STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

EMERGENCY

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-		2009-1112-01EE

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OFFICE OF ADMINISTRATIVE LAW

NOTICE | REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY: Fish and Game Commission

AGENCY FILE NUMBER (If any):

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE | TITLE(S) | FIRST SECTION AFFECTED | 2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE: ☐ Notice re Proposed Regulatory Action ☐ Other | 4. AGENCY CONTACT PERSON | TELEPHONE NUMBER | FAX NUMBER (Optional)

OAL USE ONLY — ACTION ON PROPOSED NOTICE: ☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn | NOTICE REGISTER NUMBER | PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S): Incidental Take of California Tiger Salamander During Candidacy

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S): 2009-0213-01E, 2009-0817-01EE

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT: 749.4

AMEND:

REPEAL:

TITLE(S): 14

3. TYPE OF FILING

- ☐ Regular Rulemaking (Gov. Code §11346)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☒ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ File & Print
- ☐ Other (Specify)
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Print Only

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)

- ☐ Effective 30th day after filing with Secretary of State
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Sherrie Fonbuena	(916) 654-9866	(916) 653-5040	SFonbuena@fgc.ca.gov

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

SIGNATURE OF AGENCY HEAD OR DESIGNEE: Jon K. Fischer

DATE: November 12, 2009

TYPED NAME AND TITLE OF SIGNATORY: Jon K. Fischer, Deputy Executive Director

For use by Office of Administrative Law (OAL) only

REGULATORY LANGUAGE

Section 749.4, Title 14, CCR, is added to read:

749.4 Incidental Take of California Tiger Salamander (*Ambystoma californiense*) During Candidacy Period.

This regulation authorizes take of California Tiger Salamander (*Ambystoma californiense*), subject to certain terms and conditions, during the species' candidacy for listing as an endangered or threatened species pursuant to the California Endangered Species Act (Fish & G. Code, § 2050 et seq.).

(a) Take Authorization

Subject to the terms and conditions prescribed by this section, the Commission authorizes take of California tiger salamander during the candidacy period where such take is incidental to an otherwise lawful activity.

(1) Incidental Take Authorized Pursuant to the Federal Endangered Species Act

Incidental take of California tiger salamander is authorized where such take is consistent with and otherwise authorized pursuant to the Federal Endangered Species Act (16 U.S.C. § 1531 et seq.).

(2) Lake or Streambed Alteration Agreements

Incidental take of California tiger salamander is authorized where: (i) take occurs as the result of an activity covered by a lake or streambed alteration agreement issued by the Department of Fish and Game pursuant to Fish and Game Code section 1602, subdivision (a)(4)(B); (ii) the take occurs only within the area specifically covered by the lake or streambed agreement; and (iii) the agreement holder is in compliance with the terms and conditions prescribed by the agreement at the time incidental take occurs.

(3) Agricultural Activities

Incidental take of California tiger salamander as a result of routine and ongoing agricultural operations on land in an existing agricultural use is authorized as set forth in this paragraph.

(A) For purposes of this paragraph "routine and ongoing agricultural operations" shall have the same meaning as defined by California Code of Regulations, Title 14, section 786.1, subdivision (b), except routine and ongoing agricultural operations shall not include: (i) the conversion of agricultural land to a nonagricultural use, excluding the conversion of land

in existing agricultural use to conserve, restore, protect, or enhance fish or wildlife habitat; (ii) the conversion of rangeland or natural lands to more intensive agricultural uses, including but not limited to, the conversion of rangeland or natural lands to permanent crops, dry land farming, row crops, and/or any cultivated row crops unless the alterations to the land were commenced before the candidacy period; (iii) the use of toxic or suffocating gases to control ground-burrowing rodents; (iv) the improvement, upgrade, or construction of new roads; or (v) the intentional introduction into a stock pond of species that may prey on California tiger salamander adults, larvae, or eggs.

(B) For purposes of this paragraph "agricultural use" shall mean the use of land for the purpose of producing an agricultural commodity for a personal or commercial purpose.

