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STATE OF CALIFORNIA
Fish and Game Commission

March 15, 2011

TO ALL AFFECTED AND INTERESTED PARTIES:

This is to provide you with a copy of the notice of proposed emergency regulatory action relating to incidental take of Mountain yellow-legged frog.

Sincerely,

Sheri Tiemann
Staff Services Analyst

Attachments

Received 3-18-2011

TITLE 14. Fish and Game Commission
Notice of Proposed Emergency Changes in Regulations

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), pursuant to the authority vested by sections 200, 202, 205, 240, and 2084, of the Fish and Game Code (FGC) and to implement, interpret or make specific sections 200, 202, 205, 240, 2080, 2084, and 2085 of said Code, readopted Section 749.6, Title 14, California Code of Regulations (CCR), relating to incidental take of mountain yellow-legged frog *(Rana muscosa* and *Rana sierrae)* ("MYLF") during candidacy period.

Informative Digest/Policy Statement Overview

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

Fish and Game Code 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 of Fish and Game (Department) for evaluation.

Fish and Game Code 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.

Fish and Game Code 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. Fish and Game Code 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 an ITP issued by the Department under CESA the California Supreme Court stated, "'take' in this context means to catch, capture or kill").)

CESA's take prohibition applies to candidate species pursuant to Fish and Game Code section 2085 upon public notice by the Commission of its finding that sufficient information exists to indicate the petitioned action may be warranted. Upon publication of such notice in the

California Regulatory Notice Register, take of candidate species is prohibited absent authorization as provided in the Fish and Game Code. Following such notice, 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 Fish and Game Code section 2084 or the Department authorizes the take through the issuance of an ITP or other means available pursuant to the Fish and Game Code.

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 Fish and Game Code 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. (Fish & G. Code, § 2074.) The Commission must schedule the petition for final consideration at its next available meeting after receiving the Department's report. (*Id.*, § 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." (*Id.*, § 2075.5.) If listing is not warranted in the Commission's judgment, controlling authority directs the Commission to enter that finding in the public record and the subject species is removed from the list of candidate species. (*Id.*, § 2075.5(1); Cal. Code Regs., tit. 14, § 670.1, subd. (i)(2).)

B. Effect of the Emergency Action

Section 749.6 of Title 14 of the California Code of Regulations would authorize and provide for take of MYLF during its candidacy subject to the following terms and conditions:

(a) Take Authorization.

The Commission authorizes the take of Mountain yellow-legged frog during the candidacy period subject to the terms and conditions herein.

(1) Scientific, Education or Management Activities.
Take of Mountain yellow-legged frog incidental to scientific, education or management activities is authorized.

(2) Scientific Collecting Activities.
Take of Mountain yellow-legged frog authorized by a scientific collecting permit issued by the Department pursuant to California Code of Regulations, Title 14, section 650 or a recovery permit issued by a federal wildlife agency pursuant to United States Code, Title 16, section 1539(a)(1)(A) is authorized.

(3) Actions to Protect, Restore, Conserve or Enhance.
Take of Mountain yellow-legged frog incidental to otherwise lawful activities initiated to protect, restore, conserve or enhance a state or federally threatened or endangered species and its habitat is authorized.

(4) Fish Hatchery and Stocking Activities.
Take of Mountain yellow-legged frog incidental to fish hatchery and related stocking activities consistent with the project description and related mitigation measures identified in the Department of Fish and Game (Department) and U.S. Fish & Wildlife Service Hatchery and Stocking Program Joint Environmental Impact Report/Environmental Impact Statement (SCH. No. 2008082025), as certified by the Department on January 11, 2010, is authorized.

(5) Wildland Fire Response and Related Vegetation Management.
Take of Mountain yellow-legged frog incidental to otherwise lawful wildland fire prevention, response and suppression activities, including related vegetation management, is authorized.

(6) Water Storage and Conveyance Activities
Take of Mountain yellow-legged frog incidental to otherwise lawful water storage and conveyance activities is authorized.

(7) Forest Practices and Timber Harvest.
Incidental take of Mountain yellow-legged frog 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 (Pub. 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.

(b) Reporting.

Any person, individual, organization, or public agency for which incidental take of Mountain yellow-legged frog is authorized pursuant to subdivision (a), shall report observations and detections of Mountain yellow-legged frog, including take, to the Department of Fish and Game on a semi-annual basis during the candidacy period. Observations, detections, and take shall be reported pursuant to this subdivision to the Department of Fish and Game, Fisheries Branch, Attn: Mountain yellow-legged frog observations, 830 S St., Sacramento, CA 95811, or by email submission to mylfdata@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.

(c) Additions, Modifications or Revocation.

(1) Incidental take of Mountain yellow-legged frog 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 Mountain yellow-legged frog.

C. Existing, Comparable Federal Regulations or Statutes

The Federal Endangered Species Act ("FESA") (16 U.S.C. § 1531 et seq.) includes a listing process that is similar to the listing process under CESA, except that take of a candidate species is not prohibited under FESA. The U.S. Fish & Wildlife Service ("Service") designated the southern California population of MYLF (*Rana muscosa*) as a distinct population segment and listed it as an endangered species under FESA on July 2, 2002. (67 Fed.Reg. 44382.) In January 2003, the Service determined that listing the Sierra Nevada populations of MYLF (*Rana sierrae*) as endangered was warranted, but precluded by other higher priority listing actions. (68 Fed.Reg. 2283.) MYLF (*Rana sierrae*) remains a candidate under FESA based on the Service's "warranted but precluded" finding and take of the species under FESA is not currently prohibited.

FESA Section 4(d) (16 U.S.C. § 1533, subd. (d)) is similar in some respects to Fish and Game Code section 2084. Section 4(d) authorizes the Service or the National Marine Fisheries Service (NMFS) 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 Service and NMFS the ability to craft comprehensive regulations to apply to particular activities that may result in take of a threatened species in a manner similar to the Commission's authority to prescribe terms and conditions pursuant to FGC section 2084 during the species' candidacy period. Here, no 4(d) rules have been promulgated for MYLF (*Rana sierrae)* because the "warranted but precluded" finding by the Service did not yet effectuate the designation of MYLF (*Rana sierrae)* as a federally listed threatened or endangered species.

