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STATE OF CALIFORNIA

Fish and Game Commission

December 23, 2009

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 Pacific fisher.

Sincerely,

A handwritten signature in cursive script that reads "Sherrie Fonbuena".

Sherrie Fonbuena
Associate Governmental Program Analyst

Attachments

BOARD OF SUPERVISORS
2010 JAN -4 A 9:51

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

NOTICE IS HEREBY GIVEN that the Fish and Game Commission (Commission), at its December 10, 2009 meeting, pursuant to the authority vested by sections 200, 202, 240, and 2084 of the Fish and Game Code (FGC) and to implement, interpret or make specific sections 200, 202, 240, 2080, 2084, and 2085 of said Code, readopted Section 749.5, Title 14, California Code of Regulations (CCR), relating to incidental take of Pacific fisher during candidacy period.

Informative Digest/Policy Statement Overview

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

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

1. Petition and Acceptance

FGC Section 2070 requires the Commission to establish a list of endangered species and a list of threatened species. Any interested person may petition the Commission to add a species to the endangered or threatened list by following the requirements in FGC 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.

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

FGC Section 2074.2 provides that, if the Commission finds that the petition provides sufficient information to indicate that the petitioned action may be warranted, the petition is accepted for consideration and the species that is the subject of the petition becomes a "candidate species" under CESA. CESA prohibits unauthorized take of a candidate species. FGC Section 86 states "take" means to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill. Killing of a candidate, threatened, or endangered species under CESA that is incidental to an otherwise lawful activity and not the primary purpose of the activity constitutes take under state law. (*Department of Fish and Game v. Anderson-Cottonwood Irrigation District* (1992) 8 Cal.App.4th 1554; see also *Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 507 (in the context of an incidental take permit 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 FGC 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 FGC.

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 FGC section 2084 or the Department authorizes the take through the issuance of an incidental take permit (ITP) or other means available under CESA.

2. Status Review and Final Action on the Petition

The Commission's acceptance of a petition initiates a 12-month review of the species' status by the Department, pursuant to FGC Section 2074.6. This status review helps to determine whether the species should be listed as threatened or endangered. Unlike the Department's initial evaluation, which focuses largely on the sufficiency of information submitted in the petition, the 12-month status review involves a broader inquiry into and evaluation of available information from other sources. The Commission is required to solicit data and comments on the proposed listing soon after the petition is accepted, and the Department's written status report must be based upon the best scientific information available.

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

B. Effect of the Emergency Action

Section 749.5 of Title 14 of the California Code of Regulations would authorize and provide for take of Pacific fisher during its candidacy subject to the following terms and conditions:

(a) Take Authorization

The Commission authorizes 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, Modification, 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.

C. Existing, Comparable Federal Regulations or Statutes

The Federal Endangered Species Act (FESA) (16 U.S.C. Section 1531 et seq.) includes a listing process that is comparable to the listing process under CESA, except that take of a candidate species is not prohibited under FESA. Pacific fisher is not listed as an endangered or threatened species under FESA, although the U.S. Fish and Wildlife Service (Service) made a determination in April 2004 that, while listing was warranted, designating the species as threatened or endangered under FESA was precluded by other listing priorities. (69 Fed.Reg. 18770.) Pacific fisher 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. Section 1533 (d)) is similar in some respects to FGC 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, because the "warranted but precluded" finding by the Service did not yet effectuate the designation of Pacific fisher as a federally listed threatened or endangered species.

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 Pacific fisher, 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 of the attached "Statement of Facts Constituting Need for Emergency Action." 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 in ~~underline~~ format are attached to this notice. Notice of the 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 Facts Constituting Need for Emergency Action," the Commission expressly finds that the adoption of this regulation is necessary for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of this regulation will allow activities that may affect Pacific fisher 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 December 10, 2009 meeting. It is anticipated that the emergency regulation will be filed with the Office of Administrative Law (OAL) on or about January 4, 2010.

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the OAL, 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 OAL, OAL 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, 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 749.5 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 749.5 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to FGC section 2084 will likely provide cost savings to local agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take of Pacific fisher 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 timber operations on land already managed for timber harvest would be delayed or cancelled entirely, as would vegetation management, wildfire suppression and response, and research and monitoring while awaiting the necessary CESA authorization. These delays and cancellations would cause great economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California.

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

The Commission has determined that the adoption of Section 749.5 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 749.5 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 749.5 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to FGC section 2084 will likely provide cost savings to state agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take of Pacific fisher 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. Additionally, reopening existing Timber Harvest Plans (THPs), in addition to participating in review and issuance of new THPs in Pacific fisher range, would pose a significant burden on the California Department of Forestry and Fire Protection as well as the Department. Without this emergency regulation, many routine and ongoing otherwise lawful timber operations on land already managed for timber harvest would be delayed or cancelled entirely while awaiting the necessary State CESA authorization. These delays and cancellations would cause great economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California.

