EMERGENCY

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

8

STD. 400 (REV. 01-09)

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-		2010-0104-04EE

For use by Office of Administrative Law (OAL) only

2010 JAN -4 PM 3:27

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	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

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	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn		

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S): Incidental Take of Pacific Fisher During Candidacy

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S): 2009-0417-03E, 2009-1012-01EE

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: 749.5

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- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov.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- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov.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): January 26, 2010, 12:01 am

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	

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.**

For use by Office of Administrative Law (OAL) only

SIGNATURE OF AGENCY HEAD OR DESIGNEE: Jon K. Fischer

DATE: 4 January 2010

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

Regulatory Language

Section 749.5, Title 14, CCR is added to read:

§ 749.5. Incidental Take of Pacific Fisher (*Martes pennanti*) During Candidacy Period.
This regulation authorizes the taking of Pacific fisher (*Martes pennanti*), 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 Pacific fisher during the candidacy period subject to the terms and conditions herein.
(1) Forest Practices and Timber Harvest.
Incidental take of Pacific fisher is authorized for otherwise lawful timber operations. For purposes of this authorization, an otherwise lawful timber operation shall mean a timber operation authorized or otherwise permitted by the Z'Berg Nejedly Forest Practice Act (Public Resources Code, Section 4511 et seq.), the Forest Practice Rules of the Board of Forestry, which are found in Chapters 4, 4.5, and 10, of Title 14 of the California Code of Regulations, or other applicable law. The Z'Berg Nejedly Forest Practice Act and Forest Practice Rules can be found at the following website: http://www.fire.ca.gov/resource_mgt/resource_mgt_forestpractice.php.
(2) Vegetation Management to Prevent or Reduce Wildland Fire.
Incidental take of Pacific fisher is authorized for otherwise lawful vegetation or fuels management activities necessary to reduce hazardous fuels and prevent or reduce the risk of catastrophic wildland fires. For purposes of this authorization, an otherwise lawful vegetation or fuels management activity shall mean an activity to reduce hazardous fuels and prevent or reduce the risk of catastrophic wildland fires authorized or otherwise permitted by the Z'Berg Nejedly Forest Practice Act (Public Resources Code, Section 4511 et seq.), the Forest Practice Rules of the Board of Forestry, which are found in Chapters 4, 4.5, and 10, of Title 14 of the California Code of Regulations, the Wildland Fire Protection and Resources Management Act of 1978 (Public Resources Code, Section 4461-4480), the California Forest Improvement Act of 1978 (Public Resources Code, Section 4790 et seq.), the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), or other applicable law.
(3) Wildland Fire and Fire Response.
Take of Pacific fisher incidental to otherwise lawful wildland fire response and suppression activities is authorized.
(4) Management, Monitoring, and Research Activities.
Incidental take of Pacific fisher is authorized relative to Department approved or supported survey, monitoring, research, and translocation plans. Department approvals of management, monitoring, and research activities may be provided pursuant to a memorandum of understanding, a scientific collecting permit, or other Department authorization provided by law.
(b) Application of the California Environmental Quality Act.
Consistent with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code), if a state or local agency determines

that an activity identified in subdivision (a) will result in a significant impact on Pacific fisher, the agency should not approve the activity as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant impact on Pacific fisher. (See Public Resources Code, Section 21002.) Measures or project changes required as part of a state or local agency authorization to address significant impacts on Pacific fisher may include measures to conserve the species, including avoidance or preservation of habitat attributes relied on by the species. Voluntary measures to aid in the conservation of Pacific fisher shall also be encouraged.

(c) Reporting.

Any person, individual, organization, or public agency for which incidental take of Pacific fisher is authorized pursuant to subdivision (a), shall report observations and detections of Pacific fisher, including take, to the Department of Fish and Game on a semi-annual basis during the candidacy period. Observations, detections, and take of Pacific fisher pursuant to this subdivision for the previous six months shall be reported by the first day of March and the first day of September, respectively, during the candidacy period for Pacific fisher. Observations, detections, and take shall be reported pursuant to this subdivision to the Department of Fish and Game, Wildlife Branch, Attn: Fisher Observations, 1812 Ninth St., Sacramento, CA 95814, or by email submission to fisherdata@dfg.ca.gov. Information reported to the Department pursuant to this subdivision shall include as available: a contact name; the date and location (GPS coordinate preferred) of the observation, detection, or take; and details regarding the animal(s) observed.

(d) Additions, Modifications or Revocation.

(1) Incidental take of Pacific fisher 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, pursuant to law, if it determines that any activity or project may cause jeopardy to the continued existence of Pacific fisher.

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

FISH AND GAME COMMISSION
REQUEST FOR SECOND READOPTION OF EMERGENCY REGULATIONS

Emergency Action to Readopt Section 749.5, Title 14, CCR, Re: Special Order Relating to Incidental Take of Pacific fisher *(Martes pennanti)* During Candidacy Period

Request for Second Readoption of Emergency Regulation:

The Fish and Game Commission ("Commission") requests to readopt Section 749.5, Title 14, California Code of Regulations ("CCR") [Office of Administrative Law (OAL) file numbers 2009-0417-03E and 2009-1012-01EE]. The Finding of Emergency for OAL file 2009-0417-03E is hereby incorporated by reference and contains the following information: Statement/Finding of Emergency; Authority and Reference Citations; Informative Digest; Fiscal Impact Statement; Standard Form 399. 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 Pacific fisher, while the Department of Fish and Game ("Department") focuses its efforts on further evaluating the status of Pacific fisher.

