

CALIFORNIA FISH AND GAME COMMISSION
FINDING OF EMERGENCY AND
STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION

Emergency Action to
Re-adopt Section 749.13
Title 14, California Code of Regulations
Re: Incidental Take of Southern California Steelhead

Date of Statement: September 14, 2022

Unless otherwise specified, all section references in this document are to Title 14, California Code of Regulations.

I. Statement of Facts Constituting the Need for Emergency Regulatory Action

Background

On June 14, 2021, the California Fish and Game Commission (Commission) received a petition (the Petition) from California Trout to list Southern California steelhead (*Oncorhynchus mykiss*, herein referred to as “SCS”), as endangered under the California Endangered Species Act (CESA). SCS is defined in the petition as all *O. mykiss*, including anadromous and resident life histories, below manmade and natural complete barriers to anadromy from the Santa Maria River, San Luis Obispo County (inclusive) to the U.S. Mexico border. The anadromous and resident life history forms of the species *O. mykiss* commonly referred to as “steelhead” and “rainbow trout,” respectively, overlap in distribution and interbreed throughout much of their range.

A Southern California steelhead Distinct Population Segment (Southern California steelhead DPS) is currently listed under the federal Endangered Species Act (50 C.F.R. § 224.101). That federal listing has the same geographic scope as the SCS CESA listing proposed by California Trout in its petition; however, the federal listing only includes the anadromous life history of *O. mykiss* and does not include *O. mykiss* with resident life histories. It is important to note that it is difficult if not impossible to visually distinguish between the two life histories in freshwater, especially during early life stages. Even genetic analysis may not reveal which life history an individual *O. mykiss* has or will express. Accordingly, for management purposes the National Marine Fisheries Service generally considers any *O. mykiss* within the rivers included in the geographic scope of the Southern California steelhead DPS listing to be a part of that listing unit.

On December 15, 2021, the Commission received the California Department of Fish and Wildlife’s (Department) 90-day evaluation report on the Petition. In that evaluation report the Department determined that there is sufficient scientific information in the petition to indicate that the petitioned action may be warranted.

On February 17, 2022, the Commission closed the public hearing and administrative record and continued the deliberation and decision on whether listing SCS as endangered under CESA may be warranted to a future Commission meeting to be held no later than May 18, 2022. Continuing the deliberation and decision allowed the Commission to consider a potential 2084 regulation in the same Commission meeting in which the Commission might make a may-be-warranted finding that would make SCS a candidate species under CESA.

On April 21, 2022, the Commission found that listing SCS under CESA may be warranted pursuant to FGC Section 2074.2, and SCS will become a CESA candidate species upon the Commission's publication of a notice of finding that the Commission has accepted the California Trout Petition for consideration and designated SCS as a candidate species under CESA. In the same meeting, the Commission adopted the Fish and Game Code Section 2084 regulation through emergency authority. On October 12, 2022, the Commission re-adopted the same Fish and Game Code Section 2084 regulation.

Statutory Authority

Candidate-species are protected from take under CESA pursuant to Fish and Game Code (FGC) sections 2080 and 2085. FGC Section 86 states that "[t]ake means hunt, pursue, catch, capture, or kill or attempt to hunt, pursue, catch, capture, or kill." Under FGC Section 2084, CESA provides that the Commission may adopt regulations to authorize take of candidate species, based on the best available scientific information, when the take is otherwise consistent with CESA. As with all regulations, the Commission may adopt a regulation under Section 2084 on an emergency basis when it determines that a situation exists that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

Consistency Determinations (CD) pursuant to FGC Section 2080.1 or Incidental Take Permits (ITP) pursuant to FGC Section 2081, subdivision (b), may also authorize the take of CESA candidate species. CESA take may only be authorized through a CD after the Department has determined that a project's federal take authorization under the federal Endangered Species Act meets certain CESA criteria; some federal take authorizations will likely not entirely meet those criteria. The Department may authorize CESA take through an ITP on a project-specific basis, which would be a substantially more lengthy and costly process for getting CESA take authorization than through this proposed emergency regulation.