This emergency regulation does not provide FESA authorization for take of MYLF (*Rana muscosa* and *Rana sierrae*). To the extent a project will result in take of MYLF as defined by the FESA, the project proponent is responsible for consulting with the Service to obtain the appropriate take authorization.

D. Policy Statement Overview

The objective of this emergency regulation is to allow specified activities to continue on an interim basis, subject to the measures in the regulation designed to protect MYLF, pending final action by the Commission under CESA related to the proposed listing. The Department's evaluation of the species during the candidacy period will result in the status report described in Section 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.

The regulations as proposed are attached to this notice. Notice of the proposed action shall be posted on the Fish and Game Commission website at http://www.fgc.ca.gov.

Section 240 Finding

Pursuant to the authority vested in it by FGC Section 240 and for the reasons set forth in the attached "Statement of Emergency Action," the Commission expressly finds that the adoption of this regulation is necessary for the immediate conservation, preservation, or protection of fish and wildlife resources, and for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of this regulation will allow activities that may affect MYLF to continue during the candidacy period as long as those activities are conducted in a manner consistent with the protections specified in this regulation.

Public Comments on Proposed Emergency Regulations

The Commission readopted this emergency regulation at its March 14, 2011 teleconference meeting. It is anticipated that the emergency regulation will be filed with the Office of Administrative Law (OAL) on or about March 28, 2011

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law, the adopting agency provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After submission of the proposed emergency to the Office of Administrative Law, the Office of Administrative Law shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

In order to be considered, public comments on proposed emergency regulations must be submitted in writing to the Office of Administrative Law (OAL), 300 Capitol Mall, Room 1250, Sacramento, CA 95814; AND to the Fish and Game Commission, 1416 Ninth Street, Room 1320, Sacramento, CA 95814, or via fax to (916) 653-5040 or via e-mail to fgc@fgc.ca.gov. Comments must identify the emergency topic and may address the finding of emergency, the standards set forth in sections 11346.1 and 11349.1 of the Government Code and Section 240 of the Fish and Game Code. Comments must be received within five calendar days of filing of the emergency regulations. Please refer to OAL's website (www.oal.ca.gov) to determine the date on which the regulations are filed with OAL.

Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the emergency 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 the adoption of Section 749.6 of Title 14 of the California Code of Regulations 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 749.6 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to Fish and Game Code 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 of MYLF on a project-by-project basis, which is both time-consuming and costly to local agencies seeking take authorization. Without this emergency regulation, many routine and ongoing otherwise lawful wildfire suppression and response activities; water management and conveyance activities; restoration, conservation and enhancement actions; scientific research, monitoring and management activities; and forest practices and timber harvest activities would be delayed, or cancelled entirely while awaiting the necessary CESA authorization or ultimate listing determination by the Commission. 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, especially during the current economic crisis.

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

The Commission has determined that the adoption of Section 749.6 of Title 14 of the California Code of Regulations 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, Government Code; and

(e) Effect on Housing Costs:

The Commission has determined that the adoption of Section 749.6 of Title 14 of the California Code of Regulations 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 749.6 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to Fish and Game Code 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 of MYLF on a project-by-project basis, which is both time-consuming and costly for both the Department in processing and authorizing such take, as well as to state agencies seeking take authorization. Without this emergency regulation, many routine and ongoing otherwise lawful wildfire suppression and response activities; water management and conveyance activities; restoration, conservation and enhancement actions; scientific research, monitoring and management activities; and forest practices and timber harvest activities would be delayed, or cancelled entirely while awaiting the necessary CESA authorization or the ultimate listing decision by the Commission. 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, especially in light of the current economic crisis.

Effect on Small Business

It has been determined that the adoption of these regulations may affect small business. The Commission has drafted the regulations in Plain English pursuant to Government Code sections 11342.580 and 11346.2(a)(1).

Consideration of Alternatives

In view of information currently possessed, no reasonable alternative considered would be more effective in carrying out the purposes for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

FISH AND GAME COMMISSION

Jon K. Fischer
Acting Executive Director

Dated: March 15, 2011

FISH AND GAME COMMISSION
STATEMENT OF EMERGENCY ACTION
FOR RE-ADOPTION OF EMERGENCY REGULATIONS

Emergency Action to Re-adopt Section 749.6, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Mountain-Yellow Legged Frog *(Rana muscosa* and *Rana sierrae)* During Candidacy Period

I. Request for Approval of Re-adoption of Emergency Regulation

The Fish and Game Commission (Commission) requests to re-adopt Section 749.6, Title 14, California Code of Regulations (CCR) [Office of Administrative Law (OAL) file number 2010-0930-03 E] without modification. The Findings of Emergency for this file (Attachment A), which contain the following information: Statement/Finding of Emergency; Authority and Reference Citations; Informative Digest; Fiscal Impact Statement; and Standard Form 399 are incorporated by reference. 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 Mountain yellow-legged frog (MYLF), while the Department of Fish and Game (Department) focuses its efforts on further evaluating the status of MYLF.

II. Emergency Regulation in Effect to Date

On September 15, 2010, the Commission determined that the listing of MYLF may be warranted. (Cal. Reg. Notice Register 2010, No. 40-Z, p. 1601 (October 1, 2010).) The Commission's determination designates MYLF as a candidate species under the California Endangered Species Act (CESA). On September 15, 2010, the Commission adopted an emergency regulation pursuant to Fish and Game Code (FGC) section 2084 to allow incidental take of MYLF during its candidacy period subject to specified conditions. (Cal. Reg. Notice Register 2010, No. 43-Z, p. 1782 (October 22, 2010).) The emergency regulation was approved by OAL and became effective on October 11, 2010. Pursuant to Government Code (GC) sections 11346.1(e) and (h), emergency regulations are effective for 180 days. OAL may approve two re-adoptions, each for a period not to exceed ninety days. In the absence of re-adoption, the current 2084 regulation will expire on April 12, 2011.

