

## STAFF SUMMARY FOR DECEMBER 6-7, 2017

**8. TRICOLORED BLACKBIRD – INCIDENTAL TAKE****Today's Item****Information** ☒**Action** ☐

Discuss proposed regulations for the incidental take of tricolored blackbird during the candidacy period.

**Summary of Previous/Future Actions**

- |                                     |                                 |
|-------------------------------------|---------------------------------|
| • Notice hearing                    | Oct 11-12, 2017; Atascadero     |
| • <b>Today's discussion hearing</b> | <b>Dec 6-7, 2017; San Diego</b> |
| • Adoption hearing                  | February 7-8, 2018; Sacramento  |

**Background**

FGC is the decision-making body that implements the California Endangered Species Act (CESA; Fish and Game Code, Section 2050 et seq.). CESA authorizes FGC 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 Fish and Game Code Section 2084, FGC may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while DFW and FGC evaluate whether the species should be listed as threatened or endangered under CESA.

On Jan 8, 2016, tricolored blackbird was listed as a candidate species, initiating the development of a status review report by DFW to inform the listing decision, pursuant to Fish and Game Code Section 2074.6. On Dec 8, 2016, FGC approved DFW's request for a six-month extension to complete its report on the status of tricolored blackbird. The six-month extension will delay final resolution of the tricolored blackbird listing decision, which cannot occur until after FGC receives DFW's status review report pursuant to Fish and Game Code Section 2075.

At its Feb 16, 2017 meeting, FGC adopted Section 749.9 as an emergency regulation to authorize incidental take of tricolored blackbird; the emergency regulation expired on Sep 6, 2017. Without the currently proposed regulation, activities that result in the take of tricolored blackbird would be prohibited and could not be implemented pending final action by FGC 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 permittees, their employees, their local communities, and the state of California would be postponed during the candidacy period or canceled entirely.

The proposed regulation authorizes incidental take of tricolored blackbird during candidacy for three categories of activities, which are detailed in the initial statement of reasons (ISOR; Exhibit 2):

- Actions to protect, restore, conserve or enhance habitat.
- Actions to monitor tricolored blackbird breeding colonies.
- Harvest of grain crops under a harvest management program to protect colonies.

## STAFF SUMMARY FOR DECEMBER 6-7, 2017

**Significant Public Comments**

The California Farm Bureau Federation and Dairy Cares support the proposed regulations (Exhibits 3-4). The Center for Biological Diversity believes that more direct oversight from DFW is needed of the harvest management programs and has provided suggested revisions to the proposed regulatory language for FGC consideration (Exhibit 5).

**Recommendation (N/A)****Exhibits**

1. [DFW memo, received Sep 18, 2017](#)
2. [ISOR](#)
3. [Email from Noelle Cremers, California Farm Bureau Federation, received Nov 16, 2017](#)
4. [Email from J.P. Cativiela, on behalf of Dairy Cares, received Nov 22, 2017](#)
5. [Email from Lisa Belenky, Center for Biological Diversity, received Nov 22, 2017](#)

**Motion/Direction (N/A)**

## Memorandum

2017 SEP 18 PM 1:00

Date: September 15, 2017

To: Valerie Termini  
Executive Director  
Fish and Game Commission

From: Charlton H. Bonham  
Director



Subject: **Initial Statement of Reasons to Add Section 749.9, Re: Special Order Relating to Incidental Take of Tricolored Blackbird During Candidacy Period, to Title 14, California Code of Regulations**

Attached is the Department of Fish and Wildlife's Initial Statement of Reasons to add regulations authorizing take of tricolored blackbird in limited circumstances subject to certain terms and conditions, during the species' candidacy under CESA.

If you have any questions or need additional information, please contact Scott Gardner at 916-445-5545 or [Scott.Gardner@wildlife.ca.gov](mailto:Scott.Gardner@wildlife.ca.gov).

### Attachments

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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

- 1

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.

