

Cox, Castle & Nicholson LLP
 555 California Street, 10th Floor
 San Francisco, California 94104-1513
 P 415.392.4200 F 415.392.4250

Sarah Ellen Owsowitz
 415.262.5122
 sowsowitz@coxcastle.com

January 7, 2009

Monterey County
 Planning and Building
 Inspection Administration

VIA OVERNIGHT MAIL

JAN 08 2009

Charles J. McKee
 County Counsel
 168 West Alisal Street, 3rd Floor
 Salinas, CA 93901

RECEIVED

Re: Definition of "Special-Status Species" In Monterey County 2007 General Plan Draft EIR

Dear Mr. McKee:

On behalf of the Monterey County Cattlemen's Association we have prepared the following analysis of the appropriateness of the use of the term "CEQA-Defined Special Status Species" in the Draft Environmental Impact Report ("Draft EIR") for the Monterey County 2007 General Plan ("2007 General Plan"). The Association is concerned that the Draft EIR's use of this term may not comport with CEQA and goes beyond legal requirements. The Draft EIR disregards the 2007 General Plan's definition of "Special Status Species," a definition which includes only those species listed as threatened or endangered pursuant to the federal Endangered Species Act ("ESA") or rare, threatened or endangered under the California Endangered Species Act ("CESA"). Instead, the Draft EIR coins a new, more expansive term, "CEQA Defined Special Status Species," which includes a long list of unlisted "candidate" and "sensitive" species. The Draft EIR employs this new term in conducting its analysis of the potential impacts of implementation of the 2007 General Plan.

Based on our review of the Draft EIR, as well as of CEQA, the CEQA Guidelines and applicable case law, we have determined that the Draft EIR inappropriately assumes that unlisted "candidate" and "sensitive" species are "rare" or "endangered" species which require consideration under CEQA. There is no provision of CEQA or other state law which requires the County to employ such an expansive definition of Special Status Species, nor has the County issued any policy directing the EIR to employ such this definition. It also appears that there is contrary policy direction from the County on this issue, namely the County's proposal in the 2007 General Plan to employ a narrower definition of Special Status Species – a definition which is consistent with the requirements of CEQA and legally defensible. Finally, there is no provision of CEQA or other state law which requires the County to employ significance thresholds that consider the 2007 General Plan's potential impacts to unlisted "candidate" and "sensitive" species.

99999\128237v3

Charles J. McKee
 January 7, 2009
 Page 2

Analysis

The Draft EIR's Definition "CEQA-Defined Special Status Species" Is Not Supported By Substantial Evidence As Required by CEQA Guideline Section 15380..

The Draft EIR considers the potential environmental impacts of implementing the policies of the draft 2007 General Plan. It states that the 2007 General Plan's definition of "special status species" provides for the "assessment and mitigation of impacts" to species listed as threatened or endangered pursuant to the ESA or rare, threatened or endangered under CESA. However, the Draft EIR asserts that because the "2007 General Plan does not provide a systematic approach to address the impacts of development to CEQA-defined special status species," implementation of the 2007 General Plan will result in "potentially significant" impacts to CEQA-defined special status species. (Draft EIR at p. 4.9-73.) The Draft EIR defines "CEQA-Defined Special Status species" as including:

both listed and non-listed species that are candidate, sensitive, or special-status species in local or regional plans, policy or regulations, or by the [California Department of Fish and Game] or [United State Fish and Wildlife Service] or that otherwise meet the definitions of rare or endangered under CEQA based on substantial evidence (State CEQA Guidelines Section 15380).¹

(Draft EIR at pp. 4.9-1; *see also* pp. 4.9-21 – 4.9-22.)

The Draft EIR's definition of "CEQA-Defined Status Special Species" appears to be an attempt to bootstrap unlisted "candidate" and "sensitive" species into CEQA's definition of "rare" or "endangered" species as defined in CEQA Guidelines sections 15065 and 15380. Section 15065 provides that certain categories of environmental impacts are, *per se*, "significant" and therefore must be considered in an EIR, referencing projects which have "the potential to . . . reduce the number or restrict the range of an *endangered, rare or threatened species . . .*" (Emphasis added.) In turn, CEQA Guidelines section 15380 provides for a case-by-case, fact-based, determination as to whether a species is "endangered" or "rare" under section 15065.² Here, there is no evidence that a case-by-

¹ The Draft EIR's list of "CEQA-Defined Special Status Species" is lengthy. While it includes species listed on the ESA, it also includes "fish species that are considered commercially valuable" under the "Sustainable Fisheries Act of 1996" – a designation that does not appear to concern fish species that are rare or endangered, but rather fish that should be farmed. (Draft EIR at pp. 4.9-22 – 4.9-23.)

² "[a] species of animal or plant is:

(1) 'Endangered' when its survival and reproduction in the wild are in immediate jeopardy from one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, disease, or other factors; or

Charles J. McKee
 January 7, 2009
 Page 3

case, fact-based analysis has been undertaken in order to determine whether the species listed in the Draft EIR as "CEQA-Defined Special Status Species" qualify under Section 15380 to be treated as "rare" or "endangered" species.

