the silage crop and also avoid take penalties and processing costs.

(a) Effects of the Regulation on the Creation or Elimination of Jobs Within the State:

The Commission does not anticipate impact on the creation or elimination of jobs within the state.

(b) Effects of the Regulation on the Creation of New Businesses or the Elimination of Existing Businesses Within the State:

The proposed action is not anticipated to impact the creation of new businesses or the elimination of existing businesses within the state.

(c) Effects of the Regulation on the Expansion of Businesses Currently Doing Business Within the State:

The proposed action is not anticipated to impact the expansion of businesses currently doing business within the state.

(d) Benefits of the Regulation to the Health and Welfare of California Residents:

No impact on the Health and Welfare of California Residents is anticipated.

(e) Benefits of the Regulation to Worker Safety:

No impact to Worker Safety is anticipated.

(f) Benefits of the Regulation to the State's Environment:

The Commission anticipates benefits to the State's Environment with the improved protection of tricolor blackbirds.

(g) Other Benefits of the Regulation:

None.

## Informative Digest/Policy Statement Overview

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, Fish and Game Code, the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while the Department of Fish and Wildlife (Department) and Commission evaluate whether the species should be listed as threatened or endangered under CESA.

Historically, tricolored blackbirds nested in native flora in or adjacent to wetlands in the Central Valley and elsewhere across the State of California. Concomitant with the loss of wetlands during the 19th and 20th centuries, tricolored blackbirds have adapted to nest in varied substrates. For example, grain fields planted for winter silage on dairy farms provide attractive nesting sites for the species; unfortunately, nesting occurs at about the same time the crops are scheduled for harvest.

For the past two decades, a patchwork of funding sources has been used to pay farmers for a lost crop when they agree to delay harvest until after tricolored blackbird nesting is complete. In some cases, particularly where funding was unavailable or farmers were not aware of the potential for funding to offset losses, harvest has occurred before the young fledged. Recently, the U.S. Department of Agriculture's Natural Resources Conservation Service (NRCS) committed to provide multiple years of funding to support a program to delay harvest of fields in which tricolored blackbird colonies have nested. At the same time, Dairy Cares, an organization composed of dairy businesses across California, in coordination with other farming interests has initiated an active campaign to educate dairy farmers about tricolored blackbird and the NRCS-funded program. In 2016, through a coordinated effort including NRCS, farming interests, the Department, and Audubon California, dairy farmers enrolled in the NRCS program delayed harvest on fields where an estimated 67,000 tricolored blackbirds nested.

NRCS funds compensate a farmer for about 85 percent of the value of a crop lost by a harvest delay. Under the NRCS program, a colony is identified and the area inhabited by the colony is delineated by a biologist. Once the colony is delineated, a buffer is established and the farmer is allowed to harvest only those fields outside the colony site and buffer area. Delaying harvest protects the vast majority of the colony until the birds fledge, but it does not guarantee that no take will occur. The tricolored blackbird was designated as a candidate for listing, and is therefore subject to the regulatory protections provided by CESA. Promulgating a regulation to authorize incidental take provides farmers assurances that if they agree to follow the requirements imposed by NRCS, delay harvest, and protect the colony nesting in their field, they will not be

penalized in the event a small number of birds are taken incidental to their beneficial conservation actions in delaying harvest and otherwise lawful agricultural activities.

The harvest management programs administered by NRCS and the Department can be expected to protect tens of thousands of nesting tricolored blackbirds provided farmers are incentivized to participate. However, the designation of the tricolored blackbird as a candidate for listing under CESA could inhibit participation in the harvest management programs. This regulation, in combination with funding from NRCS, will provide farmers with a strong incentive to participate in the harvest management program.

Tricolored blackbird nesting can begin as early as February. The timing of this nesting relative to the listing determination requires that a regulation be in place to conserve nesting tricolored blackbirds and protect farmers that enroll in one of the harvest management programs in 2018. Such action will effectuate the purposes of Fish and Game Code Section 2084 and CESA more broadly. Absent this regulation, enrollment in the NRCS program may decline. Furthermore, farmers may elect to plant lower value crops that do not provide nesting habitat for tricolored blackbird, thereby decreasing available nesting habitat; farmers may harvest their crop early before onset of the nesting season, which would decrease the value of the crop and also decrease available nesting habitat; or farmers may risk harvesting their crop even if tricolored blackbird are present.

Without this 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 tricolored blackbird would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby tricolored blackbird 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.

### **Proposed Regulations**

Section 749.9 authorizes incidental take of the tricolored blackbird during candidacy for three categories of activities:

- (1) Actions to protect, restore, conserve or enhance habitat.
- (2) Actions to monitor tricolored blackbird breeding colonies.
- (3) Harvest of grain crops under a harvest management program to protect colonies.
  - (a) Take Authorization.

