

STATE OF CALIFORNIA
FISH AND GAME COMMISSION
FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

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. Date of Pre-adoption Statement of Reasons: January 19, 2018
- III. Date of Final Statement of Reasons: February 15, 2018
- IV. 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

V. Update:

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action. At its February 8, 2018 meeting, the Commission adopted the regulations as originally proposed.

This rulemaking incorporates by reference one document: “California Department of Fish and Wildlife (Department) Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015”. This document is incorporated by reference because it would be cumbersome and otherwise impractical to publish the incorporated document in the California Code of Regulations since there are four pages. During the public comment period, the document to be incorporated by reference was available directly from the Commission upon request and was posted on the Department’s website.

VI. Summary of Primary Considerations Raised in Support of or Opposition to the Proposed Actions and Reasons for Rejecting Those Considerations:

At the October 11, 2017 Notice Hearing, three oral comments were received on the proposed regulations:

1. Noelle Cremers, representing the California Farm Bureau Federation, stated an appreciation for the effort to put a regulation, pursuant to Fish and Game Code Section 2084, in place for the 2018 breeding season. Ms. Cremers expressed support for moving forward with the regulation.

Response: Supports proposal.

2. Robert van de Hoek stated that it is necessary to list the species under the California Endangered Species Act, but also to focus on increasing the number of tricolored blackbirds. Mr. van de Hoek would specifically like to see efforts to bring tricolored blackbird back to wetlands in southern California.

Response: Comment makes no statement regarding the proposed regulation.

3. Dennis Fox stated that habitat is being lost at federal National Wildlife Refuges because of water supply loss, and provided several contacts for potential collaborators in tricolored blackbird conservation.

Response: Comment makes no statement regarding the proposed regulation.

Prior to the December 6, 2017 Discussion Hearing on the proposed regulations, four comment letters were received from the public on the proposed regulations. Three comments were in support of the proposal:

4. The California Farm Bureau Federation (Farm Bureau) provided a letter on November 16, 2017, expressing appreciation and support for the proposed regulation, pursuant to Fish and Game Code Section 2084, allowing incidental take in limited circumstances during the candidacy period of the tricolored blackbird.
5. Dairy Cares provided a letter on November 22, 2017, requesting adoption of the proposed regulation allowing incidental take of the tricolored blackbird.
6. Audubon California provided a letter on December 1, 2017, asking the Commission to adopt incidental take regulations for tricolored blackbird during the candidacy period and stating that the revisions to the proposed

regulatory language by the Center (Comment 7) might threaten future participation by the NRCS.

Response: Supports proposal. The support of the Farm Bureau, Dairy Cares, and Audubon California is noted and appreciated.

7. The Center for Biological Diversity (Center) provided a letter on November 22, 2017. The Center did not oppose similar regulations adopted in the past, but expressed a desire for more direct oversight by the Department on harvest management programs and, hence, proposed revisions to the regulatory language for consideration. The proposed revision included:
 - a. An additional requirement for the Natural Resources Conservation Service (NRCS) to report colonies and outreach efforts to the Department, and
 - b. An additional requirement for the Department to contact each landowner within 24 hours.

Response:

- a. The NRCS is a federal agency bound by federal regulation to protect the privacy of personal information of landowners that participate in NRCS programs, and therefore the proposed language to compel direct reporting from NRCS to the Department may threaten future involvement of NRCS in tricolored blackbird colony protection efforts. If this change were included, the NRCS might be unable to comply with the regulation.
- b. The Department understands the intent (i.e. increased oversight) behind the Center's proposed language to require a landowner contact within 24 hours. However, the Department believes that improved protections for tricolored blackbirds can be achieved without modifications to the regulatory language, and will make a good faith effort to contact landowners with colonies on grain fields if confirmation of participation in colony protection programs is not received in a timely manner.

For these reasons, the Department recommended making no change to the regulatory language.

At the December 6, 2017 Discussion Hearing, five oral comments were received during the public comment period:

8. Samantha Arthur, representing Audubon California, expressed support for adoption of the proposed regulation. Ms. Arthur stated that the adoption of emergency regulations in previous breeding seasons contributed to an increase in participation by landowners in tricolored blackbird colony

protection programs. Ms. Arthur also stated that the revisions to the proposed regulatory language by the Center might threaten future participation by the NRCS.

Response: Supports proposal.

9. Noelle Cremers, representing the California Farm Bureau Federation, stated that emergency regulation in prior years had been helpful. Ms. Cremers urged the adoption of regulations with no change to the proposed regulatory language.

Response: Supports proposal.

10. Lisa Belenky, representing the Center for Biological Diversity, stated support for a regulation, pursuant to Section 2084, Fish and Game Code, in some form, but was concerned about take that had occurred in the 2017 breeding season. Ms. Belenky expressed a desire for stronger protections in the regulation, and offered to consider other changes to the regulatory text that would be effective at increasing protections.

Response: See responses 7a and 7b.

11. Mark Hennelly, representing the California Waterfowl Association, expressed concern for the potential take of tricolored blackbird at private duck clubs during habitat enhancement and other wetland management activities. Mr. Hennelly expressed support for the proposed regulation.

Response: Supports proposal.

12. Robert van de Hoek expressed that his concern was not so much for tricolored blackbird colonies on agricultural fields, but for those on wetlands in urban areas. Mr. van de Hoek expressed concern for habitat loss that occurs when wetland vegetation is removed.

Response: Comment makes no statement regarding the proposed regulation.