III. Statement of Emergency

The Commission has prepared this Emergency Action Statement under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) in connection with its request to OAL to approve the re-adoption of section 749.6 of Title 14 of the California Code of Regulations (CCR). The Commission's adoption, and requested re-adoption, of section 749.6 as an emergency action under the APA is based, in part, on authority provided by FGC sections 240 and 2084. Pursuant to the latter section, the emergency regulation adopted by the Commission,

section 749.6, authorizes incidental "take" of MYLF during candidacy, subject to certain terms and conditions prescribed by the Commission. (See generally Fish & G. Code, §§ 86, 2080, 2084, 2085.)

As set forth above, the Commission designated MYLF as a candidate species under CESA and found that adoption of section 749.6 pursuant to FGC sections 240 and 2084 constituted a necessary emergency action by the Commission under the APA. If the emergency regulation is not re-adopted, individuals engaging in activities authorized pursuant to section 749.6 would need to obtain an incidental take permit (ITP) or other authorization from the Department on a project-by-project basis to avoid potential criminal liability for violating CESA should take occur. The issuance of individual ITPs authorizing incidental take is a complicated and lengthy process, and the Commission finds specifically that it is not feasible for the regulated community to obtain, and the Department to issue, ITPs or other authorizations on a project-by-project basis for the numerous activities that would otherwise be prohibited during the candidacy period for MYLF. Without re-adoption of the emergency regulation, prospective permittees, by any reasonable measure, would be subject to CESA's take prohibition without an ability to obtain the necessary state authorization during the candidacy period. As a practical matter, activities that result in the take of MYLF would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby MYLF may or may not be listed as endangered or threatened under CESA. As a result, many projects that are planned or underway that may provide economic, scientific, conservation, and/or other benefits to the State of California, its residents and their communities, and the State's natural resources would be postponed during the candidacy period or canceled entirely. The Commission finds this threatened result constitutes an emergency under Fish and Game Code section 240 and the APA requiring immediate action, especially against the backdrop of the economic crisis currently faced by the State of California.

Given that the emergency circumstances that necessitated the original 2084 regulation are continuing and unchanged, the Commission requests that the previous Finding of Emergency (Attachment A) previously incorporated by reference into this document be used to supplement this justification.

IV. Re-adoption Criteria

1) Same or Substantially Equivalent

Pursuant to GC section 11346.1(h), the text of a re-adopted regulation must be the "same or substantially equivalent" to the text of the original emergency regulation. The proposed language for the re-adopted 2084 emergency regulation is the same as the language of the original 2084 emergency regulation. As no changes have been made to the text of Section 749.6, Title 14, CCR, this requirement has been met.

(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 due diligence" to comply with the standard rulemaking provisions. The Commission has not technically complied with this requirement because a standard rulemaking is not necessary in this particular circumstance and this 2084 regulation is not the appropriate mechanism to authorize take of a threatened or endangered species absent statutory authority.

A 2084 regulation is an appropriate mechanism to authorize take for "candidate" species. 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." (Fish & G. Code § 2075.5.) This determination immediately follows the conclusion of the 12-month review of the species' status by the Department. (Id. § 2074.6.) After the Commission makes the determination that listing the species is or is not warranted, a 2084 regulation is no longer appropriate because the species is no longer a candidate for listing. At that point, the species is either protected under CESA as a listed species or is no longer protected under CESA because it is not listed and is no longer a candidate for listing.

If the Commission determines that listing the MYLF "is warranted," the former candidate species will become a listed species and the persons conducting activities currently covered by the 2084 regulation that take MYLF will be required to obtain an Incidental Take Permit (ITP) pursuant to FGC section 2081(b). ITP's are authorized for certain activities only if specified criteria are met including minimization and full mitigation of the impacts of the take. ITP's are issued on a project-by-project basis to ensure the mitigation and minimization measures are narrowly tailored to the individual project and completely protective of the species. Given that persons conducting activities that will take MYLF will be required to obtain an ITP, which will contain tailored measures to mitigate the impacts of the take, adoption of this 2084 regulation as permanent is not necessary because the MYLF will be protected under CESA and its provisions as a listed species.

If the Commission decides that listing the MYLF "is not warranted," take of the former candidate species will no longer be prohibited under CESA. Absent protected status, no mechanism would be needed to authorize take of MYLF. In that circumstance, adoption of this 2084 regulation as permanent is unnecessary.

A standard rulemaking is not necessary to authorize take of MYLF regardless. As discussed above, if the MYLF is listed it will be protected under CESA as a listed species independent of this 2084 regulation. If the MYLF is not listed, no authorization will be needed for a take. The Commission is currently proceeding with due diligence in accordance with its statutory duties to determine whether or not the listing of MYLF is warranted and the inherent temporary nature of a 2084 regulation makes pursuing its permanent status unnecessary.

FISH AND GAME COMMISSION
STATEMENT OF EMERGENCY ACTION

Emergency Action to Add Section 749.6, Title 14, CCR,
Re: Special Order Relating to Incidental Take of Mountain-Yellow Legged Frog *(Rana muscosa* and *Rana sierrae)* During Candidacy Period

I. INTRODUCTION

The Fish and Game Commission ("Commission") as established by the Constitution of the State of California has exclusive statutory authority to designate species protected by the California Endangered Species Act ("CESA") (Fish & G. Code, § 2050 et seq.). (Cal. Const., art. IV, § 20, subd. (b); Fish & G. Code, § 2070.) 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 of the Fish and Game Code, the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any species designated as a candidate for listing under CESA. Pursuant to controlling statutory authority, the candidacy period under CESA generally runs for a 12-month period. (See generally *Id.*, §§ 2074.6, 2080, 2085.) The Commission has relied on the authority in section 2084 to permit take of candidate species on eight 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; in 2008 for the longfin smelt; in 2009 for the California tiger salamander; and in 2009 for the Pacific fisher.