Emergency Regulation in Effect to Date:

On April 8, 2009, the Commission accepted a petition to list Pacific fisher as threatened or endangered under the California Endangered Species Act ("CESA"), thereby designating the Pacific fisher a candidate species. On that same date, the Commission adopted an emergency regulation pursuant to Fish and Game Code ("FGC") Section 2084 to provide coverage for the take of Pacific fisher during its candidacy period ("2084 regulation"). The 2084 regulation was approved by OAL and became effective on April 27, 2009. Pursuant to Government Code ("GC") sections 11346.1(e) and (h), emergency regulations are effective for 180 days. OAL may approve two readoptions, each for a period not to exceed 90 days. On October 1, 2009, the Commission readopted the emergency regulation. The readopted emergency regulation was approved by OAL on October 22, 2009 and became effective on October 27, 2009. In the absence of a second readoption, the 2084 regulation will expire on January 26, 2010.

Statement of Emergency:

Pursuant to FGC sections 2080 and 2085, take of a candidate species is prohibited, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to FGC Section 2084; or (2) the Department authorizes the take through incidental take permits issued on a project-by-project basis pursuant to FGC Section 2081. Therefore, in the absence of a 2084 regulation, individuals engaged in otherwise lawful activities including timber harvest activities and

operations; vegetative management activities necessary to prevent or reduce, or respond to wildland fire; and management, monitoring, and research activities, including translocation of Pacific fisher, would have to obtain a permit from the Department in order avoid liability and potential criminal violations of CESA for actions or activities that result in take of the candidate species.

The issuance of individual permits authorizing incidental take can be a complicated, lengthy, and expensive process, and the Commission specifically finds that it is not feasible for the Department to issue incidental take permits on a project-by-project basis for the above-referenced activities that will otherwise be prohibited during the Pacific fisher's candidacy period. The Department has determined that, with the measures outlined in the readopted 2084 regulation, the species will not become immediately at risk of extinction. For these reasons, readoption of the 2084 regulation is necessary to allow the activities described above. This regulation will ensure appropriate interim protections for Pacific fisher while the Department continues its 12-month review of the status of the candidate species.

Given that the emergency circumstances that necessitated the original 2084 regulation are continuing and unchanged, the Commission requests that the previous Finding of Emergency be incorporated to supplement this justification.

Compliance with Readoption Criteria

(1) Same or Substantially Equivalent:

Pursuant to GC Section 11346.1(h), the text of a readopted regulation must be "the same as or substantially equivalent to" the text of the original emergency regulation. The proposed language for the readopted 2084 emergency regulation is the same as the language of the original 2084 emergency regulation. The text of both regulations provide coverage for the take of Pacific fisher subject to certain conditions for the following otherwise lawful activities: timber harvest activities and operations; vegetative management activities necessary to prevent or reduce, or respond to wildland fire; and management, monitoring, and research activities, including translocation of Pacific fisher.

(2) Substantial Progress:

GC Section 11346.1(h) specifies that the emergency rulemaking agency must demonstrate that it is making "substantial progress and has proceeded with diligence" to comply with the standard rulemaking provisions. The Commission has complied with this requirement by proceeding with due diligence to determine whether or not listing the Pacific fisher as a threatened or endangered species is warranted. The Commission's forthcoming final decision regarding the status of the Pacific fisher obviates the need for permanent 2084 measures.

Pursuant to FGC sections 2080 and 2085, take of a candidate species is prohibited, unless: (1) the take is authorized in a regulation adopted by the Commission pursuant to FGC Section 2084 or (2) the Department authorizes the take through incidental take permits issued on a project-by-project basis pursuant to FGC Section 2081. Therefore a 2084 regulation is an appropriate mechanism to authorize take of a candidate species. However, a species is only a "candidate" until the Commission decides whether listing the species as threatened or endangered "is warranted" or "is not warranted" (FGC Section 2075.5). This determination immediately follows the conclusion of the 12-month review of the species' status by the Department (FGC Section 2074.6). After that point, the species is either protected under CESA by virtue of its listed status or is no longer protected under CESA because it is not listed and is no longer a candidate for listing.

If the Commission decides that listing the Pacific fisher "is warranted," the former candidate species then becomes a listed species and all activities resulting in take of Pacific fisher currently covered by the 2084 regulation will require an Incidental Take Permit (ITP) pursuant to FGC Section 2081 or another form of take coverage. ITPs are authorized for certain activities if specified criteria are met, including minimization and full mitigation of the impacts of the take. ITPs are issued on a project-by-project basis to ensure the mitigation and minimization measures are narrowly tailored to the individual project and protective of the species covered.

If the Commission decides that listing the Pacific fisher "is not warranted," take of the former candidate species would no longer be prohibited under CESA. Absent protected status, no mechanism would be needed to authorize take of Pacific fisher.

In summary, the Commission has complied with this requirement by diligently pursuing its determination of whether or not listing of Pacific fisher is warranted. The inherent temporary nature of a 2084 regulation makes pursuing its permanent status unnecessary.

Regulatory Language

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