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

John Carlson, Jr.
Executive Director

Dated: December 23, 2009

**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.

**FISH AND GAME COMMISSION
STATEMENT OF EMERGENCY ACTION**

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

I. INTRODUCTION

The Fish and Game Commission (“Commission”) is the decision-making body that implements the California Endangered Species Act (“CESA”) (Fish & G. Code, § 2050 et seq.). 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 (“FGC”), the Commission may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while the Department of Fish and Game (“Department”) and Commission evaluate whether the species should be listed as threatened or endangered under CESA. The Commission has relied on the authority in Section 2084 to permit take of candidate species on seven 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; and in 2009 for the California tiger salamander.

On April 8, 2009, the Commission considered the adoption of findings designating Pacific fisher as a candidate species under CESA. 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 749.5 of Title 14 of the California Code of Regulations. The Commission’s adoption of Section 749.5 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 of the FGC, Section 749.5 will authorize incidental “take” of Pacific fisher during candidacy, subject to certain terms and conditions prescribed by the Commission. (See generally Fish & G. Code, §§ 2080, 2084, 2085, and 86.)

As set forth below, the Commission designated Pacific fisher as a candidate species under CESA and finds that adoption of Section 749.5 pursuant to FGC 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 749.5 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. 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 Pacific fisher. Without this emergency regulation, prospective permittees, many of whom already have the necessary entitlements to proceed with their approved projects, would be subject to CESA's take prohibition without, by any reasonable measure, an ability to obtain the necessary state authorization during the candidacy period. As a practical matter, activities that result in the take of Pacific fisher would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby Pacific fisher may or may not be listed as endangered or threatened under CESA. As a result, many projects that are planned or underway that provide great economic and other benefits to the permittees, their employees, their local communities, and the State of California would be postponed during the candidacy period or canceled entirely. The Commission finds this threatened result constitutes an emergency under the APA requiring immediate action, especially against the backdrop of the economic crisis currently faced by the State of California.

II. BACKGROUND

On January 23, 2008, the Commission received a petition from the Center for Biological Diversity ("Center") to list the Pacific fisher as an endangered or threatened species under CESA. (Cal. Reg. Notice Register 2008, No. 8-Z, p. 275 (February 22, 2008).) In June 2008, the Department provided the Commission with a written evaluation of the petition pursuant to FGC 2073.5, indicating the Department did not believe the petition provided sufficient information to indicate the petitioned action may be warranted. On August 7, 2008, at a public meeting in Carpinteria, California, the Commission considered the petition, the Department's evaluation report and recommendation, and other information presented to the Commission and determined sufficient information did not exist to indicate the petitioned action may be warranted. In so doing, the Commission adopted a motion declining to accept the petition for further review under CESA. (Fish & G. Code, § 2074.2, subd. (a)(1).) At the same time, the Commission postponed the adoption of findings documenting its determination until a later date.

The Commission considered further action on the Pacific fisher petition at public meetings on December 12, 2008 and February 5, 2009. Consistent with action taken at the latter public meeting, the Commission published notice of its intent to reconsider its earlier determination regarding the petition at a public meeting scheduled in Woodland, California, on March 4, 2009. (Cal. Reg. Notice Register 2009, No. 8-Z, p. 285 (February 20, 2009).) At the Woodland public meeting, the Commission reconsidered its earlier determination and concluded the petition to list Pacific fisher provided sufficient information to indicate the petitioned action

may be warranted. In so doing, the Commission adopted a motion to designate Pacific fisher as a candidate species and to accept the petition for further consideration under CESA. (Fish & G. Code, § 2074.2, subd. (a)(2).) The Commission, however, postponed the adoption of findings documenting its determination under CESA until the April 2009 Commission meeting, indicating it would consider possible action at the same time pursuant to FGC Section 2084.

On April 8, 2009, as noted above, the Commission adopted findings designating Pacific fisher as a candidate species under CESA. (*Ibid.*) CESA's prohibition on "take" of Pacific fisher as a candidate species will be effective upon publication of the Commission's finding in the California Regulatory Notice Register, which is expected on or about April 24, 2009. (See *Id.*, §§ 2080, 2085, and 86.) In the absence of the take authorization provided by Section 749.5, or as otherwise provided by the Department, take of Pacific fisher will be prohibited by CESA at that time and unauthorized take will be subject to criminal liability and potential prosecution under state law.

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." (§ 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 FGC section 240. Under this latter authority, notwithstanding any other provision of the FGC, the Commission may adopt an emergency regulation where doing so is necessary for the immediate preservation of the general welfare. The Commission finds that such necessity exists in the present case.

