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Fish and Game Commission OF SUPERVISORS



2017 OCT 30 A 10:13

Wildlife Heritage and Conservation
Since 1870

October 23, 2017

TO ALL INTERESTED AND AFFECTED PARTIES:

This is to provide you with a copy of the notice of proposed regulatory action relative to adding Section 749.9, Title 14, California Code of Regulations, regarding incidental take of tricolored blackbird during candidacy period which will be published in the California Regulatory Notice Register on October 27, 2017.

Please note the date of the public hearing related to this matter and associated deadlines for receipt of written comments.

Additional information and all associated documents may be found on the Fish and Game Commission website at <http://www.fgc.ca.gov/regulations/2017/index.aspx>.

Neil Clipperton, Nongame Bird Conservation Coordinator, Department of Fish and Wildlife, has been designated to respond to questions on the substance of the proposed regulations. Mr. Clipperton can be reached at (916) 445-9753 or Neil.Clipperton@wildlife.ca.gov.

Sincerely,

Sheri Tiemann
Associate Governmental Program Analyst

Attachment

buffer is established and the farmer is allowed to harvest only those fields outside the colony site and buffer area. Delaying harvest protects the vast majority of the colony until the birds fledge, but it does not guarantee that no take will occur. The tricolored blackbird was designated as a candidate for listing, and is therefore subject to the regulatory protections provided by CESA. Promulgating a regulation to authorize incidental take provides farmers assurances that if they agree to follow the requirements imposed by NRCS, delay harvest, and protect the colony nesting in their field, they will not be penalized in the event a small number of birds are taken incidental to their beneficial conservation actions in delaying harvest and otherwise lawful agricultural activities.

The harvest management programs administered by NRCS and the Department can be expected to protect tens of thousands of nesting tricolored blackbirds provided farmers are incentivized to participate. However, the designation of the tricolored blackbird as a candidate for listing under CESA could inhibit participation in the harvest management programs. This regulation, in combination with funding from NRCS, will provide farmers with a strong incentive to participate in the harvest management program.

Tricolored blackbird nesting can begin as early as February. The timing of this nesting relative to the listing determination requires that a regulation be in place to conserve nesting tricolored blackbirds and protect farmers that enroll in one of the harvest management programs in 2018. Such action will effectuate the purposes of Fish and Game Code Section 2084 and CESA more broadly. Absent this regulation, enrollment in the NRCS program may decline. Furthermore, farmers may elect to plant lower value crops that do not provide nesting habitat for tricolored blackbird, thereby decreasing available nesting habitat; farmers may harvest their crop early before onset of the nesting season, which would decrease the value of the crop and also decrease available nesting habitat; or farmers may risk harvesting their crop even if tricolored blackbird are present.

Without this 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 tricolored blackbird would be prohibited and could not be implemented pending final action by the Commission on the listing petition, an action whereby tricolored blackbird 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.

Proposed Regulations

Section 749.9 authorizes incidental take of the tricolored blackbird during candidacy for three categories of activities:

colonies, including entering colonies to perform walking transects. Only trained observers approved by the Department will be authorized to engage in such monitoring.

Without Section 749.9, subdivision (a)(2), the necessary monitoring would not occur to ensure the protection and immediate conservation of tricolored blackbird during the upcoming harvest of grain fields planted for silage. Department guidance suggests that walking survey transects through a portion of the colony could be used to estimate the nesting stage of breeding colonies and inform decisions necessary to comply with subsection (a)(3).

(3) Harvest of Grain Crops under a Harvest Management Program to Protect Colonies.

Section 749.9, subdivision (a)(3), authorizes take of tricolored blackbird incidental to harvest of grain fields and related agricultural activities where the individual participates in a harvest management program administered by the Natural Resources Conservation Service (NRCS), or harvest management program administered or approved by the Department. The harvest management program shall include the establishment of a buffer zone and harvest date as described under Topics 1 and 2 in the document "California Department of Fish and Wildlife (Department) Staff Guidance Regarding Avoidance of Impacts to Tricolored Blackbird Breeding Colonies on Agricultural Fields in 2015" (adopted on March 19, 2015 and available at <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=99310&inline>).

An individual seeking authorization for take incidental to harvest of grain fields and related agricultural activities shall receive written confirmation of participation in the harvest management program and must obtain specific authorization for the timing of harvest and related agricultural activities from NRCS, the Department, or a biologist authorized by the Department or NRCS before proceeding with any harvest activities that take tricolor blackbirds

Without Section 749.9, subdivision (a)(3), enrollment in the NRCS program may decline, which is necessary to ensure the protection and immediate conservation of the tricolored blackbird during the upcoming harvest of grain fields planted for silage.

(b) Reporting.

Section 749.9, subdivision (a)(2), requires that any person, individual, organization, or public agency, or their agents, for which incidental take of tricolored blackbirds is authorized pursuant to subdivision (a)(1) or (a)(3), shall report observations and detections of tricolored blackbird

February 8, 2018, at 8:00 a.m., or as soon thereafter as the matter may be heard. It is requested, but not required, that written comments be submitted on or before 5:00 p.m. on January 25, 2018 at the address given below, or by email to FGC@fgc.ca.gov. Written comments mailed, or emailed to the Commission office, must be received before 12:00 noon on February 2, 2018. All comments must be received no later than February 8, 2018, at the hearing. If you would like copies of any modifications to this proposal, please include your name and mailing address.

Availability of Documents

The Initial Statement of Reasons, text of the regulations, as well as all related documents upon which the proposal is based (rulemaking file), are on file and available for public review from the agency representative, Valerie Termini, Executive Director, Fish and Game Commission, 1416 Ninth Street, Box 944209, Sacramento, California 94244-2090, phone (916) 653-4899. Please direct requests for the above mentioned documents and inquiries concerning the regulatory process to Valerie Termini or Sheri Tiemann at the preceding address or phone number. **Neil Clipperton, Nongame Bird Conservation Coordinator, Department of Fish and Wildlife, has been designated to respond to questions on the substance of the proposed regulations. Mr. Clipperton can be reached at (916) 445-9753 or Neil.Clipperton@wildlife.ca.gov.** Copies of the Notice of Proposed Action, the Initial Statement of Reasons, and the text of the regulation in underline and strikeout can be accessed through our website at <http://www.fgc.ca.gov>.

Availability of Modified Text

If the regulations adopted by the Commission differ from but are sufficiently related to the action proposed, they will be available to the public for at least 15 days prior to date of adoption. Any person interested may obtain a copy of said regulations prior to the date of adoption by contacting the agency representative named herein.

If the regulatory proposal is adopted, the final statement of reasons may be obtained from the address above when it has been received from the agency program staff.

Impact of Regulatory Action/Results of the Economic Impact Assessment

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following initial determinations relative to the required statutory categories have been made:

Significant Statewide Adverse Economic Impact Directly Affecting Businesses, Including the Ability of California Businesses to Compete with Businesses in Other States:

- (a) The proposed action will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

and the State of California.

- (f) Programs Mandated on Local Agencies or School Districts: None
- (g) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code: None
- (h) Effect on Housing Costs: None

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

The Commission must determine that no reasonable alternative considered by the Commission, or that has otherwise been identified and brought to the attention of the Commission, would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

FISH AND GAME COMMISSION

Dated: October 17, 2017

Valerie Termini
Executive Director