## Regulatory Text

Section 749.9, Title 14, CCR, is added to read:

### Section 749.9. Incidental Take of Tricolored Blackbird (*Agelaius tricolor*) During Candidacy Period

This 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 the California Endangered Species Act (Fish and Game Code, Section 2050 et seq.).

#### (a) Take Authorization.

The commission authorizes the take of tricolored blackbird during the candidacy period subject to the terms and conditions herein.

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

Take of 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.

#### (2) Actions to Monitor Tricolored Blackbird Breeding Colonies.

Take of tricolored blackbird incidental to efforts to monitor active tricolored blackbird breeding colonies, including entering colonies to perform walking transects. Only trained observers who are approved by the department will be authorized to engage in such monitoring.

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

Take of tricolored blackbird incidental to harvest of grain fields and related agricultural activities is authorized where an 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>). The 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.

#### (b) Reporting.

Any person, individual, organization, or public agency, or their agents, for which incidental take of tricolored blackbirds is authorized pursuant to subsections (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.

Information reported to the department pursuant to this subsection shall include: a contact name; the date and location (GPS coordinate preferred) of the colony or take; colony size; colony outcome; and details regarding the tricolored blackbirds observed. Colony outcome means whether the colony was abandoned or whether young in a colony fledged. Any person, individual, organization, or public agency, or their agents seeking incidental take authorization pursuant to subsection (a)(3), shall report their participation in an approved harvest management program to the department prior to grain harvest.

(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.

Note: Authority cited: Sections 200, 265, 399 and 2084, Fish and Game Code.  
Reference: Sections 200, 265, 399, 2080, 2084 and 2085, Fish and Game Code.

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**From:** Noelle Cremers <ncremers@CFBF.com>  
**Sent:** Thursday, November 16, 2017 9:12 PM  
**To:** FGC  
**Cc:** Termini, Valerie@FGC  
**Subject:** TRBL 2084 Comment Letter  
**Attachments:** 2084 FGC Support Letter 11-16-17.pdf

Please find my comment letter on the proposed 2084 regulation for Tricolored Blackbirds attached.

Thanks,  
Noelle



# CALIFORNIA FARM BUREAU FEDERATION

GOVERNMENTAL AFFAIRS DIVISION

1127-11TH STREET, SUITE 626, SACRAMENTO, CA 95814 • PHONE (916) 446-4647

November 16, 2017

Eric Sklar, President  
California Fish and Game Commission  
1416 9<sup>th</sup> Street, Room 1320  
Sacramento, CA 95814

**RE: Regulations concerning the incidental take of tricolored blackbird (*Agelaius tricolor*) during candidacy period**

Dear President Sklar:

The California Farm Bureau Federation (Farm Bureau) is writing to express appreciation and support for the proposed notice of intent to adopt a 2084 regulation allowing incidental take in limited circumstances during the candidacy period of the Tricolored Blackbird. Farm Bureau represents more than 48,000 members as it strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. Our dairy farmer members who plant small grain crops adjacent to their dairies provide valuable nesting habitat for Tricolored Blackbirds, but need incidental take protection when they agree to provide that habitat.

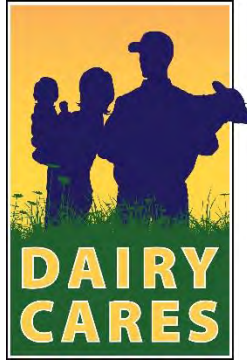
Farm Bureau appreciates the Fish and Game Commission's (Commission) continued engagement on this issue. The 2084 regulation protects dairy farmers who provide habitat for Tricolored Blackbirds from liability under the California Endangered Species Act (CESA). Farm Bureau appreciates the Commission's adoption of a 2084 regulation for Tricolored Blackbirds the previous two breeding seasons. Both nesting seasons proved successful and having a 2084 regulation in place has been helpful when conducting outreach with dairy farmers on this important issue. Farm Bureau continues to work with the Department of Fish and Wildlife (DFW) to ensure that the 2084 regulation works as intended. Farm Bureau recognizes the importance of communication between farmers who choose to participate and DFW and will continue to ensure that DFW has the information it needs regarding farmers participating in the program.