Section 749.5 authorizes incidental take of Pacific fisher during candidacy for three categories of activities:

- In connection with otherwise lawful timber harvest activities and operations authorized by the Z'Berg Nejedly Forest Practice Act (Pub. Resources Code, § 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.

- In connection with vegetation management activities necessary to prevent or reduce, or respond to wildland fire; and
- In connection with management, monitoring, and research activities, including translocation of Pacific fisher.

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

A. Otherwise Lawful Timber Harvest Operations

Section 749.5, subdivision (a)(1), authorizes incidental take of Pacific fisher incidental to otherwise lawful timber harvest activities. As explained below, the Commission finds that the designation of Pacific fisher 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 749.5, subdivision (a)(1), 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 749.5, subdivision (a)(1), many existing, already-approved otherwise lawful timber harvest operations in Pacific fisher range could not move forward absent additional review and re-approval. Likewise, without Section 749.5, many already-approved, otherwise lawful timber harvest operations and activities would require a project-specific authorization under CESA from the Department. Yet, many otherwise lawful existing timber operations 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, Pacific fisher. Re-opening and re-negotiating these agreements to address the Pacific fisher'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 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.

B. Vegetation Management, Wildland Fire Suppression and Response

Section 749.5, subdivision (a)(2) and (3), authorizes take of Pacific fisher incidental to otherwise lawful vegetation management to prevent or reduce wildfires, and wildland fire suppression and response activities. As explained below, the Commission finds that the designation of Pacific fisher as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to vegetation management to prevent or reduce wildfires, and wildland fire suppression and response activities. The Commission also finds that immediate emergency action to adopt Section 749.5, subdivision (a)(2), is necessary to preserve the general welfare.

In the absence of Section 749.5, subdivision (a)(2) and (3), take of Pacific fisher incidental to otherwise lawful vegetation management to prevent or reduce wildfires, and wildland fire suppression and response 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 vegetation management, wildland fire 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, 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 while providing safeguards to protect the Pacific fisher, including continued regulatory oversight by CalFire and the Department pursuant to the Forest Practice Act and Forest Practice Rules, CEQA, and other applicable laws. Therefore, the Commission finds that impacts to vegetation management for wildfire prevention, and wildland fire suppression and response activities, caused by designating the Pacific fisher as a candidate species, constitute an emergency under the APA requiring immediate action.

C. Management, Research, and Monitoring, Including Translocation

Subdivision (a)(4) of the emergency regulation would authorize take of Pacific fisher incidental to otherwise lawful management, monitoring, and research activities, including fisher translocation. As explained below, the Commission finds that the designation of Pacific fisher as a candidate species under CESA, and the related take prohibition, constitutes an emergency under the APA with respect to management, research and monitoring, including translocation. The Commission also finds that immediate emergency action to adopt Section 749.5, subdivision (a)(4), is necessary to preserve the general welfare.

In the absence of the emergency regulation, take of Pacific fisher incidental to management, monitoring, and research 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.) For some of the activities authorized by this subdivision, there is one other unique form of take authorization available, FGC section 2081(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.

Department approved or supported management, research and monitoring are critical during this candidacy period. During this period, the Department is expected to prepare a status review for the species 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 decision. Ongoing fisher studies, which are occurring throughout the fisher's range, must continue to ensure a complete data set. In addition, new studies during this period that might be proposed should also be facilitated without delay to fill in any data gaps. Finally, there is a proposed fisher translocation study that has been the subject of a completed CEQA review. This translocation study will provide important information on the efficacy of moving individuals of the species into previously occupied habitat. The program will be studying the effect of translocation on donor populations and fisher that may exist in the areas into which the translocated fisher are placed. It is critical that this study begin without delay to see if it is an effective conservation tool. In the event that it is, it will likely be a critical element of future mitigation measures needed for ITPs once the emergency regulation expires, if the species becomes listed.

Adoption of this emergency regulation would minimize the hardships that would be caused by delays in ongoing or new management, research and monitoring while providing safeguards to protect the Pacific fisher, including continued regulatory oversight by CalFire and the Department pursuant to the Forest Practice Act and Forest Practice Rules, CEQA, and other applicable laws. All of the activities authorized under this subsection must be Department approved or supported. Therefore, the Commission finds that impacts to management, research and monitoring activities, including translocation, caused by designating the Pacific fisher as a candidate species, constitute an emergency under the APA requiring immediate action.

D. Application of the California Environmental Quality Act

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. Subdivision (b) is guidance from the Fish and Game Commission, the entity with responsibility for designating the status of a species under CESA, to other CEQA lead agencies that are reviewing projects that could impact Pacific fisher. This guidance is designed to assist lead agencies in their CEQA review by setting out the Commission's expectations as to how this species should be treated under CEQA. This CEQA review may be ongoing or may arise during the candidacy period. The Commission believes that this information is needed as soon as the candidacy period begins so lead agencies will know what measures, if any, are needed to protect the species.