Finding of Emergency

The Commission considered the following factors in determining whether an emergency exists: public health, safety, and general welfare, as well as the magnitude of potential harm; the immediacy of the need; and whether the anticipation of harm has a basis firmer than simple speculation and has determined that an emergency regulation authorized under FGC Section 2084 is needed. In this case, an emergency exists because of the immediate, serious harm to the public health, safety, or general welfare that would be caused by work delays or stoppages for projects or activities that relate to flood control and provide flood protection necessary to prevent flood damage to communities or infrastructure; projects or activities that relate to highways and provide public-safety benefits through highway maintenance or improvements; or projects or activities that relate to the diversion, impoundment, or discharge of water and provide water supply or water treatment for essential domestic, agricultural, industrial, or other commercial uses. Regarding projects or activities that provide water supply, on March 28, 2022, in Executive Order N-7-22, Governor Newsom ordered that the previously proclaimed states of emergency due to extreme and expanding drought conditions that exist across all the counties of California shall remain in full force and effect. The proposed addition of Section 749.13 creates a special order allowing incidental take of SCS during CESA candidacy for certain activities subject to specific terms and conditions described below.

II. Proposed Emergency Regulations

Under this emergency regulation the Commission will continue to authorize the incidental take of SCS during the candidacy period that may occur during the implementation of certain projects or activities that relate to flood control; highways; and the diversion, impoundment, or discharge of water; that provide certain benefits to public peace, health, safety, or general welfare; and that meet other specific conditions described in the proposed addition of Section 749.13. The following paragraphs justify each subsection as follows:

749.13(a): This subsection is necessary to inform how the proponent of a project or activity seeking take authorization shall submit to the Department written documentation via email or physical mail to demonstrate that the project or activity satisfies the criteria in subsections (a)(1) through(4).

(a)(1): This subsection lists the types of projects or activities that would satisfy this first of four criteria in subsections (a)(1) through (4). Flood control, and the diversion, impoundment, or discharge of water are mentioned to define to project proponents of the scope of in-stream activities and applicability of this regulation. The definition of “highway” in subsection (a)(1) is the same as in Section 360 of the California Vehicular Code: “‘Highway’ is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.” Referencing this code is necessary to ensure clarity to project proponents of the scope of transportation nexus and applicability of this regulation.

(a)(2): This subsection describes the public benefits that the types of projects or activities listed in subsection (a)(1) must provide to satisfy this second of four criteria in subsections (a)(1) through (4).

Projects or activities that provide flood protection necessary to prevent flood damage to communities or infrastructure may take SCS through work in wetted streams. Without CESA take authorization through this emergency regulation for the take of SCS during candidacy, the risk of unlawful take of a CESA candidate species may cause these flood-protection projects or activities to not be undertaken or significantly delayed if they must instead seek CESA take authorization from the Department through other non-emergency CESA take authorization pathways.

Projects or activities that provide public-safety benefits through highway maintenance or improvements may take SCS through work in wetted streams. Take of SCS may occur during the construction of highway projects when water diversions, which dewater streams and rivers that may be occupied by SCS, are necessary to install bridges or culverts. Without CESA authorization through this emergency regulation for the take of SCS during candidacy, the risk of unlawful take of a CESA candidate species may cause these highway maintenance or improvement projects or activities to not be undertaken or significantly delayed if they must instead seek CESA take authorization from the Department through other non-emergency CESA take authorization pathways. Highway maintenance or improvement projects provide public-safety benefits by their nature. Approval of such projects will rely on the project meeting the criteria that it is necessary to avoid serious harm to the public peace, health, or safety to ensure that not only is the project an emergency but also that it provides the public benefit. Only those projects where the stoppage or delay would cause harm would be approved.

Ongoing water diversions that provide drinking water or supply water for agriculture, local industries, or other commercial uses are necessary to ensure public health, safety, and general welfare. Projects or activities that provide water supply or water treatment for essential domestic, agricultural, industrial, or other commercial uses may take SCS through work in wetted streams. Take of SCS may occur through dewatering of streams and rivers or entrainment or injury at a point of diversion. Without CESA authorization for the take of a CESA candidate species through this emergency regulation, the risk of unlawful take of a CESA candidate species may cause these water-supply or water-treatment projects or activities to not be undertaken or significantly delayed if they must instead seek CESA take authorization from the Department through other non-emergency CESA-take-authorization pathways.