Having a 2084 regulation in place for the 2018 nesting season will ensure that farmers who agree to protect colonies of Tricolored Blackbirds nesting in their grain fields are not put at risk of violating CESA. Farm Bureau appreciates the Commission's continued commitment to providing incidental take protection to dairy farmers who agree to provide and protect nesting habitat for Tricolored Blackbirds by proposing to publish a notice of intent to adopt another 2084 regulation. Should you have any questions, please contact Noelle G. Cremers (916/446-4647 or [ncremers@cfbf.com](mailto:ncremers@cfbf.com)).

Sincerely,

Noelle G. Cremers  
Director, Natural Resources and Commodities





VIA EMAIL TO [fgc@fgc.ca.gov](mailto:fgc@fgc.ca.gov)

November 22, 2017

Eric Sklar, President  
California Fish and Game Commission  
1416 9th Street, Room 1320  
Sacramento, CA 95814

RE: Emergency regulation concerning special order relating to incidental take of tricolored blackbird (*Agelaius tricolor*) during candidacy period as an endangered species

Dear Mr. Sklar:

On behalf of Dairy Cares, I am writing to request adoption of the above-referenced emergency regulation.

Dairy Cares is a coalition of California's dairy producer and processor organizations, including the state's largest producer trade associations (California Dairy Campaign, California Farm Bureau Federation, Milk Producers Council, and Western United Dairymen) and the largest milk processing companies and cooperatives (including California Dairies, Inc., Dairy Farmers of America-Western Area Council, Hilmar Cheese Company, and Land O'Lakes, Inc.). Formed in 2001, Dairy Cares is dedicated to promoting the long-term sustainability of California dairies.

California dairy farm families, by planting winter cereal crops to feed their cattle, provide valuable nesting habitat for Tricolored Blackbirds, but need incidental take protection when they agree to provide that habitat.

Dairy Cares appreciates the Commission's early 2017 adoption of an emergency 2084 petition to protect dairy farmers who provide habitat for tricolored blackbirds from liability under the California Endangered Species Act (CESA). The 2017 nesting season was successful and the 2084 regulation in place during the spring worked exactly as intended. Unfortunately, since it was an emergency regulation, it has expired, and another 2084 regulation is necessary for the 2018 nesting season.

Having a 2084 regulation in place for the 2018 nesting season will ensure that farmers who agree to protect colonies of tricolored blackbirds nesting in their grain fields are not put at risk of violating CESA. We therefore respectfully request adoption of a 2084 regulation in time for the 2018 nesting season in the spring.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.P. Cativiela', with a stylized, cursive script.

J.P. Cativiela  
Regulatory Affairs Consultant

C: Charles "Chuck" Ahlem, Dairy Cares Chairman  
Michael Boccadoro, Dairy Cares Executive Director  
Kevin Abernathy, Environmental Services Director, Milk Producers Council  
Paul Sousa, Environmental Services Director, Western United Dairymen  
Lynne McBride, Executive Director, California Dairy Campaign  
Noelle Cremers, California Farm Bureau Federation



**VIA ELECTRONIC MAIL**

Fish and Game Commissioners  
Valerie Termini, Executive Director  
1416 Ninth Street, Room 1320  
Sacramento, CA 95814  
[fgc@fgc.ca.gov](mailto:fgc@fgc.ca.gov)

November 22, 2017

**Re: Comments re Item #8. Discuss proposed regulations concerning the incidental take of tricolored blackbird during candidacy period (Section 749.9, Title 14, CCR)**

Dear Commissioners and Executive Director Termini,

I am writing on behalf of the Center for Biological Diversity (“Center”) regarding the proposed regulations concerning the incidental take of tricolored blackbird during candidacy period (Section 749.9, Title 14, CCR), pursuant to Fish and Game Code Section 2084.