On September 15, 2010, the Commission determined that the listing of Mountain yellow-legged frog (MYLF) may be warranted. The Commission's determination designates MYLF as a candidate species under CESA and notice of the Commission's finding will be published in the California Regulatory Notice Register. The Commission has prepared this Emergency Action Statement under the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) in connection with its subsequent adoption of section 749.6 of Title 14 of the California Code of Regulations. The Commission's adoption of section 749.6 as an emergency action under the APA is based, in part, on authority provided by Fish and Game Code sections 240 and 2084. Pursuant to the latter section, the emergency regulation adopted by the Commission, section 749.6, authorizes incidental "take" of MYLF during candidacy, subject to certain terms and conditions prescribed by the Commission. (See generally Fish & G. Code, §§ 86, 2080, 2084, 2085.)

As set forth below, the Commission designated MYLF as a candidate species under CESA and found that adoption of section 749.6 pursuant to Fish and

Game Code sections 240 and 2084 constitutes a necessary emergency action by the Commission under the APA. In the absence of this emergency regulation, individuals engaging in activities authorized pursuant to section 749.6 would need to obtain an incidental take permit ("ITP") or other authorization from the Department of Fish and Game ("Department") on a project-by-project basis to avoid potential criminal liability for violating CESA should take occur. The issuance of individual ITPs authorizing incidental take is a complicated and lengthy process, and the Commission finds specifically that it is not feasible for the regulated community to obtain, and the Department to issue, ITPs or other authorizations on a project-by-project basis for the numerous activities that would otherwise be prohibited during the candidacy period for MYLF. Without this emergency regulation, prospective permittees, by any reasonable measure, would be subject to CESA's take prohibition without an ability to obtain the necessary state authorization during the candidacy period. As a practical matter, activities that result in the take of MYLF would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby MYLF may or may not be listed as endangered or threatened under CESA. As a result, many projects that are planned or underway that may provide economic, scientific, conservation, and/or other benefits to the State of California, its residents and their communities, and the State's natural resources would be postponed during the candidacy period or canceled entirely. The Commission finds this threatened result constitutes an emergency under Fish and Game Code section 240 and the APA requiring immediate action, especially against the backdrop of the economic crisis currently faced by the State of California.

II. BACKGROUND

On January 27, 2010, the Commission received a petition from the Center for Biological Diversity ("Center") to list MYLF as an endangered species under CESA. (Cal. Reg. Notice Register 2010, No. 9-Z, p. 333 (February 26, 2010).) In June 2010, the Department provided the Commission with a written evaluation of the petition pursuant to FGC section 2073.5, indicating the Department believed that the petition provided sufficient information to indicate the petitioned action may be warranted. On September 15, 2010, at a public meeting in McClellan, California, the Commission considered the petition, the Department's evaluation report and recommendation, and other information presented to the Commission and determined sufficient information exists to indicate the petitioned action may be warranted. In so doing, the Commission accepted the Center's petition for further review and designated MYLF as a candidate species under CESA. The Commission expects to publish notice of its finding as required by law on or about October 1, 2010, at which time "take" of MYLF as defined by the Fish and Game Code will be prohibited, except as authorized by law. (See Fish & G. Code, §§ 86, 2074.2, subds. (a)(2), (b), 2080, 2085.)

On September 15, 2010, the Commission also adopted section 749.6 as an emergency action under the APA (Gov. Code, § 11340 et seq.), as well Fish and Game Code section 240. In the absence of the take authorization provided by section 749.6, or as otherwise provided under existing law, take of MYLF will be prohibited by CESA and unauthorized take will be subject to criminal liability and potential prosecution under state law. Under the APA, upon approval by the Office of Administrative Law, section 749.6 will remain in effect initially for six months beginning on or about October 1, 2010.

III. FACTS CONSTITUTING THE NEED FOR EMERGENCY ACTION

The APA defines an "emergency" to mean "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (*Id.* § 11342.545.) To make a finding of emergency, the agency must describe the specific facts supported by substantial evidence that demonstrate the existence of an emergency and the need for immediate adoption of the proposed regulation. (*Id.*, § 11346.1, subd. (b)(2).) Some of the factors an agency may consider in determining whether an emergency exists include: (1) the magnitude of the potential harm, (2) the existence of a crisis situation, (3) the immediacy of the need, i.e., whether there is a substantial likelihood that serious harm will be experienced unless immediate action is taken, and (4) whether the anticipation of harm has a basis firmer than simple speculation. The Commission has considered all of these factors and the definition of an emergency provided in the APA, as well as pertinent authority in Fish and Game Code section 240. Under this latter authority, notwithstanding any other provision of the Fish and Game Code, the Commission may adopt an emergency regulation where doing so is necessary for the immediate conservation, preservation, or protection of fish and wildlife resources, or for the immediate preservation of the general welfare. The Commission finds that such necessity exists in the present case.

Section 749.6 authorizes incidental take of MYLF during candidacy for seven categories of activities:

- In connection with scientific, education or management activities.
- In connection with activities authorized pursuant to a scientific collecting permit issued by the Department or a recovery permit issued by a federal wildlife agency pursuant to United States Code, Title 16, section 1539, subdivision (a)(1)(A).
- In connection with otherwise lawful activities initiated to protect, restore, conserve or enhance any state or federally threatened or endangered species and its habitat.
- In connection with fish hatchery and stocking operations consistent with the project description and related mitigation measures identified in the

Department and U.S. Fish & Wildlife Service ("Service") Hatchery and Stocking Program Joint Environmental Impact Report/Environmental Impact Statement (SCH No. 2008082025)("EIR/EIS"), as certified by the Department on January 11, 2010.

- In connection with activities necessary to prevent, respond or suppress wildland fire; and
- In connection with water storage and conveyance activities.
- In connection with otherwise lawful timber operations.

The Commission finds as set forth below that an emergency exists with respect to each of these covered activities.