The Draft EIR's failure to comply with CEQA Guidelines section 15380 by simply assuming that potential impacts to all unlisted "candidate" and "sensitive" species must be considered in the EIR is in direct conflict with established case law. In *Sierra Club v. Gilroy* (1990) 222 Cal.App.3d 30, the Court of Appeal held that evidence that a species is a "candidate" species or "species of special concern" is not sufficient evidence to consider that species to be "rare" or "endangered" under section 15380.

In *Sierra Club*, the petitioners argued that the lead agency should have determined, pursuant to CEQA Guidelines section 15380, that the California Tiger Salamander was a "rare or endangered" species. However, the Salamander was only designated as "a 'Category 2 candidate' species, meaning that there [was] insufficient biological data available to justify listing the species as threatened, and by [CDFG] as a species of 'special concern,' meaning that the species has a declining population and is being monitored for future listing." (*Id.* at 37.) The petitioners argued that this information alone was sufficient to require the lead agency to treat the Salamander as "rare" or "endangered" under Section 15380. They also argued that CEQA Guidelines section 15380 imposed an affirmative duty on lead agencies to determine whether a species not formally listed as rare or endangered should be declared rare or endangered for purposes of environmental analysis under CEQA. (*Id.* at 47.)

The Court of Appeal rejected both arguments. First, it held that evidence that a species is a "candidate" or "species of special concern" is not sufficient to consider the species to be "rare" or "endangered" under CEQA Guidelines section 15380. (*Id.*) Second, it noted that section 15380 was "directory," rather than "mandatory," in character. The court quoted from the California Resources Agency's "Discussion" following section 15380, which states that "[t]he section also provides that a plant or animal *may* be treated as rare or endangered even if it has not been placed on an official list." (*Id.* (emphasis in original).) Therefore, the Court held that while a lead agency may chose to conduct a factual analysis as to whether a specific unlisted species meets the definition of "rare" or "endangered" set forth in section 15380, they are not required to do so.

(2) 'Rare' when either:

(A) Although not presently threatened with extinction, the species is existing in such small numbers throughout all or a significant portion of its range that it may become endangered if its environment worsens; or

(B) The species is likely to become endangered within the foreseeable future throughout all or significant portion of its range and may be considered 'threatened' as that term is used in the Federal Endangered Species Act.

Charles J. McKee
 January 7, 2009
 Page 4

Therefore, here, although the County would not be precluded, in its policy-making discretion, from directing the preparers of the EIR to consider whether unlisted species are rare or endangered, any such determination in the EIR must be supported by specific facts which demonstrate why the species in question satisfies the standards of CEQA Guidelines section 15380. Here, the Draft EIR contains no such evidence, instead (just as the petitioners in *Sierra Club v. Gilroy* attempted to) relying only on the fact that an unlisted species is a "candidate" and "sensitive" species. Further, it does not appear that the County has issued a direction that EIRs should be prepared using such a broad definition of Special-Status Species. Rather, by proposing to adopt a General Plan with a definition of Special-Status Species that is confined to only those species listed in the ESA or the CESA, it appears that the County has issued a contrary policy directive. 2

Finally, as demonstrated by *Sierra Club v. Gilroy*, it is appropriate under CEQA for the 2007 General Plan, and its attendant EIR, to limit consideration of potential impacts of development to those species that are listed as threatened or endangered pursuant to the ESA or rare, threatened or endangered under CESA. There is no requirement in CEQA, and specially none in CEQA Guideline section 15380, that a lead agency conduct a broader evaluation of potential impacts to special status species.

The Draft EIR Employs a Standards of Significance Concerning Candidate and Sensitive Species That Is Not Required By CEQA or the CEQA Guidelines.

In addition to considering the questions regarding the Draft EIR's use and application of the term "CEQA-Defined Special Status Species," we also note that the Draft EIR's Biological Resources section relies on a list of standards of significance borrowed from the "Environmental Checklist Form" contained in Appendix G of the CEQA Guidelines, standards which include a question as to whether the 2007 General Plan will substantially adversely impact species that are "identified as a candidate, sensitive, or special status species." (Draft EIR at p. 4.9-55.) But the Checklist does not contain mandatory standards of significance under CEQA. While it includes some environmental inquiries that can be read as mandatory, it also reflects that there are distinctions between species that are formally listed under ESA or CESA as "threatened" or "endangered," on one hand, and species that are only "identified as a candidate, sensitive, or special status species," on the other. 3