(b) Additions, Modification, or Revocation

(1) Incidental take of California tiger salamander from activities not addressed in this section may be authorized during the candidacy period by the Commission pursuant to Fish and Game Code section 2084, or by the Department on a case-by-case basis pursuant to Fish and Game Code Section 2081, or other authority provided by law.

(2) The Commission may modify or repeal this regulation in whole or in part as provided by law, including modification or repeal based on a determination that any activity or project may cause jeopardy to the continued existence of California tiger salamander.

Note: Authority cited: Sections 200, 202, 205, 240 and 2084, Fish and Game Code. Reference: Sections 200, 202, 205, 240, 2080, 2084 and 2085, Fish and Game Code.

FISH AND GAME COMMISSION
STATEMENT OF EMERGENCY
ACTION

Emergency Action to Add Section 749.4, Title 14, CCR,
Re: Special Order Relating to Incidental Take of California tiger salamander
(Ambystoma californiense) During Candidacy Period

I. Statement of Facts Constituting Need for Emergency Action:

The Fish and Game Commission ("Commission") is the decision-making body that implements the California Endangered Species Act ("CESA"). 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 the lists if it finds, upon receipt of sufficient scientific information, that the action is warranted. Pursuant to Section 2084 of the Fish and Game Code ("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 Game ("Department") and Commission evaluate whether the species should be listed as threatened or endangered under CESA. The Commission has relied on the authority in Section 2084 to permit take of candidate species on six previous occasions: in 1994 for the southern torrent salamander; in 1994 for the coho salmon south of San Francisco; in 1997 and 1998 for the spring-run chinook salmon; in 2000 for coho salmon throughout its range in California; in 2002 for the Xantus's murrelet; and in 2008 for the longfin smelt.

On June 11, 2001, the Commission received a petition from the Center for Biological Diversity (Center) to list the California tiger salamander as an endangered species under the California Endangered Species Act. The Commission scheduled consideration of the petition and the Department evaluation report for its December 7, 2001 meeting in Sacramento. On this date, the Commission formally rejected the petition. (Cal. Reg. Notice Register 2002, No. 9-Z, p. 469.)

The Commission received a second petition from the Center to list the California tiger salamander. On December 2, 2004, the Commission rejected this petition finding, among other things, that there was insufficient information about California tiger salamander population trends and abundance and that the petition unpersuasively relies on the loss of native wetland habitat to indicate declines in California tiger salamander populations. (Cal. Reg. Notice Register 2004, No. 52-Z, p. 1754.)

On February 28, 2005, the Center filed a petition for writ of mandate in the superior court, appealing the Commission's decision. On December 14, 2006, the trial court directed the Commission to enter a decision accepting the petition. On September 2, 2008, the Third District Court of Appeal upheld the Superior Court's decision. (*Center for Biological Diversity v. California Fish and Game Commission* (2008) 166 Cal.App.4th 597.) On February 5, 2009, the Commission formally accepted the petition.

FGC sections 2080 and 2085 prohibit the take of candidate species, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to Section 2084; (2) the Department authorizes the take through incidental take permits (Permits) issued on a project-by-project basis; or (3) the take is authorized through a federal incidental take permit or incidental take statement and the Department makes a determination that the federal authorization is consistent with CESA (Consistency Determination). Because the Commission has designated California tiger salamander as a candidate species, individuals engaging in activities authorized by the emergency regulation would, in the absence of this emergency regulation, need to obtain a Permit or a consistency determination based on federal authorization to avoid liability and potential criminal violations of CESA for take of California tiger salamander.

However, since the issuance of individual Permits authorizing incidental take is a complicated and lengthy process, the Commission finds specifically that it is not feasible for the regulated community to obtain and the Department to issue Permits or Consistency Determinations on a project-by-project basis for the numerous activities that would otherwise be prohibited during the California tiger salamander's candidacy period. Without this emergency regulation, prospective permittees, many of whom already have the necessary federal entitlements pursuant to the Federal Endangered Species Act (16 U.S.C. § 1531 et seq.) 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 California tiger salamander would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby California tiger salamander 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 face long delays or be canceled entirely. The Commission finds this result constitutes an emergency under the APA requiring immediate action, especially against the backdrop of the economic crisis currently faced by the State of California.