A. Scientific, Education or Management Activities

Section 749.6, subdivision (a)(1) and (2), authorizes incidental take of MYLF for scientific, education or management activities, including activities authorized through a scientific collecting permit issued by the Department or through a recovery permit issued by a federal wildlife agency. As explained below, the Commission finds that the designation of MYLF as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to otherwise lawful scientific, education or management activities. The Commission also finds that immediate emergency action to adopt Section 749.6, subdivision (a)(1) and (2), is necessary to conserve, preserve, or protect of fish and wildlife resources, and to preserve the general welfare.

In the absence of the emergency regulation, take of MYLF for scientific, education and management purposes would require authorization by the Department through an individual ITP which is a lengthy, complicated process. (See previous discussion on CESA's other forms of take authorization and why they are not likely to authorize these activities to continue during the candidacy period.) For some of the activities authorized by this subdivision, there is one other unique form of take authorization available, Fish and Game Code section 2081, subdivision (a). Because this form of take authorization still requires "permits or memorandums of understanding (to) authorize individuals...and scientific or educational institutions" to take, it is unlikely that permits under this section could be issued much more quickly than the standard ITP issued by the Department under section 2081, subdivision (b).

Management, education and scientific activities (including research and monitoring) are critical during this candidacy period. During this period, the Department is expected to prepare a status review for MYLF so the Commission can determine if the species should in fact be listed. During this candidacy period, the Department needs all of the scientific information that is available to

make the most scientifically sound recommendation to the Commission and the Commission to make the most scientifically sound final listing decision. There are currently many ongoing MYLF studies proceeding pursuant to Department-issued scientific collecting permits, which are occurring throughout the species' range, and must be allowed to continue to ensure a complete data set. Many studies operate on a continuous basis and rely on that predictability in coming to scientific conclusions about the data they acquire. In addition, new studies during this period that might be proposed should also be facilitated without delay to fill in any data gaps relevant to the possible listing of MYLF. If these activities are not allowed to continue, adequate evaluation and protection of MYLF could be severely impaired and the public will be disserved by decisions being made without the best available science.

Adoption of this emergency regulation would minimize the hardships that would be caused by delays in ongoing or new management, education and scientific activities while providing safeguards to protect the MYLF, including continued regulatory oversight by the Department pursuant to its authority to condition scientific collecting permits. (See Cal. Code Regs, tit. 14, § 650.) Therefore, the Commission finds that impacts to management, education and scientific activities caused by designating the MYLF as a candidate species, constitute an emergency under the APA requiring immediate action.

B. Actions to Protect, Restore, Conserve or Enhance

Section 749.6, subdivision (a)(3), authorizes take of MYLF incidental to otherwise lawful activities where the purpose of the underlying activity is to protect, restore, conserve or enhance a state or federally threatened or endangered species and its habitat. As explained below, the Commission finds that the designation of MYLF as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to otherwise lawful activities to protect, restore, conserve or enhance state or federally threatened or endangered species and their habitat. The Commission also finds that immediate emergency action to adopt Section 749.6, subdivision (a)(3), is necessary to conserve, preserve, or protect of fish and wildlife resources, and to preserve the general welfare.

In the absence of the emergency regulation, take of MYLF incidental to otherwise lawful activities to protect, restore, conserve or enhance state or federally threatened or endangered species and their habitat would require authorization by the Department through an individual ITP which is a lengthy, complicated process. (See previous discussion on CESA's other forms of take authorization and why they are not likely to authorize these activities to continue during the candidacy period.) Ongoing and planned activities to protect, restore, conserve or enhance state or federally threatened or endangered species are critical during this candidacy period. The status of many listed species is precarious, and even the slightest delay in initiated or continued implementation of any

related conservation actions could adversely affect or otherwise cause further decline of these species. In addition, any further decline in the status of listed species will lead to increased costs to the Department because more resources will be required to get the species to the point where protective measures are no longer necessary. Increased cost will also be shouldered by prospective permittees, who will be charged with funding the mitigation and related monitoring required for the impacts of their project on the species.

Adoption of this emergency regulation would minimize the hardships that would be caused by delays in ongoing or new lawful activities to protect, restore, conserve and enhance state or federally threatened or endangered species and their habitat. The Commission finds that impacts to activities to protect, restore, conserve, or enhance state or federally threatened or endangered species and their habitat caused by designating the MYLF as a candidate species, constitute an emergency under the APA requiring immediate action.

C. Fish Hatchery and Stocking Operations

Section 749.6, subdivision (a)(4), authorizes take of MYLF incidental to fish hatchery and related stocking activities consistent with the project description and related mitigation measures identified in the Department and Service Hatchery and Stocking Program Joint EIR/EIS as certified by the Department on January 11, 2010. As explained below, the Commission finds that the designation of MYLF as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to hatchery and stocking program activities. The Commission also finds that immediate emergency action to adopt Section 749.6, subdivision (a)(4), is necessary for the conservation, preservation, or protection of fish and wildlife, and to preserve the general welfare.

In the absence of Section 749.6, subdivision (a)(4), take of MYLF incidental to otherwise lawful fish hatchery and related stocking activities would require authorization by the Department through an individual ITP and, as previously stated, doing so is a lengthy and complicated process. (There are other means by which take can be authorized under CESA, however they either take longer than individual ITPs or are not likely to be available for use for fish hatchery and related stocking activities.) Fish hatchery and related stocking activities consistent with the project description and related mitigation measures identified in the recent Department and Service Joint EIR/EIS play a critical role in efforts to conserve and manage California's fishery both from a conservation and management, and recreational standpoint. In addition, the project description and mitigation measures identified in the Joint EIR/EIS were carefully crafted by the Department and Service with extensive public review and related scientific input, all with the goal of conserving and managing California's fisheries in a way that protects and ensures that any indirect impacts are avoided or substantially reduced to the extent feasible. Absent the take authorization provided by Section

749.6, subdivision (a)(4), during the 12-month candidacy period fish hatchery and related stocking activities would cease or be substantially curtailed to the detriment of the People of California and related natural resources.

Adoption of this emergency regulation would minimize the hardships to hatchery and stocking activities as a result of MYLF being designated as a candidate species under CESA. The Commission finds, as a result, that impacts to hatchery and stocking activities constitute an emergency under the APA requiring immediate action.

