

California Building Industry Association  
California Cattlemen's Association  
California Chamber of Commerce  
California Farm Bureau Federation  
California Grain and Feed Association  
California Waterfowl Association  
California Wheat Growers Association  
Dairy Cares  
Rural County Representatives of California  
Western United Dairymen

July 31, 2014

Mr. Michael Sutton, President  
Fish and Game Commission  
1416 Ninth Street, Suite 1320  
Sacramento, CA 95814

**RE: Item 11: Possible Adoption of Emergency Regulation to Add Tricolored Blackbird (*Agelaius tricolor*) to the List of Endangered Species (Pursuant to Section 2076.5, Fish and Game Code)**

Dear Mr. Sutton:

The Coalition as listed above is writing to urge the California Fish and Game Commission (Commission) not to list Tricolored Blackbird (*Agelaius tricolor*), hereafter tricolors, under the California Endangered Species Act (CESA). Our associations range from independent, non-governmental, voluntary organizations representing farm and ranch families and private habitat managers to statewide groups representing county governments and home builders. Our organizations work in, support, and represent the communities in which they live. An acceptance of the tricolor for endangered species status will greatly impact the ability of many of our members and those they represent to maintain economically viable businesses and environmentally friendly farming and ranching operations. Further, a decision to list tricolors will diminish the willingness of landowners to provide managed habitat benefits to their land – decreasing the availability of these important lands for tricolors and other species. To that end, the Coalition submits the following comments on the proposal before the Commission.

### **History**

The Commission has some history with the status of tricolors. In 1991 the Yolo Chapter of the National Audubon Society submitted a petition to list tricolors to the Commission. However, upon further research of the status of the species, researchers found that the population had increased from the 1980's and the petitioners decided to withdraw their petition. During this

time period, a working group of landowner organizations was formed to discuss opportunities for further research on the species and habitat improvement projects. Upon results of the research of the increased population the working group stopped meeting.

In April 2004 the Center for Biological Diversity (CBD) submitted a petition to list the tricolor as an endangered species under CESA and requested that the Commission take emergency action pursuant to Section 2076.5 of the Fish and Game Code to list the tricolor as an endangered species. The Commission rightly rejected both the emergency request at its meeting in May 2004 and rejected the entire petition at its February 2005 meeting. CBD also submitted a petition to the U.S. Fish and Wildlife Service (FWS) in 2004, which FWS rejected in 2006.

In 2004, the Tricolor Working Group was reestablished to reinvigorate efforts to improve habitat for the species and to address the issue of tricolors nesting in silage fields on dairy farms. This group is made up of agricultural organizations, other landowner groups, wildlife and conservation agency representatives, tricolor researchers and conservation organizations. The working group developed and adopted a Conservation Plan for Tricolored Blackbird in 2007, which was updated in 2009. This document has guided activities of the group and on the ground conservation efforts to improve habitat for the species. These efforts are important to recognize as they illustrate the conservation commitment to tricolors from all the necessary entities to make meaningful change to conserve tricolors. A listing will do nothing to add to these efforts and, likely will complicate these efforts and make conservation more challenging.

### **Species Status**

Tricolors are endemic to California and found in much of the state. Over the past 30 years, breeding has been documented in 46 counties with a significant focus on the Central Valley and to a lesser extent, Southern California. Tricolors are also found on the Central Coast, primarily during the winter, but much less is known about their wintering habitat. In recent years, the population of Tricolors has been variable. 1994 was the first year a survey was coordinated following a protocol that is close to the current protocol being used. This survey documented 369,400 breeding tricolors<sup>1</sup>. The 1997 survey found 232,960 breeding tricolors<sup>2</sup>. The 2000 survey documented 162,000 breeding tricolors<sup>3</sup>. The 2004 survey did not follow the same protocol, as it only visited historical breeding colonies where 2,000 or more birds had been found and no formal breeding bird estimate was made. Using data gathered from this survey, a UC Davis ecologist and tricolor expert, William Hamilton estimated that 223,069 tricolors

---

<sup>1</sup> Beedy, E.C. and W.J. Hamilton III. 1997. Tricolored Blackbird Status Update and Management Guidelines. Jones and Stokes Associates, Inc. 97-099, Sacramento, CA. Prepared for U.S. Fish and Wildlife Service, Portland, OR, and California Department of Fish and Game, Sacramento, CA

<sup>2</sup> Ibid.

<sup>3</sup> Hamilton, W.J. III. 2000. Tricolored Blackbird breeding season census and survey: observations and recommendations. Report submitted to U.S. Fish and Wildlife Service.

fledged during the 2004 breeding season<sup>4</sup>. In 2005, the survey using the same methods as the earlier surveys estimated 260,000 breeding tricolors<sup>5</sup>.