(a)(3): This subsection describes the federal take authorization and associated documents that are required to satisfy this third of four criteria in subsections (a)(1) through (4). This required federal take authorization is specifically cross-referenced in subsections 749.13(c) and (d).

(a)(4): This subsection describes the requirement related to notification pursuant to FGC Section 1602 that is necessary to satisfy this fourth of four criteria in subsections (a)(1) through (4). Under FGC 1602, when an entity is required to notify the Department and the Department determines the activity may substantially adversely affect an existing fish and wildlife resource, the Department may issue a final agreement to that entity that includes reasonable measures necessary to protect the resource, which may include SCS.

(b): This subsection creates a 30-day timeline, which is necessary to give the Department sufficient time to review the written documentation that the proponent of a project or activity has submitted and make a determination on whether the project or activity satisfies the criteria in subsections (a)(1) through (4) while also ensuring that the Department will promptly make such determinations.

(b)(1) and (b)(2): The requirements in these subsections that the Department make its determinations in writing are intended to ensure transparency and clarity in the Department's determinations.

(c): This subsection describes how any CESA take authorization conferred by this emergency regulation shall have the same operational requirements and be for the same type and amount of take as the federal take authorization for the project or activity that satisfied subsection (a)(3). This subsection is intended to limit the scope of the CESA take authorization (operational requirements and type and amount of take) to the scope of the federal take authorization that CESA take authorization is based on. Further, this subsection is intended to provide a mechanism for the Department to revoke the CESA take authorization if the project or activity is not complying with the terms of its federal take authorization.

(d): This subsection is intended to ensure that only projects that continue to have valid federal take authorization will continue to have CESA take authorization.

(e): This subsection describing responsibility of project proponent to ensure consistency with all applicable laws is necessary to clarify the limitations of the intended effect of this emergency regulation.

III. Identification of Reports or Documents Supporting Regulation Change

A summary of general scientific information on the life history of Southern California steelhead is presented in the National Marine Fisheries Service’s Southern California Steelhead Recovery Plan published in January 2012 available online at:

<https://www.fisheries.noaa.gov/resource/document/southern-california-steelhead-recovery-plan>.

IV. 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) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

The Commission anticipates that there will be costs to the State, specifically the (Department). Estimated program costs of \$16,462 over the extended emergency regulation period of 90 days will be absorbed within existing budgets.

Table 1. Estimated Department Implementation Costs for Making Determinations as Required Under this Special Order Relating to Take of Southern California Steelhead

| DFW Classification | Activity/Task | Hourly Rate ¹ | Hours per Task | Projected Cost |
|---|--|--------------------------|----------------|----------------|
| Senior Environmental Scientist (Region) | Review whether project or activity satisfies specified criteria | \$76.35 | 2 | \$152.70 |
| Senior Environmental Scientist (Fisheries Branch) | Review whether project or activity satisfies specified criteria | \$76.35 | 2 | \$152.70 |
| Senior Environmental Scientist | Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department’s determination on whether it does or does not | \$76.35 | 6 | \$458.10 |
| Senior Environmental Scientist, Supervisor | Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department’s determination on whether it does or does not | \$101.80 | 6 | \$610.80 |
| Environmental Program Manager | Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department’s determination on whether it does or does not | \$123.92 | 6 | \$743.52 |
| Regional Manager | Meet with proponent to discuss whether project or activity satisfies specified criteria and write explanation of Department’s determination on whether it does or does not | \$123.02 | 2 | \$246.04 |
| Attorney IV | Consultation with Region | \$110.72 | 4 | \$466.92 |

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|--|--|--------|--|-------------|
| | Subtotal per project | | | \$2,830.78 |
| | Overhead ² | 16.31% | | \$461.40 |
| | Total per project cost | | | \$3,292.48 |
| | Grand Total for five (5) Projects | | | \$16,462.40 |

¹ Hourly Rate includes mean wages per CalHR payscale 2022 and Department benefit rates.

² Non-Federal Project Overhead rate for FY 2022/23 is 16.31% per Department Budget Branch.

Note: Minor discrepancies (less than \$1.00) may be apparent in total costs due to rounding error.

Other State agencies, such as California Department of Transportation (Caltrans) may also be affected if they pursue a take allowance through the Department. An estimate of Caltrans potential per project costs is detailed in Table 2.