D. Wildland Fire Prevention, Suppression and Response

Section 749.6, subdivision (a)(5), authorizes take of MYLF incidental to otherwise lawful wildland fire prevention, response and suppression activities. As explained below, the Commission finds that the designation of MYLF as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to fire prevention, response and suppression activities. The Commission also finds that immediate emergency action to adopt Section 749.6, subdivision (a)(5), is necessary to preserve the general welfare.

In the absence of Section 749.6, subdivision (a)(5), take of MYLF incidental to otherwise lawful fire prevention, response, and suppression activities, would require authorization by the Department through an individual ITP and, as previously stated, doing so is a lengthy and complicated process. (There are other means by which take can be authorized under CESA, however they either take longer than individual ITPs or are not likely to be available for use for wildland fire prevention, suppression and response activities.) It is important to note that unlike many other regulatory statutes, CESA does not contain any exemption from the permitting requirements or the take prohibition for emergency situations like fuel (vegetation) control, wildfire suppression and response.

California's fire seasons have recently involved far-ranging catastrophic wildland fires. The role of the emergency regulation in allowing activities related to fire-related vegetation management and prevention, fire suppression and response to continue falls squarely within virtually any statutory definition of "emergency," including one of the most narrow--CEQA's definition of an emergency that states it is an activity "involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services." (Pub. Resources Code, § 21080; see also CEQA Guidelines, § 15359.)

According to CalFire's website, creating a "defensible space" by controlling vegetation within 100 feet of dwellings and other buildings "dramatically increases the chance of your house surviving a wildfire" and "provides for firefighter safety" when fighting a fire. It is precisely these vegetation control

activities that are authorized under the emergency regulation without the need for additional take authorization. The emergency regulation also removes impediments to critical wildland fire suppression and response. Delays due to permitting would cause risks to public safety, should fire suppression activities be delayed or cancelled entirely. In addition, there would be grave social and economic harm to the employees and agencies tasked with carrying out the fire suppression activities and the local communities where those activities might be critically needed.

Adoption of this emergency regulation would minimize these hardships. Therefore, the Commission finds that impacts to wildland fire prevention, response and suppression activities, caused by designating the MYLF as a candidate species, constitute an emergency under the APA requiring immediate action.

D. Watershed Storage and Conveyance Activities

Section 749.6, subdivision (a)(6), authorizes take of MYLF incidental to otherwise lawful water storage and conveyance activities. As explained below, the Commission finds that the designation of MYLF as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to otherwise lawful water storage and conveyance activities. The Commission also finds that immediate emergency action to adopt Section 749.6, subdivision (a)(6), is necessary to preserve the general welfare.

In the absence of the emergency regulation, take of MYLF incidental to otherwise lawful water storage and conveyance activities would require authorization by the Department through an individual ITP which is a lengthy, complicated process. (See previous discussion on CESA's other forms of take authorization and why they are not likely to authorize these activities to continue during the candidacy period.) Activities to maintain, manage or operate watershed storage and conveyance facilities must be allowed to continue during this candidacy period. Many dams are located in the range of MYLF, and are utilized for power generation, water storage, and recreation. The conveyance facilities operate to transport the water from storage facilities to customers, including members of the public. Without take protection, it is possible that water deliveries, power generation or recreational opportunities would be interrupted. The ability to deliver water and manage stored water without impediment is necessary to avoid serious harm to public health due to lack of water for drinking, sanitation and food production.

Adoption of this emergency regulation would minimize the hardships that would be caused by delays in lawful water storage and conveyance activities. The Commission finds that impacts to lawful water storage and conveyance activities constitute an emergency under the APA requiring immediate action.

E. Forest Practices and Timber Harvest Activities

Section 749.6, subdivision (a)(7), authorizes incidental take of MYLF incidental to otherwise lawful timber harvest activities. As explained below, the Commission finds that the designation of MYLF as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to otherwise lawful timber harvest activities and operations. The Commission also finds that immediate emergency action to adopt Section 749.6, subdivision (a)(7), is necessary to preserve the general welfare.

In general, timber harvest review in California is administered by the California Department of Forestry and Fire Protection ("CalFire") pursuant to the Z'Berg Nejedly Forest Practice Act (Pub. Resources Code, § 4511 et seq.), the Forest Practice Rules (Cal. Code Regs., tit. 14, § 895 et seq.), and other applicable law, including the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). In the absence of Section 749.6, subdivision (a)(7), many existing, already-approved, otherwise lawful timber harvest operations in MYLF range could not move forward absent additional review and re-approval. Likewise, without Section 749.6, many already-approved, otherwise lawful timber harvest operations and activities would require a project-specific authorization under CESA from the Department. Yet, the regulatory oversight of timber operations by various public agencies under State law generally requires consideration and protection of various environmental resources and in many instances government approval of individual timber harvest activities requires compliance with CEQA and mitigation of significant environmental impacts to the extent feasible. Therefore, many timber projects that are about to commence or are already underway currently include measures that will reduce the prospect of adverse impacts to, and minimize and mitigate take of MYLF. Re-opening and re-negotiating agreements for timber activities to address the MYLF's legal status as a candidate species and, where necessary, to obtain an ITP or other take authorization under CESA (e.g., FGC section 2835) would unnecessarily delay these already-approved and otherwise lawful timber operations, resulting in undue burden on the Timber Harvest Plan (THP) holder.

Without this emergency regulation, many routine and ongoing otherwise lawful timber operations on land already managed for timber harvest would be delayed while awaiting the necessary State CESA authorization or cancelled entirely. In many cases, the delays would cause THP holders to substantially delay or cancel their projects entirely, resulting in great social and economic harm to the THP holders, their employees, registered professional foresters, the local communities that rely on timber harvest activities, and the State of California. CalFire review of existing otherwise lawful timber operations, along with project-specific CESA permitting by the Department, would also pose a significant burden to these state agencies. Both CalFire and the Department would likely face a sudden and potentially large increase in requests for timber harvest review and related take authorizations under CESA. Neither agency is equipped with

appropriate resources to handle and address the likely workload associated with this scenario, creating a significant permitting backlog.