As the Tricolor Blackbird awaits a full status review from the California Department of Fish and Wildlife (“CDFW”) (which is now expected to be provided by the February, 2018 Commission meeting), the Commission has proposed to adopt another regulation to provide incidental take authorization for individuals who participate in a harvest management program to protect Tricolor Blackbird colonies. The Center has not opposed similar regulations adopted in the past, however, the Center is very concerned about the large numbers of Tricolor Blackbirds taken during harvesting activities in 2017 in violation of CESA. The Center believes that before adopting the proposed regulations, the Commission must review how the earlier, identical regulation authorizing incidental take functioned over the last season and whether the regulation needs to be revised.

As CDFW noted in its presentation at the October 11, 2017 meeting, there were significant impacts to nesting Tricolor Blackbirds last year with an identical regulation in place. Of greatest concern are the impacts to 11,000 Tricolor Blackbirds in the nesting colony in Madera County. While not all of those 11,000 birds were likely killed, many certainly were and the disruption of eggs and nests and breeding is a significant loss to this candidate species. As the 2017 Monitoring Report explained “reproductive success of this colony was minimal due to the harvest activities.” (2017 Tricolored Blackbird Monitoring Report, Tricolored Blackbird Survey and Colony Protection, San Joaquin Valley, California at 22.) It appears that despite the large amount of unpermitted take, the site was later enrolled in the harvest management program and received incidental take coverage and compensation for delaying harvest to protect the remaining nesting colony.

In order to protect nesting Tricolor Blackbirds and avoid similar incidents in the future

**Error! Main Document Only.** *Alaska • Arizona • California • Florida • Minnesota • Nevada • New Mexico • New York • Oregon •*

Lisa T. Belenky • Senior Attorney • 1212 Broadway, Suite 800 Oakland, CA 94612  
tel: (415) 632-5307 fax: (510) 844-7150 [lbelenky@biologicaldiversity.org](mailto:lbelenky@biologicaldiversity.org) [www.BiologicalDiversity.org](http://www.BiologicalDiversity.org)

the Center believes that more direct oversight by CDFW of the harvest management programs is needed particularly regarding the initial contacts by those administering the programs with individuals when nesting colonies are first observed in their fields. The Center suggests the following revisions to the proposed regulatory language for consideration by the Commission. Add to Section (a)3 (changes in red):

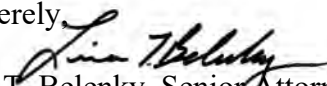
(3) Harvest of Grain Crops Under Harvest Management Program to Protect Colonies. Take of tricolored blackbird incidental to harvest of grain fields and related agricultural activities is authorized where an individual participates in a harvest management program administered by the Natural Resources 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>).

All observations of nesting colonies and outreach contacts to individuals regarding specific fields and any of the harvest management programs by any person on behalf of the NRCS harvest management program or any other harvest management program shall be documented in writing and reported to CDFW within 24 hours. CDFW will follow up on these contacts immediately, within the next 24 hours, to ensure that the individual understands the benefits of participating in one of the authorized harvest management programs and that without such participation any take of Tricolor blackbirds from agricultural activities is unauthorized and unlawful.

The 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.

The Center appreciates all the efforts that have been made to protect breeding colonies of Tricolor Blackbirds under the programs, and urges the Commission to consider these proposed revisions or others that would improve the protections for the Tricolor Blackbird before authorizing any new 2084 regulation. I plan to attend the meeting on December 6, 2017 in order to participate in the discussion regarding whether changes should be made to the proposed regulation. Please do not hesitate to contact me if you have any questions about the issues raised in these comments.

Sincerely,



Lisa T. Belenky, Senior Attorney  
Center for Biological Diversity  
1212 Broadway, Suite 800  
Oakland, CA 94612  
[lbelenky@biologicaldiversity.org](mailto:lbelenky@biologicaldiversity.org)