The 2008 survey benefited from an even more formalized approach as UC Davis had created the tricolor portal, which allowed improved data capture and a formalized naming system of locations. The 2008 survey found 394,858 breeding birds. The 2011 survey found 259,322 breeding birds and the 2014 survey found 145,000 breeding birds. While the 2014 survey shows a marked decline in the number of breeding birds, since the 2008 study, it is not much lower than the numbers found during the 2000 survey. It is important for the Commission to recognize that the decline documented in 2014 does not preclude a subsequent rebounding of the population as was seen in 2005 and 2008. It is also important to recognize the environmental factors influencing tricolor habitat in 2014. California's record drought is likely to have significantly impacted tricolors, a species that historically relied on wetlands for its nesting habitat. Drier conditions would also have impacted the availability of insects for tricolors to feed their young. Unfortunately, listing tricolors will do nothing to influence rainfall.

### **Silage Nesting**

Since the 1980's, tricolors have shifted some of their breeding from historic wetland sites to dairy silage fields, primarily triticale. Colony sizes in silage fields have been significant and have been a complicated issue to ensure agricultural operations can continue while simultaneously protecting the silage colony. This has been a significant focus of the working group. Historically FWS and the Natural Resources Conservation Service (NRCS), with some assistance from the Department of Fish and Wildlife (Department), have provided funds to reimburse the farmer for his or her lost forage value by foregoing or delaying harvest of the silage field. Significant effort and investment in this effort has also been made by Audubon California. From 2005 to 2009 \$311,000 was invested in conserving tricolor colonies nesting in silage fields<sup>6</sup>. This funding came from a number of sources including, FWS, the Department and NRCS. Just in the past three years, NRCS has invested more than \$375,000 towards protecting tricolors nesting in silage fields. This figure doesn't include additional investments landowners and NRCS have jointly made directly towards improving tricolor habitat.

Agricultural fields provide significant habitat for tricolors and the challenge a listing creates to farm and ranch families needs to be recognized. Dairy farmers are significantly challenged when tricolors choose to nest in their triticale fields. Through cooperative efforts between the NRCS, FWS, the Department, conservation organizations and agricultural organizations, dairy farmers have been able to receive compensation to cover most of the losses created by having

---

<sup>4</sup> Hamilton, W.J. III. 2004. Management implications of the 2004 Central Valley Tricolored Blackbird Survey. Central Valley Bird Club Bulletin 7:32-46.

<sup>5</sup> Hamilton, W.J. III and R.J. Meese. 2006. Habitat and population characteristics of Tricolored Blackbird colonies in California. Report submitted to California Department of Fish and Game.

<sup>6</sup> Meese, R.J. 2009. Contribution of the Conservation of Silage Colonies to Tricolored Blackbird Conservation from 2005-2009. Report submitted to U.S. Fish and Wildlife Service, Sacramento, CA.

to delay harvest. However, as was documented this year when enforcement agents showed up at a dairy with a nesting tricolor colony, enforcement threats do not engender cooperation from landowners. The additional threat of enforcement under CESA is a real risk to the cooperative relationships that have been painstakingly built over the past decade. Listing presents a great risk to cooperation with landowners and we strongly urge the Commission not to list tricolors on an emergency basis.

### **Private Lands Conservation**

Significant effort has been made in recent years to reverse California's decline in wetlands. Tens of thousands of acres of wetlands have been restored on private lands. This is especially important because public lands are fairly limited in the Central Valley, the region that provides habitat to the vast majority of the world's tricolors. Many of California's rice farmers have adopted or improved their farming practices to make them more wildlife friendly and created significant wetland bird habitats. This habitat has been created through landowner-friendly, incentive-based approaches, not through regulatory mandates. This approach has helped increase many waterfowl populations throughout the United States and significantly expanded wetland habitat in California in the last 20 years. State and federal incentive-programs, including those offered through federal Farm Bill, Wildlife Conservation Board and the Department, have proven a valuable conservation tool. New or expanded voluntary programs tailored specifically to tricolors' habitat needs would undoubtedly also aid in the management of that species. The difference between the conservation outcomes of voluntary, incentive-based programs and regulatory mandates cannot be overstated.

This is important to recognize as listing tricolors has the very real possibility of creating disincentives for allowing nesting habitat for tricolors on private lands. For example, a significant number of tricolor colonies used Himalayan blackberry as their nesting substrate (23.1 percent in 2011<sup>7</sup>). Himalayan blackberry is an invasive species and is designated as a species of "high" concern by the California Invasive Plant Council, which means it is a species with "severe ecological impacts on physical processes, plant and animal communities, and vegetation structure."<sup>8</sup> Listing Tricolors could lead to further efforts to eliminate Himalayan blackberry from private property to reduce the regulatory challenges that are created by a species listing.

Instead of listing tricolors under CESA, we urge the Commission to recommend to the Department that it redouble its efforts to engage in the Tricolored Blackbird Working Group, improve its partnerships with private landowners to improve habitat for tricolors, and improve habitat for tricolors on Department owned and managed lands. These activities will go much further than simply listing a species, which provides very little direct conservation benefits to a species, but adds significant regulatory challenges for private landowners managing their lands.

---

<sup>7</sup> Kyle, K. and R. Kelsey. 2011. Results of the 2011 Tricolored Blackbird Statewide Survey. Report submitted to U.S. Fish and Wildlife Service, Portland, OR.