F. Reporting

Subdivision (b) of the emergency regulation is different from the previous sections described herein. It is not an additional activity for which take is authorized under the regulation. Instead, subdivision (b) of the emergency regulation concerns reporting detections and observations of MYLF in connection with and by persons involved or otherwise engaged in the activities for which take is authorized pursuant to subdivision (a). It is vital that during this candidacy period detections and observations of MYLF be reported to the Department so it can have the most complete information possible as it prepares its scientific status review of the species and develops related recommendation to the Commission regarding whether listing MYLF under CESA is warranted.

For these reasons, the immediate adoption of this emergency regulation is necessary to allow numerous projects and activities to continue during the candidacy review period for MYLF under CESA. The Commission believes the activities permitted under this regulation will result in very limited take and will not jeopardize the continued existence of the species. The Commission finds, in this respect, that the regulation subject to this determination will ensure appropriate interim protections for MYLF while the Department conducts a 12-month review of the status of the candidate species and the Commission makes its final determination regarding listing under CESA.

IV. Express Finding of Emergency

Pursuant to the authority vested in the Commission by Fish and Game Code section 240, and for the reasons set forth above, the Commission expressly finds that the adoption of this regulation is necessary for the immediate conservation, preservation, or protection of fish and wildlife resources, and for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of this regulation will allow activities that may affect MYLF to continue during the candidacy period as long as those activities are conducted in a manner consistent with the protections specified in this regulation.

V. Authority and Reference Citations

Authority: FGC sections 200, 202, 205, 240, and 2084.
Reference: FGC sections 200, 202, 205, 240, 2080, 2084, and 2085.

VI. 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

Fish and Game Code 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.

Fish and Game Code 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.

Fish and Game Code 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. Fish and Game Code 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 an ITP issued by the Department under CESA the California Supreme Court stated, "'take' in this context means to catch, capture or kill").)

CESA's take prohibition applies to candidate species pursuant to Fish and Game Code section 2085 upon public notice by the Commission of its finding that sufficient information exists to indicate the petitioned action may be warranted. Upon publication of such notice in the California Regulatory Notice Register, take

of candidate species is prohibited absent authorization as provided in the Fish and Game Code. Following such notice, 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 Fish and Game Code section 2084 or the Department authorizes the take through the issuance of an ITP or other means available pursuant to the Fish and Game Code.

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 Fish and Game Code 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. (Fish & G. Code, § 2074.) The Commission must schedule the petition for final consideration at its next available meeting after receiving the Department's report. (*Id.*, § 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." (*Id.*, § 2075.5.) If listing is not warranted in the Commission's judgment, controlling authority directs the Commission to enter that finding in the public record and the subject species is removed from the list of candidate species. (*Id.*, § 2075.5(1); Cal. Code Regs., tit. 14, § 670.1, subd. (i)(2).)

B. Effect of the Emergency Action

Section 749.6 of Title 14 of the California Code of Regulations would authorize and provide for take of MYLF during its candidacy subject to the following terms and conditions:

a) Take Authorization.

The Commission authorizes the take of Mountain yellow-legged frog during the candidacy period subject to the terms and conditions herein.

(1) Scientific, Education or Management Activities.
Take of Mountain yellow-legged frog incidental to scientific, education or management activities is authorized.

(2) Scientific Collecting Activities.
Take of Mountain yellow-legged frog authorized by a scientific collecting permit issued by the Department pursuant to California Code of Regulations, Title 14, section 650 or a recovery permit issued by a federal wildlife agency pursuant to United States Code, Title 16, section 1539(a)(1)(A) is authorized.

(3) Actions to Protect, Restore, Conserve or Enhance.
Take of Mountain yellow-legged frog incidental to otherwise lawful activities initiated to protect, restore, conserve or enhance a state or federally threatened or endangered species and its habitat is authorized.

(4) Fish Hatchery and Stocking Activities.
Take of Mountain yellow-legged frog incidental to fish hatchery and related stocking activities consistent with the project description and related mitigation measures identified in the Department of Fish and Game (Department) and U.S. Fish & Wildlife Service Hatchery and Stocking Program Joint Environmental Impact Report/Environmental Impact Statement (SCH. No. 2008082025), as certified by the Department on January 11, 2010, is authorized.

(5) Wildland Fire Response and Related Vegetation Management.
Take of Mountain yellow-legged frog incidental to otherwise lawful wildland fire prevention, response and suppression activities, including related vegetation management, is authorized.

(6) Water Storage and Conveyance Activities
Take of Mountain yellow-legged frog incidental to otherwise lawful water storage and conveyance activities is authorized.

(7) Forest Practices and Timber Harvest.
Incidental take of Mountain yellow-legged frog 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.

(b) Reporting.

Any person, individual, organization, or public agency for which incidental take of Mountain yellow-legged frog is authorized pursuant to subdivision (a), shall report observations and detections of Mountain yellow-legged frog, including take, to the Department of Fish and Game on a semi-annual basis during the candidacy period. Observations, detections, and take shall be reported pursuant to this subdivision to the Department of Fish and Game, Fisheries Branch, Attn: Mountain yellow-legged frog observations, 830 S St., Sacramento, CA 95811, or by email submission to mylfdata@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.

(c) Additions, Modifications or Revocation.

(1) Incidental take of Mountain yellow-legged frog 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 Mountain yellow-legged frog.

C. Existing, Comparable Federal Regulations or Statutes

The Federal Endangered Species Act ("FESA") (16 U.S.C. § 1531 et seq.) includes a listing process that is similar to the listing process under CESA, except that take of a candidate species is not prohibited under FESA. The U.S. Fish & Wildlife Service ("Service") designated the southern California population of MYLF (*Rana muscosa*) as a distinct population segment and listed it as an endangered species under FESA on July 2, 2002. (67 Fed.Reg. 44382.) In January 2003, the Service determined that listing the Sierra Nevada populations of MYLF (*Rana sierrae*) as endangered was warranted, but precluded by other higher priority listing actions. (68 Fed.Reg. 2283.) MYLF (*Rana sierrae*) remains a candidate under FESA based on the Service's "warranted but precluded" finding and take of the species under FESA is not currently prohibited.