Furthermore, the Department has issued streambed alteration agreements pursuant to FGC sections 1601 and 1603 in the past year within the range of the California tiger salamander. Many of the activities authorized by these agreements are about to commence or have already commenced, and already provide take minimization and mitigation measures for the California tiger salamander. Renegotiating these agreements to obtain a Permit or Consistency Determination would unnecessarily delay these streambed alterations and could unduly burden the agreement holder. In many cases, the delays would cause agreement holders to cancel their projects entirely, resulting in great social and economic harm to the agreement holders, their employees, their local communities, and the State of California. The Commission finds these impacts constitute an emergency under the APA requiring immediate action.

Finally, without this emergency regulation, many routine and ongoing agricultural operations on land in an existing agricultural use would be delayed or cancelled entirely

while awaiting the necessary State CESA authorization. These delays and cancellations would cause great economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California. Adoption of this emergency regulation would minimize these hardships while providing safeguards to protect the California tiger salamander, including but not limited to, restrictions on the conversion of agricultural land to a nonagricultural use or a more intensive agricultural use. The Commission finds the impacts to routine and ongoing agricultural operations on land in an existing agricultural use caused by designating the California tiger salamander as a candidate species constitute an emergency under the APA requiring immediate action.

For these reasons, the immediate adoption of this emergency regulation are necessary to allow numerous projects to continue within the area affected by the candidacy while ensuring appropriate interim protections for California tiger salamander while the petition is under review. This regulation includes conditions designed to protect the species for all of the activities covered. The Department believes the activities permitted under this regulation will result in very limited take and will not likely jeopardize the continued existence of the species. This regulation will ensure appropriate interim protections for California tiger salamander while the Department conducts a 12-month review of the status of the candidate species.

II. Express Finding of Emergency

Pursuant to the authority vested in it by FGC Section 240 and for the reasons set forth above in the "Statement of Facts Constituting Need for Emergency Action," the Commission expressly finds that the adoption of this regulation is necessary for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of this regulation will allow activities that may affect California tiger salamander to continue during the candidacy period as long as those activities are conducted in a manner consistent with the protections specified in this regulation.

III. Authority and Reference Citations

Authority: FGC Sections 200, 202, 205, 240, and 2084.
Reference: FGC Sections 200, 202, 205, 240 and 2084.

IV. Informative Digest

The sections below describe laws relating to listing species under CESA, the effect of this emergency regulation, a description of related federal law, and a policy statement overview.

A. Laws Related to the Emergency Regulation - Listing under CESA

1. Petition and Acceptance

FGC Section 2070 requires the Commission to establish a list of endangered species and a list of threatened species. Any interested person may petition the Commission to add a species to the endangered or threatened list by following the requirements in Fish and Game Code Sections 2072 and 2072.3. If a petition is not factually incomplete and is on the appropriate form, it is forwarded to the Department for evaluation.

FGC Section 2073.5 sets out the process for accepting for further consideration or rejecting a petition to list a species and, if the petition is accepted, a process for actually determining whether listing of the species as threatened or endangered is ultimately warranted. The first step toward petition acceptance involves a 90-day review of the petition by the Department to determine whether the petition contains sufficient information to indicate that the petitioned action may be warranted. The Department prepares a report to the Commission that recommends rejection or acceptance of the petition based on its evaluation.