<sup>8</sup> <http://www.cal-ipc.org/ip/inventory/index.php#categories> (accessed July 29, 2014)

## Current Regulatory Protections

Tricolors are currently protected under the federal Migratory Bird Treaty Act (MBTA). This protection gives the FWS the authority to take enforcement action against individuals found to have taken tricolors. This is not an empty threat as individuals have been prosecuted for take of tricolors under the MBTA. The Department also has the authority to enforce the MBTA under Fish and Game Code Section 3513. These protections raise the question of what value listing tricolors under CESA provides to the species.

Taking regulatory action under laws that prohibit take does not engender cooperation with landowners. As recommended by the conservation strategy, the best approach is to work to create new and improve existing native habitat to attract tricolors away from silage. However, despite the efforts made towards creating and improving native habitat, tricolors have still preferred nesting in silage. Dairies provide nesting habitat, grain for the adults and insects to feed the young. These qualities appear to provide greater attraction for tricolors than native habitat. This fact has driven the need to address silage nesting colonies by paying farmers to delay harvest until the nestlings fledge.

## Regulatory Difficulties in Differentiating Species of Blackbird

Tricolors spend four months out of every year (approximately March through June) in large breeding colonies. Following the end of breeding season these colonies disperse. Tricolors spend the remaining eight months of the year either in single-species flocks, or with other blackbird species<sup>9</sup>. Additionally female tricolors look remarkably similar to redwing blackbird females. It is for these reasons that the Commission must consider the ability of the Department to regulate take of tricolors under CESA when the species commingles with other blackbirds.

Blackbirds cause significant damage to agricultural crops and these birds can also spread disease at farms with livestock. In the U.S., European starlings, blackbirds, and crows cause an estimated annual damage to grain, fruit, and berry crops of \$150 million<sup>10</sup>. Recognizing this damage, the FWS has issued a regulation<sup>11</sup> under MBTA to allow take of Brewer's, Red-winged, and Yellow-headed blackbirds when they are damaging or about to damage ornamental or shade trees, agricultural crops, livestock, or wildlife. This allowance will make damage control caused by other blackbirds challenging for farmers and ranchers to implement.

---

<sup>9</sup> Beedy, E.C., and W.J. Hamilton III. 1999. Tricolored Blackbird (*Agelaius tricolor*). In *The Birds of North America*, No. 423.

<sup>10</sup> USDA APHIS Blackbirds and Starlings in Conflict with Agriculture ([http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/wildlifedamage/sa\\_programs/sa\\_nwrc/sa\\_research/sa\\_blackbirds%20and%20starlings%20in%20conflict%20with%20agriculture!/ut/p/a0/04\\_Sj9CPyKssy0xPLMnMz0vMAfGjzOK9\\_D2MDJ0MjDzd3V2dDDz93HwCzL29jAwMTfOLsh0VAXWczqE!/?](http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/wildlifedamage/sa_programs/sa_nwrc/sa_research/sa_blackbirds%20and%20starlings%20in%20conflict%20with%20agriculture!/ut/p/a0/04_Sj9CPyKssy0xPLMnMz0vMAfGjzOK9_D2MDJ0MjDzd3V2dDDz93HwCzL29jAwMTfOLsh0VAXWczqE!/)) (Accessed July 25, 2014)

<sup>11</sup> US CFR Title 50 Section 21.43

## Emergency Listing Standard

Fish and Game Code Section 2076.5 gives the Commission the authority to list species on an emergency basis if “there is any emergency posing a significant threat to the continued existence of the species.” It does not appear that there are any such emergencies facing tricolors that would justify an emergency listing. The population has declined since 2008, but it has declined before and rebounded after the decline. There are significant efforts by agricultural and conservation organizations and agencies to improve habitat for the species. These actions, along with the fact that the most recent decline was most likely due to this year’s record breaking drought – upon which a listing has no impact – illustrates that there are no emergencies that could be rectified by a listing.

## Summary of Key Findings

- Tricolors are not faced with threats necessitating listing on an emergency basis.
- Cooperative efforts are the solution to ensuring reproductive success by tricolors; a listing threatens those efforts.
- For eight months of the year, tricolors are virtually impossible to distinguish from other blackbirds, making enforcement or even management of a listed species a regulatory nightmare for citizens and the Department.
- A listing would discourage landowners from voluntarily managing their lands to provide habitat benefits to tricolors and other species.

Tricolors are already protected from take under the Migratory Bird Treaty Act.

The Commission should direct the Department to work cooperatively with the Tricolor Working Group to ensure continued progress in tricolor management. Further the Commission should direct the Department to ensure that enforcement efforts do not derail conservation partnerships created between agencies, conservation organizations, and farmers and ranchers.

The contact person for any questions regarding this Coalition letter is Noelle Cremers, California Farm Bureau Federation, who can be reached at (916) 446-4647 or via email at [ncremers@cfbf.com](mailto:ncremers@cfbf.com).

CC: Members, Fish and Game Commission  
Ms. Karen Ross, Secretary, Department of Food and Agriculture  
Mr. Sonke Mastrup, Executive Director, Fish and Game Commission  
Mr. Charlton H. Bonham, Director, Department of Fish and Wildlife