Between the December 6, 2017 Discussion Hearing and the February 8, 2018 Adoption Hearing, two written comments were received in support of the proposal:

13. Audubon California provided a letter on January 25, 2018, asking the Commission to adopt incidental take regulations for tricolored blackbird during the candidacy period and stating that the previous 2084 take

regulations, along with CESA protections and the availability of financial support, had increased participation by farmers in colony protection programs during the 2016 and 2017 breeding seasons.

14. The Farm Bureau provided a letter on February 1, 2018, expressing appreciation and support for the proposed regulation, pursuant to Fish and Game Code Section 2084, allowing incidental take in limited circumstances during the candidacy period of the tricolored blackbird. The letter also stated that there is no need for changes to the proposed regulatory language.

Response: Supports proposal.

At the February 8, 2018 Adoption Hearing, four oral comments were received during the public comment period:

15. Jeff Miller, representing the Center for Biological Diversity (Center), stated that he is pleased that the Department is recommending listing as threatened. Mr. Miller stated that it is true that the Center had not opposed emergency regulations in the past. The loss of tricolored blackbirds in 2017 led the Center to propose revisions to the regulatory language in their letter of November 22, 2017, but they are not opposing the proposed regulation at this time.

Response: Concur with proposal.

16. Mark Hennelly, representing the California Waterfowl Association, expressed support for the proposed regulations, especially for the authorization of take covering restoration and management of wetland habitats.

Response: Supports proposal.

17. Samantha Arthur, representing Audubon California, expressed support for the proposed regulation. Ms. Arthur stated that California Endangered Species Act protections, take authorization, and financial and technical support to landowners have increased protections of tricolored blackbird colonies. Audubon California also supports strong regulatory oversight by the Department and law enforcement activities if illegal take occurs.

Response: Supports proposal.

18. Noelle Cremers, representing the California Farm Bureau Federation, thanked the Commission, Commission staff, the Department, and the

Center for participation in and recognition of the importance of regulations authorizing take during the candidacy period. Ms. Cremers urged adoption of the proposed regulation for the remainder of the candidacy period.

Response: Supports proposal.

VII. Location and Index of Rulemaking File:

A rulemaking file with attached file index is maintained at:
California Fish and Game Commission
1416 Ninth Street
Sacramento, California 95814

VIII. Location of Department Files:

Department of Fish and Wildlife
1416 Ninth Street
Sacramento, California 95814

IX. Description of Reasonable Alternatives to Regulatory Action:

(a) Alternatives to Regulatory Action:

The Center for Biological Diversity proposed revisions to the regulatory language in its letter of November 22, 2017, as discussed above. The Department believes the intent of the proposed revisions can be achieved without modifications to the regulatory language. At the February 8, 2018 Adoption Hearing, the Center for Biological Diversity expressed support for the proposed regulation without modification.

No other 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 adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

X. 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 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. **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, thereby avoiding possible adverse economic impacts. In addition,** 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. No impact on the Health and Welfare of California Residents, or Worker Safety are anticipated. The State's Environment should benefit by the improved **protection** of tricolored blackbirds.

This regulation includes a reporting requirement that applies to business. Pursuant to Government Code section 11346.3(d), the Commission finds that it is necessary for the health, safety, or welfare of the people of the state of California that the regulation apply to business.

(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 **not affect costs or savings** to state agencies **nor costs/savings in federal funding to the state**.

The Initial Statement of Reasons indicated a potential cost savings to the Department by not having to process incidental take permits on a project-by-project basis during candidacy, and savings to other state agencies seeking take authorization. Since the candidacy period for the species is expected to end no later than the end of 2018, there is not sufficient time for the Department to process incidental take permits prior to the end of the candidacy period with or without the proposed regulation. Therefore, the potential cost savings to state

agencies identified in the Initial Statement of Reasons could not be realized.

- (e) Nondiscretionary Costs/Savings to Local Agencies:

The Commission has determined that adoption of the proposed regulation will **not affect nondiscretionary costs/savings** to local agencies. **Since the candidacy period for the species is expected to end no later than the end of 2018, there is not sufficient time for the Department to process incidental take permits prior to the end of the candidacy period with or without the proposed regulation. Therefore, the potential cost savings to local agencies identified in the Initial Statement of Reasons could not be realized.**

- (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.

Updated Informative Digest/Policy Statement Overview

The Fish and Game Commission (Commission) is the decision-making body that implements the California Endangered Species Act (CESA) (**Section 2050 et seq. of the Fish and Game Code (FGC)**). 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, **FGC**, the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while the Department of Fish and 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. **When the Commission designated the tricolored blackbird a candidate for listing, it became 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. **Absent a regulation authorizing incidental take**, 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 **could** 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 above subject to certain terms and conditions, during the species' candidacy under CESA.

Benefits of the Proposed Regulations

It is the policy of this state to **foster and encourage cooperation of the owners of land which is identified as habitat for endangered species and threatened species and that such cooperation is essential for the conservation of those species.**

The proposed regulations will provide benefits to the State's environment in the protection of California's tricolored blackbird resources.

Evaluation of Incompatibility with Existing Regulation:

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.

Incorporation by Reference

This rulemaking incorporates by reference one document: "California Department of Fish and Wildlife (Department) Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015". This document is incorporated by reference because it would be cumbersome and otherwise impractical to publish the incorporated document in the California Code of Regulations since there are four pages. During the public comment period, the document to be incorporated by reference was available directly from the Commission upon request and was posted on the Department's website.

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