FGC Section 2074.2 provides that, if the Commission finds that the petition provides sufficient information to indicate that the petitioned action may be warranted, the petition is accepted for consideration and the species that is the subject of the petition becomes a "candidate species" under CESA. CESA prohibits unauthorized take of a candidate species, just as it prohibits such take of threatened and endangered species, from the time the Commission notifies interested parties and the general public of its acceptance of the petition. FGC Section 86 states "Take" means to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill. Killing of a candidate, threatened, or endangered species under CESA that is incidental to an otherwise lawful activity and not the primary purpose of the activity constitutes take under state law. (*Department of Fish and Game v. Anderson-Cottonwood Irrigation District* (1992) 8 Cal.App.4th 1554; *see also "Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 507 (in the context of a Permit under FGC 2081 subd. (b), the California Supreme Court states, "'take' in this context means to catch, capture or kill," citing FGC, § 86.)).

FGC Section 2085 provides that once the Commission gives notice pursuant to FGC Section 2074.4 that it has designated a species a candidate under CESA, all activities, whether new or ongoing, that cause incidental take of the candidate species are in violation of CESA unless the take is authorized in regulations adopted by the Commission pursuant to FGC Section 2084 or the Department authorizes the take through the issuance of a Permit under FGC Section 2081 or by other means authorized by CESA.

2. Status Review and Final Action on the Petition

The Commission's acceptance of a petition initiates a 12-month review of the species' status by the Department, pursuant to FGC Section 2074.6. This status review helps to determine whether the species should be listed as threatened or endangered. Unlike the Department's initial evaluation, which focuses largely on the sufficiency of information submitted in the petition, the 12-month status review involves a broader

inquiry into and evaluation of available information from other sources. The Commission is required to solicit data and comments on the proposed listing soon after the petition is accepted, and the Department's written status report must be based upon the best scientific information available.

Within 12 months of the petition's acceptance, the Department must provide the Commission a written report that indicates whether the petitioned action is warranted (FGC Section 2074). The Commission must schedule the petition for final consideration at its next available meeting after receiving the Department's report (FGC Section 2075). In its final action on the petition, the Commission is required to decide whether listing the species as threatened or endangered "is warranted" or "is not warranted"; if listing is not warranted in the Commission's judgment, take of the former candidate species is no longer prohibited under CESA (FGC Section 2075.5).

B. Effect of the Emergency Action

Section 749.4, Title 14, CCR regulation would authorize and provide for take of California tiger salamander during its candidacy subject to the following terms and conditions:

(a) Take Authorization

Subject to the terms and conditions prescribed by this section, the Commission authorizes take of California tiger salamander during the candidacy period where such take is incidental to an otherwise lawful activity.

(1) Incidental Take Authorized Pursuant to the Federal Endangered Species Act

Incidental take of California tiger salamander is authorized where such take is consistent with and otherwise authorized pursuant to the Federal Endangered Species Act (16 U.S.C. § 1531 et seq.).

(2) Lake or Streambed Alteration Agreements

Incidental take of California tiger salamander is authorized where: (i) take occurs as the result of an activity covered by a lake or streambed alteration agreement issued by the Department of Fish and Game pursuant to Fish and Game Code section 1602, subdivision (a)(4)(B); (ii) the take occurs within the area specifically covered by the lake or streambed agreement; and (iii) the agreement holder is in compliance with the terms and conditions prescribed by the agreement at the time incidental take occurs.

(3) Agricultural Activities

Incidental take of California tiger salamander as a result of routine and ongoing agricultural operations on land in an existing agricultural use is authorized as set forth in this paragraph.

(A) For purposes of this paragraph "routine and ongoing agricultural operations" shall have the same meaning as defined by California Code of Regulations, Title 14, section 786.1, subdivision (b), except routine and ongoing agricultural operations shall not include: (i) the conversion of agricultural land to a nonagricultural use, excluding the conversion of land in existing agricultural use to conserve, restore, protect, or enhance fish or wildlife habitat; (ii) the conversion of rangeland or natural lands to more intensive agricultural uses, including but not limited to, the conversion or rangeland or natural lands to permanent crops, dry land farming, row crops, and/or any cultivated row crops unless the alterations to the land were commenced before the candidacy period; (iii) the use of toxic or suffocating gases to control ground-burrowing rodents; (iv) the improvement, upgrade, or construction of new roads; or (v) the intentional introduction into a stock pond of species that may prey on California tiger salamander adults, larvae, or eggs.