Appendix G includes language stating that though lead agencies "should normally address the questions from this checklist that are relevant to a project's environmental effects in whatever format is selected," the Checklist "is only a *suggested* form, and lead agencies are free to use different formats." (CEQA Guidelines, Appendix G, "Evaluation of Environmental Impacts," item 8 [emphasis added]; see also *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal. App.4th 357, 376, FN 21 ["Use of the forms is only 'suggested,' and the forms do not define the scope of the CEQA inquiry"].) Impacts to formally listed rare, threatened, or endangered species are addressed near the end of the checklist, under heading XVII, which is entitled, "Mandatory Findings of Significance." Species that do not merit formal protection under ESA or CESA are referenced elsewhere in the Checklist, under heading IV, "Biological Resources." Under this heading the Checklist contains a suggested question as to whether a project would "have a

Charles J. McKee
 January 7, 2009
 Page 5

substantial adverse effect, either directly or indirectly or through habitat modification, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by [CDFG] or [USFWS]." (CEQA Guidelines, Appendix G, "Sample Question[s]," § IV, question (a).) Accordingly, while it can be argued that, under Appendix G of the CEQA Guidelines, an EIR must inquire as to whether a project will impact formally listed rare, threatened, or endangered species, Appendix G considers inquiries regarding potential impacts to "candidate, sensitive, or special status species" as only a suggestion.

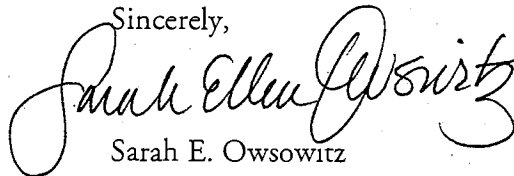
3

Therefore, again, although the County is not precluded, in its policy-making discretion, from directing the preparers of the EIR to apply a threshold of significance that considers potential impacts to "candidate, sensitive, or special status species," the application of such a threshold is not mandated by CEQA or by the CEQA Guidelines. Further, by proposing to adopt a General Plan with a definition of Special-Status Species that is confined to only those species listed in the ESA or the CESA, it appears that the County has already signaled a contrary policy directive.

Conclusion

Based on the forgoing, and particularly given the lack of discussion supporting the Draft EIR's assertions as to what constitutes a "CEQA-Defined Special Status Species," we believe it would be appropriate for the Draft EIR's discussion and analysis of Special Status Species to be revised in a manner that is consistent with the policy direction provide by the County, namely based on the definition of Special Status Species contained in the 2007 General Plan. Consistent with that approach, it would also be appropriate for the standards of significance applied in the Draft EIR's Biological Resource section to be confined to standards which analyzing potential substantial adverse impacts to Special Status Species as defined in the 2007 General Plan. It is appropriate under CEQA for the 2007 General Plan, and its attendant EIR, to limit consideration of potential impacts of development to those species that are listed as threatened or endangered pursuant to the ESA or rare, threatened or endangered under CESA.

4

Sincerely,

 Sarah E. Owsowitz

cc: Alana Knaster, Deputy Director, Resource Management Agency
 Wendy S. Strimling, Deputy County Counsel
 Carl Holm, Assistance Director of Planning

From: Origin ID: APCA (415) 392-4200
Christine Tejada
Cox Castle & Nicholson
555 California Street 10th Fl



JCLS111208/20/23

Ship Date: 07 JAN 09
ActWgt: 1.0 LB
CAD: 7528122/INET8091
Account#: S *****

O-13a

San Francisco, CA 94104

Delivery Address Bar Code

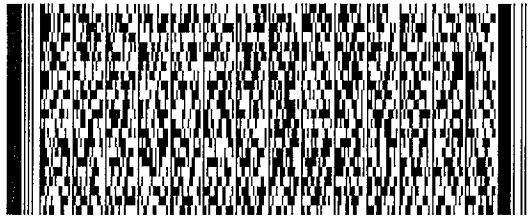


Ref # 58889
Invoice #
PO #
Dept #

SHIP TO: (415) 262-5122 BILL SENDER

Carl Holm, Asst Director Planning
County of Monterey
168 W ALISAL ST FL 3

SALINAS, CA 93901

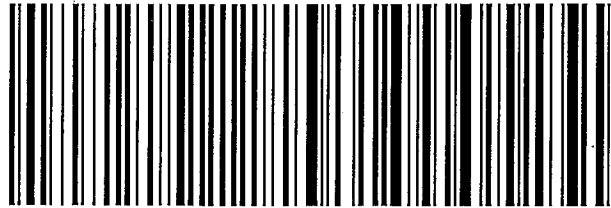


TRK# 7972 3288 5596
0201

THU - 08JAN AA
PRIORITY OVERNIGHT

93901
CA-US
OAK

WA MRYA



After printing this label:

1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.

Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com. FedEx will not be responsible for any claim in excess of \$100 per package, whether the result of loss, damage, delay, non-delivery, misdelivery, or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim. Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental, consequential, or special is limited to the greater of \$100 or the authorized declared value. Recovery cannot exceed actual documented loss. Maximum for items of extraordinary value is \$500, e.g. jewelry, precious metals, negotiable instruments and other items listed in our Service Guide. Written claims must be filed within strict time limits, see current FedEx Service Guide.