E. Reporting

As discussed in C. above, it is vital that during this candidacy period detections and observations of Pacific fisher be reported to the Department so it can have the most complete information possible as it prepares its recommendation to the Commission on whether to recommend listing the species, and for the Commission that must make the ultimate decision to list or not.

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 Pacific fisher under CESA. This regulation includes conditions designed to protect the species for all of the activities covered. The Commission believes the activities permitted under this regulation will result in very limited take and will not likely 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 Pacific fisher 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 FGC Section 240, and for the reasons set forth above, the Commission expressly finds that the adoption of this regulation is necessary for the immediate preservation of the general welfare. The Commission specifically finds that the adoption of this regulation will allow activities that may affect Pacific fisher 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, 240, and 2084.

Reference: FGC Sections 200, 202, 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

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

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

FGC Section 2074.2 provides that, if the Commission finds that the petition provides sufficient information to indicate that the petitioned action may be warranted, the petition is accepted for consideration and the species that is the subject of the petition becomes a "candidate species" under CESA. CESA prohibits unauthorized take of a candidate species. FGC Section 86 states "take" means to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill. Killing of a candidate, threatened, or endangered species under CESA that is incidental to an otherwise lawful activity and not the primary purpose of the activity constitutes take under state law. (*Department of Fish and Game v. Anderson-Cottonwood Irrigation District* (1992) 8 Cal.App.4th 1554; see also *Environmental Protection and Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 507 (in the context of 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 FGC 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 FGC. 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 FGC section 2084 or the Department authorizes the take through the issuance of an ITP or other means available under CESA.

2. Status Review and Final Action on the Petition

The Commission's acceptance of a petition initiates a 12-month review of the species' status by the Department, pursuant to FGC Section 2074.6. This status

review helps to determine whether the species should be listed as threatened or endangered. Unlike the Department's initial evaluation, which focuses largely on the sufficiency of information submitted in the petition, the 12-month status review involves a broader inquiry into and evaluation of available information from other sources. The Commission is required to solicit data and comments on the proposed listing soon after the petition is accepted, and the Department's written status report must be based upon the best scientific information available.

Within 12 months of the petition's acceptance, the Department must provide the Commission a written report that indicates whether the petitioned action is warranted. (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." If listing is not warranted in the Commission's judgment, take of the former candidate species is no longer prohibited under CESA. (*Id.*, § 2075.5.)

B. Effect of the Emergency Action

Section 749.5 of Title 14 of the California Code of Regulations would authorize and provide for take of Pacific fisher during its candidacy subject to the following terms and conditions:

(a) Take Authorization

The Commission authorizes 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 (Pub. Resources Code, § 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 (Pub. Resources Code, § 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.

(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 Pub. Resources Code, § 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 coordinates preferred) of the observation, detection, or take; and details regarding the animal(s) observed.

(d) Additions, Modification, 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.

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 comparable to the listing process under CESA, except that take of a candidate species is not prohibited under FESA. Pacific fisher is not listed as an endangered or threatened species under FESA, although the U.S. Fish and Wildlife Service ("Service") made a determination in April 2004 that, while listing was warranted, designating the species as threatened or endangered under FESA was precluded by other listing priorities. (69 Fed.Reg. 18770.) Pacific fisher 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 (d)) is similar in some respects to FGC 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, because the "warranted but precluded" finding by the Service did not yet effectuate the designation of Pacific fisher as a federally listed threatened or endangered species.

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 Pacific fisher, 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 FGC section 240. The Commission held a public hearing on this regulation on April 8, 2009, and the above finding that this regulation is necessary 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 749.5 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 749.5 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to FGC section 2084 will likely provide cost savings to local agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take of Pacific fisher 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 timber operations on land already managed for timber harvest would be delayed or cancelled entirely, as would vegetation management, wildfire suppression and response and research and monitoring while awaiting the necessary CESA authorization. These delays and cancellations would cause great economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California.

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

The Commission has determined that the adoption of Section 749.5 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; and
- (e) Effect on Housing Costs:

The Commission has determined that the adoption of Section 749.5 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 749.5 of Title 14 of the California Code of Regulations as an emergency regulation pursuant to FGC section 2084 will likely provide cost savings to state agencies in an undetermined amount. In the absence of the emergency regulation, the Department would have to authorize take of Pacific fisher 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. Additionally, reopening existing THPs, in addition to participating in review and issuance of new THPs in Pacific fisher range, would pose a significant burden on CalFire as well as the Department. Without this emergency regulation, many routine and ongoing otherwise lawful timber operations on land already managed for timber harvest would be delayed or cancelled entirely while awaiting the necessary State CESA authorization. These delays and cancellations would cause great economic harm to persons already lawfully engaged in such activities, their employees, their local communities, and the State of California.

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.