FESA Section 4(d) (16 U.S.C. § 1533, subd. (d)) is similar in some respects to Fish and Game Code section 2084. Section 4(d) authorizes the Service or the National Marine Fisheries Service (NMFS) 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 Service and NMFS the ability to craft comprehensive regulations to apply to particular activities that may result in take of a threatened species in a manner similar to the Commission's authority to prescribe terms and conditions pursuant to FGC section 2084 during the species' candidacy period. Here, no 4(d) rules have been promulgated for MYLF (*Rana sierrae)* because the "warranted but precluded" finding by the Service did not yet effectuate the designation of MYLF (*Rana sierrae)* as a federally listed threatened or endangered species.

This emergency regulation does not provide FESA authorization for take of MYLF (*Rana muscosa* and *Rana sierrae*). To the extent a project will result in take of MYLF as defined by the FESA, the project proponent is responsible for consulting with the Service to obtain the appropriate take authorization.

D. Policy Statement Overview

The objective of this emergency regulation is to allow specified activities to continue on an interim basis, subject to the measures in the regulation designed to protect MYLF, pending final action by the Commission under CESA related to the proposed listing. The Department's evaluation of the species during the candidacy period will result in the status report described in Section VI.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.

VII. Specific Agency Statutory Requirements

The Commission has complied with the special statutory requirements governing the adoption of emergency regulations pursuant to Fish and Game Code section 240. The Commission held a public hearing on this regulation on September 15, 2010, and the above finding that this regulation is necessary for the immediate conservation, preservation, or protection of fish and wildlife resources, and for the immediate preservation of the general welfare meets the requirements of section 240.

VIII. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the emergency 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 the adoption of Section 749.6 of Title 14 of the California Code of Regulations 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 749.6 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to Fish and Game Code 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 of MYLF on a project-by-project basis, which is both time-consuming and costly to local agencies seeking take authorization. Without this emergency regulation, many routine and ongoing otherwise lawful wildfire suppression and response activities; water management and conveyance activities; restoration, conservation and enhancement actions; scientific research, monitoring and management activities; and forest practices and timber harvest activities would be delayed, or cancelled entirely while awaiting the necessary CESA authorization or ultimate listing determination by the Commission. 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, especially during the current economic crisis.

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

The Commission has determined that the adoption of Section 749.6 of Title 14 of the California Code of Regulations 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, Government Code; and

(e) Effect on Housing Costs:

The Commission has determined that the adoption of Section 749.6 of Title 14 of the California Code of Regulations 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 749.6 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to Fish and Game Code 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 of MYLF on a project-by-project basis, which is both time-consuming and costly for both the Department in processing

and authorizing such take, as well as to state agencies seeking take authorization. Without this emergency regulation, many routine and ongoing otherwise lawful wildfire suppression and response activities; water management and conveyance activities; restoration, conservation and enhancement actions; scientific research, monitoring and management activities; and forest practices and timber harvest activities would be delayed, or cancelled entirely while awaiting the necessary CESA authorization or the ultimate listing decision by the Commission. 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, especially in light of the current economic crisis.

Regulatory Language

Section 749.6, Title 14, CCR, is added to read:

749.6 Incidental Take of Mountain Yellow-Legged Frog (*Rana muscosa* and *Rana sierrae*) During Candidacy Period

This regulation authorizes take as defined by Fish and Game Code section 86, of Mountain yellow-legged frog (*Rana muscosa* and *Rana sierrae*), 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 Mountain yellow-legged frog during the candidacy period subject to the terms and conditions herein.

(1) Scientific, Education or Management Activities.
Take of Mountain yellow-legged frog incidental to scientific, education or management activities is authorized.

(2) Scientific Collecting Activities.
Take of Mountain yellow-legged frog authorized by a scientific collecting permit issued by the Department of Fish and Game pursuant to California Code of Regulations, Title 14, section 650, or a recovery permit issued by a federal wildlife agency pursuant to United States Code, Title 16, section 1539, subdivision (a)(1)(A), is authorized.

(3) Activities to Protect, Restore, Conserve or Enhance.
Take of Mountain yellow-legged frog incidental to otherwise lawful activities where the purpose of the activity is to protect, restore, conserve or enhance a species designated as an endangered, threatened, or candidate species under state or federal law, or such species' habitat is authorized.

(4) Fish Hatchery and Stocking Activities.
Take of Mountain yellow-legged frog incidental to fish hatchery and related stocking activities consistent with the project description and related mitigation measures identified in the Department of Fish and Game (Department) and U.S. Fish & Wildlife Service Hatchery and Stocking Program Joint Environmental Impact Report/Environmental Impact Statement (SCH. No. 2008082025), as certified by the Department on January 11, 2010, is authorized.

(5) Wildland Fire Response and Related Vegetation Management.
Take of Mountain yellow-legged frog incidental to otherwise lawful wildland fire prevention, response and suppression activities, including related vegetation management, is authorized.

(6) Water Storage and Conveyance Activities
Take of Mountain yellow-legged frog incidental to otherwise lawful water storage and conveyance activities is authorized.

(7) Forest Practices and Timber Harvest.
Incidental take of Mountain yellow-legged frog 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.

(b) Reporting.

Any person, individual, organization, or public agency for which incidental take of Mountain yellow-legged frog is authorized pursuant to subdivision (a), shall report observations and detections of Mountain yellow-legged frog, including take, to the Department of Fish and Game on a semi-annual basis during the candidacy period. Observations, detections, and take shall be reported pursuant to this subdivision to the Department of Fish and Game, Fisheries Branch, Attn: Mountain yellow-legged frog observations, 830 S St., Sacramento, CA 95811, or by email submission to mylfdata@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.

(c) Additions, Modifications or Revocation.

(1) Incidental take of Mountain yellow-legged frog 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 Mountain yellow-legged frog.

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.