(1) Actions to Protect, Restore, Conserve, or Enhance Habitat.

Subdivision 749.9(a)(1), authorizes take of the tricolored blackbird incidental to otherwise lawful activity, where the purpose of the activity is to protect, restore, conserve, or enhance habitat for a species designated as an endangered, threatened, or candidate species under state or federal law. Without Section 749.9, subdivision (a)(1), take of the tricolored blackbird incidental to otherwise lawful activities to protect, restore, conserve, or enhance habitat for a species designated as an endangered, threatened, or candidate species under state or federal law 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 habitat 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 conserve species populations to the extent where protective measures are no longer necessary. Increased cost will also be shouldered by prospective permittees, who will be charged with funding mitigation and related monitoring required for impacts of their projects on the species.

Adoption of this regulation would minimize the hardships that would result from delays in ongoing or new lawful activities to protect, restore, conserve, and enhance the habitat of state or federally threatened or endangered species (including the tricolored blackbird). The Commission finds that impacts to activities to protect, restore, conserve, or enhance habitat of state or federally threatened or endangered species caused by designating the tricolored blackbird as a candidate species requires immediate action.

(2) Actions to Monitor Tricolored Blackbird Breeding Colonies.

Section 749.9, subdivision (a)(2), authorizes take of tricolored blackbird incidental to efforts to monitor active tricolored blackbird breeding colonies, including entering colonies to perform walking transects. Only trained observers approved by the Department will be authorized to engage in such monitoring.

Without Section 749.9, subdivision (a)(2), the necessary monitoring would not occur to ensure the protection and immediate conservation of tricolored blackbird during the upcoming harvest of grain fields planted for silage. Department guidance suggests that walking survey transects

through a portion of the colony could be used to estimate the nesting stage of breeding colonies and inform decisions necessary to comply with subsection (a)(3).

(3) Harvest of Grain Crops under a Harvest Management Program to Protect Colonies.

Section 749.9, subdivision (a)(3), authorizes take of tricolored blackbird incidental to harvest of grain fields and related agricultural activities where the individual participates in a harvest management program administered by the Natural Resources Conservation Service (NRCS), or harvest management program administered or approved by the Department. The harvest management program shall include the establishment of a buffer zone and harvest date as described under Topics 1 and 2 in the document "California Department of Fish and Wildlife (Department) Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015" (adopted on March 19, 2015 and available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=99310&inline>) . An individual seeking authorization for take incidental to harvest of grain fields and related agricultural activities shall receive written confirmation of participation in the harvest management program and must obtain specific authorization for the timing of harvest and related agricultural activities from NRCS, the Department, or a biologist authorized by the Department or NRCS before proceeding with any harvest activities that take tricolor blackbirds

Without Section 749.9, subdivision (a)(3), enrollment in the NRCS program may decline, which is necessary to ensure the protection and immediate conservation of the tricolored blackbird during the upcoming harvest of grain fields planted for silage.

(b) Reporting.

Section 749.9, subdivision (a)(2), requires that any person, individual, organization, or public agency, or their agents, for which incidental take of tricolored blackbirds is authorized pursuant to subdivision (a)(1) or (a)(3), shall report observations and detections of tricolored blackbird colonies, including take, to the Department's Wildlife Branch by August 1 during the candidacy period.

As discussed in III above, it is vital that during this candidacy period detections and observations of the tricolored blackbird are reported to the Department so the Department can base its recommendation to the Commission on whether listing tricolored blackbird is warranted on the

most complete information possible.

(c) Additions, Modifications or Revocation.

Incidental take of tricolored blackbird 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.

This subdivision is necessary to clarify that subdivision (a)(1)-(3) are not the only ways in which incidental take may be allowed and that other avenues for authorizing the take of tricolored blackbird are not precluded by the language.

**Benefits of the Proposed Regulations**

It is the policy of this state to encourage the conservation, maintenance, and utilization of the living resources of the ocean and inland waters under the jurisdiction and influence of the state for the benefit of all the citizens of the state. The objectives of this policy include, but are not limited to, the maintenance of sufficient populations of all species of terrestrial organisms to ensure their continued existence.

**Evaluation of Incompatibility With Existing Regulations:**

Section 20, Article IV, of the State Constitution specifies that the Legislature may delegate to the Commission such powers relating to the protection and propagation of fish and game as the Legislature sees fit. The Legislature has delegated to the Commission the power to establish regulations for the incidental take of a candidate species (FGC Section 2084). Commission staff has searched California Code of Regulations and has found that the proposed regulation is neither inconsistent nor incompatible with existing state regulations.