(B) For purposes of this paragraph "agricultural use" shall mean the use of land for the purpose of producing an agricultural commodity for a personal or commercial purpose.

(b) Additions, Modification, or Revocation

(1) Incidental take of California tiger salamander from activities not addressed in this section may be authorized during the candidacy period by the Commission pursuant to Fish and Game Code section 2084, or by the Department on a case-by-case basis pursuant to Fish and Game Code Section 2081, or other authority provided by law.

(2) The Commission may modify or repeal this regulation in whole or in part as provided by law, including modification or repeal based on a determination that any activity or project may cause jeopardy to the continued existence of California tiger salamander.

C. Existing, Comparable Federal Regulations or Statutes

The Federal Endangered Species Act (FESA) (16 U.S.C. Section 1531 et seq.) includes a listing process that is comparable to the listing process under CESA. California tiger salamander is listed as an endangered species under FESA in Santa Barbara and Sonoma Counties and threatened in other parts of central California.

FESA Section 4(d) (16 USC Section 1533 (d)) is similar in some respects to Section 2084. Section 4(d) authorizes the National Marine Fisheries Service (NMFS) or the United States Fish and Wildlife Service (FWS) to issue protective regulations prohibiting the take of species listed as threatened. These regulations, also called "4(d) rules," may include any or all of the prohibitions that apply to protect endangered species and may include exceptions to those prohibitions. The 4(d) rules give the NMFS and the FWS the ability to craft comprehensive regulations to apply to particular activities that may result in a take of a threatened species, in a manner similar to the Commission's authority to prescribe terms and conditions pursuant to Section 2084 during the species' candidacy period.

Similarly, the Migratory Bird Treaty Act provides for protection of migratory birds with a definition of "take" which includes all portions of the FGC Section 86 definition of "take". In addition, the Act provides for the Secretary of the Interior to adopt regulations determining the extent to which "take" will be allowed.

D. Policy Statement Overview

The objective of this regulation is to allow specified activities to continue on an interim basis, subject to the measures in the regulation designed to protect California tiger salamander, while the Department focuses its efforts on further evaluating the status of the species. The Department's evaluation of the species during the candidacy period will result in the status report described in Section IV.A.2 above. The status report provides the basis for the Department's recommendation to the Commission before the Commission takes final action on the petition and decides whether the petitioned action is or is not warranted.

V. Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements governing the adoption of emergency regulations pursuant to FGC Section 240. The Commission held a public hearing on this regulation on February 5, 2009, and the above finding that this regulation is necessary for the immediate preservation of the general welfare meets the requirements of Section 240.

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 determinations relative to the required statutory categories have been made:

(a) Costs/Savings in Federal Funding to the State:

The Commission has determined that adoption of Section 749.4, Title 14, CCR as an emergency regulation pursuant to FGC Section 2084, will not result in costs or savings in federal funding to the State.

(b) Nondiscretionary Costs/Savings to Local Agencies:

The Commission has determined that adoption of Section 749.4, Title 14, CCR as an emergency regulation pursuant to FGC Section 2084, will likely provide cost savings to local agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take by Permit on a project-by-project basis which is both time-consuming and costly to local agencies seeking take authorization.

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

The Commission has determined that the adoption of Section 749.4 Title 14, CCR as an emergency regulation does not impose a mandate on local agencies or school districts.

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

(e) Effect on Housing Costs:

The Commission has determined that the adoption of Section 749.4, Title 14, CCR as an emergency regulation will not result in any cost to any local agency or school district for which Government Code sections 17500 through 17630 require reimbursement and will not affect housing costs.

(f) Costs or Savings to State Agencies

The Commission has determined that adoption of Section 749.4, Title 14, CCR as an emergency regulation pursuant to FGC Section 2084, will likely provide cost savings to state agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take by Permit on a project-by-project basis which is both time-consuming and costly for both the Department in processing and authorizing Permits and other state agencies seeking take authorization.