Table 2. Estimated Caltrans Implementation Costs for Take of Southern California Steelhead

| Caltrans Classification | Activity/Task | Hourly Rate¹ | Hours per Task | Projected Cost |
|--------------------------------|--------------------------------|--------------------------------|-----------------------|-----------------------|
| Senior Planner | Draft correspondence | \$67.84 | 1.00 | \$67.84 |
| Attorney IV | Review correspondence | \$116.73 | 0.33 | \$38.52 |
| Deputy Director | Approve filing | \$129.88 | 0.25 | \$32.47 |
| | Subtotal per project | | 1.58 | \$138.83 |
| | Overhead² | 16.31% | | \$22.64 |
| | Total per project costs | | | \$161.47 |

¹ Hourly Rate includes mean wages per CalHR payscale 2022 and estimated benefit rates.

² Non-Federal Project Overhead rate for FY 2022/23 is estimated to be 16.31% estimate

Note: Minor discrepancies (less than \$1.00) may be apparent in total costs due to rounding error.

(b) Nondiscretionary Costs/Savings to Local Agencies:

This emergency regulation will not introduce nondiscretionary costs or savings to local agencies. Should an agency choose to consider the review and issuance of a permit, the process would likely entail the review of project plans, census information, and relocation plans.

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

None.

(d) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code:

None.

V. Authority and Reference

The Commission adopts this emergency action pursuant to the authority vested by Sections 399 and 2084 of the Fish and Game Code to implement, interpret, or make specific Sections 399 and 2084 of the Fish and Game Code.

VI. Section 399 Finding

Delays or stoppages for projects or activities that relate to flood control and provide flood protection necessary to prevent flood damage to communities or infrastructure that would likely occur without this emergency regulation because of SCS CESA protections would jeopardize that flood protection.

Delays or stoppages for projects or activities that relate to highways and provide public-safety benefits through highway maintenance or improvements that would likely occur without this emergency regulation because of SCS CESA protections would jeopardize those public safety benefits.

Delays or stoppages for projects or activities related to the diversion, impoundment, or discharge of water that provide water supply or water treatment for essential domestic, agricultural, industrial, or commercial uses that would likely occur without this emergency regulation because of SCS CESA protections would jeopardize those water supply or water treatment public benefits. Regarding projects or activities that provide water supply, on March 28, 2022, in Executive Order N-7-22, Governor Newsom ordered that the previously proclaimed states of emergency due to extreme and expanding drought conditions that exist across all the counties of California shall remain in full force and effect.

Pursuant to Section 399, subdivision (b), of the Fish and Game Code, the Commission finds, based on the information above, that adopting this regulation is necessary for the immediate preservation of the public peace, health and safety, and general welfare.

Informative Digest

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Section 2084 on an emergency basis when it determines that a situation exists that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

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The Commission considered the following factors in determining whether an emergency exists: public health, safety, and general welfare, as well as the magnitude of potential harm; the immediacy of the need; and whether the anticipation of harm has a basis firmer than simple speculation and has determined that an emergency regulation authorized under FGC Section 2084 is needed. In this case, an emergency exists because of the immediate, serious harm to the public health, safety, or general welfare that would be caused by work delays or stoppages for projects or activities that relate to flood control and provide flood protection necessary to prevent flood damage to communities or infrastructure; projects or activities that relate to highways and provide public-safety benefits through highway maintenance or improvements; or projects or activities that relate to the diversion, impoundment, or discharge of water and provide water supply or water treatment for essential domestic, agricultural, industrial, or other commercial uses. Regarding projects or activities that provide water supply, on March 28, 2022, in Executive Order N-7-22, Governor Newsom ordered that the previously proclaimed states of emergency due to extreme and expanding drought conditions that exist across all the counties of California shall remain in full force and effect. The proposed addition of Section 749.13 creates a special order allowing incidental take of SCS during CESA candidacy for certain activities subject to specific terms and conditions described below.

Commission staff have searched the California Code of Regulations and have found no other state regulation relating to the Commission's ability to allow for incidental take of a candidate species under CESA, and therefore concludes that the proposed regulation is neither inconsistent nor incompatible with existing state regulation.