

Real Estate and Environmental Client Update

September 2004

Statewide Listing of California Tiger Salamander As A Federal Endangered Species Took Effect on September 3, 2004, Critical Habitat Proposed

On September 3, 2004, the California tiger salamander (*Ambystoma californiense*) became protected throughout California under the Federal Endangered Species Act as a threatened species. Previously, the Federal Endangered Species Act had only protected the California tiger salamanders if they were found in either Sonoma County or in Santa Barbara County. Because of the extensive range of the California tiger salamander and its life history and habitat needs, this could be one of the most significant recent listings in terms of impact to the California economy.

ABOUT THIS UPDATE

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The Listing of the California Tiger Salamander Has Major Legal Effects

The statewide listing of the California tiger salamander has two major legal effects. First, the listing prohibits anyone from intentionally or unintentionally harming or harassing the California tiger salamander without having a

permit to do so from the United States Fish and Wildlife Service. These prohibitions apply to direct efforts to harm the California tiger salamander as well as harm that occurs as part of land clearing, farming, road construction, homebuilding, and any similar activities. The Fish and Wildlife Service can enforce these prohibitions with both civil and criminal penalties and injunctions seeking to halt harm from taking place. The lone exception to these prohibitions is for certain kinds of routine ranching activities as described in the listing decision.

The second major legal effect

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of the listing is that it triggers a requirement for all federal agencies to consult with the Fish and Wildlife Service before they take any federal action to ensure that their actions do not jeopardize the continued existence of the California tiger salamander. A similar consultation requirement will apply after the Fish and Wildlife Service designates "critical habitat" for the California tiger salamander. The Fish and Wildlife Service has proposed nearly 400,000 acres of critical habitat, but is not scheduled to formally adopt critical habitat for many months. The Army Corps of Engineers is an example of a federal agency that is subject to this consultation requirement as part of its program to issue permits under Section 404 of the Clean Water Act that allow the filling of wetlands and streams.



The Economic Impact of Listing May be Significant Because the California Tiger Salamander Has a Wide Distribution

California tiger salamanders have been documented in 23 counties from Sacramento and Sonoma Counties in the north to Santa Barbara and Tulare Counties in the south. The Service has identified 711 known localities where the California tiger salamander have been observed, although a significant portion of the range has not been adequately surveyed to determine whether the species is present. *An electronic version of a map showing these 711 locations and the proposed critical habitat can be provided upon request to the authors.* The California tiger salamander breeds in vernal pools and seasonal and perennial ponds, including stock ponds, during the wet season from November to early spring, but spends most of the year in rodent burrows in the surrounding uplands up to 1.3 miles from

breeding sites in grassland and oak savannah plant communities.

Other Related Actions

Challenge to the Federal Listing. On August 30, 2004 Sheppard Mullin has submitted a notice of intent to challenge the listing of the California tiger salamander on behalf of broad coalition of local government, development, and agricultural interests with Interior Secretary Gale Norton. The notice explains that the listing violated the Endangered Species Act because the Fish and Wildlife Service had not shown that the species was threatened, had failed to use the best scientific and commercial information available, had applied the wrong legal standard in evaluating the efficacy of

existing regulatory protections, and had improperly relied on alleged loss of historical habitat. The filing of a notice is a legal requirement that must be met before a lawsuit can be filed. A lawsuit cannot be filed until 60 days pass after the notice was filed.

Proposed Designation of Critical Habitat. The Fish and Wildlife Service also recently proposed rule to designate critical habitat for the central population of the California Tiger Salamander. 69 Fed. Reg. 48,570 (Aug. 10, 2004). The proposed critical habitat covers 382,666 acres. The Fish and Wildlife Service is accepting comments on the proposed designation until October 12, 2004. The Endangered Species Act also prohibits actions that destroy or adversely modify designated critical habitat. The Fish and Wildlife Service had previously proposed critical habitat for the Santa Barbara subpopulation on January 22, 2004. 69 Fed. Reg. 3064. We note that the Fish and Wildlife Service's rules define adverse modification as the

"direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. This definition has recently been invalidated by the Ninth Circuit Court of Appeals, which held that the definition of adverse modification should be any action that causes the "direct or indirect alteration that appreciably diminishes the value of critical habitat for either the survival or recovery of a listed species." Sheppard Mullin will be filing comments on behalf of clients addressing the proposed critical habitat. Please contact the authors for more information.

State Action. In a separate action, the California Fish and Game Commission is scheduled to consider whether a petition to list the California Tiger Salamander under the California Endangered Species Act may be warranted on October 21 or 22, 2004. The petition was submitted by the Center for Biological Diversity. If the Commission decides to

accept the petition, the California Tiger Salamander will become a candidate species while the California Department of Fish and Game conducts a year-long status review to help the Commission determine if listing is warranted. Under the California Endangered Species Act, a candidate species is afforded the same protections as listed species, including a take restriction that is similar to the federal prohibition. The Center for Biological Diversity had petitioned the Commission to list the California Tiger Salamander in 2001. Sheppard Mullin represented a coalition of agricultural interests and developers before the Commission, which determined that the prior petitioned action was not warranted.

If you have questions about the California tiger salamander or how the listing or proposed critical habitat designation may affect your interests, contact Robert Uram at ruram@sheppardmullin.com or Keith Garner at kgarner@sheppardmullin.com.

ABOUT THE AUTHORS



Robert Uram specializes in wetlands, endangered species and water quality issues. He has obtained permits from the Army Corps of Engineers, Fish and Wildlife Service, California Department of Fish and Game and various Regional Water Quality Control Boards for over 25 master planned communities and other residential and commercial projects of all sizes throughout California. He is working on a number of Habitat Conservation Plans and is counsel for the Homebuilders Association of Northern California in their challenge to the Fish and Wildlife Service's designation of four million acres of critical habitat for the California red-legged frog. For more information, please contact Robert at (415) 774-3285 or ruram@sheppardmullin.com.



Keith Garner is an associate in the Real Estate, Land Use and Environmental Practice Group in the firm's San Francisco office. Keith advises and represents clients on issues that arise in project planning and permitting, regulatory compliance and land use litigation. His practice includes endangered species, wetlands, water quality and land use matters, including environmental review under CEQA and NEPA. For more information, please contact Keith at (415) 774-2991 or kgarner@sheppardmullin.com.

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