

Project Screening and Review Process

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California Tiger Salamander Workshop
Elkhorn Slough National Estuarine Research Reserve
April 10, 2009



Region 4 – Central Region

● 12 Counties

- Fresno, Kern, Kings, Madera, Mariposa, Merced, Monterey, San Benito, San Luis Obispo, Stanislaus, Tulare, and Tuolumne



DFG Role in CEQA / CESA

● Trustee Agency

- One of 4 State agencies holding resources in trust for all Californians.
- Responsibility under CEQA to comment on projects that could impact plant and wildlife resources.

● Fish and Game Code

- Jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (Section 1802).
- Regulatory authority over projects that could result in the "take" of any species listed by the State as threatened or endangered (Section 2081).
- Also have regulatory authority regarding activities occurring in streams (Section 1600).



R4 CEQA Project Evaluation

- Receive Consultation Notice or CEQA document
- Log in to CEQA Tracking Database
- Assign to appropriate staff
- Begin Screening and CEQA Comment process



Photo by J. Vance



Document Log-In & Assignment

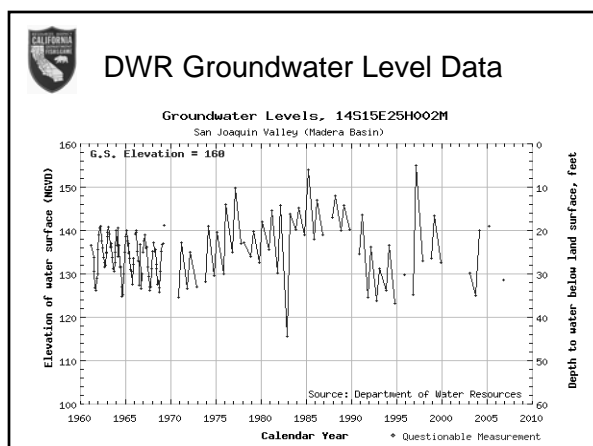
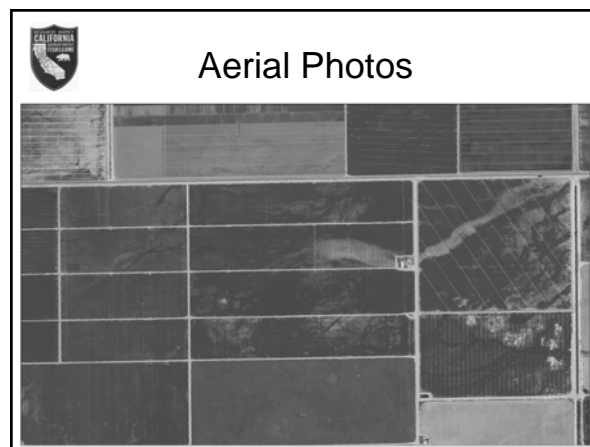
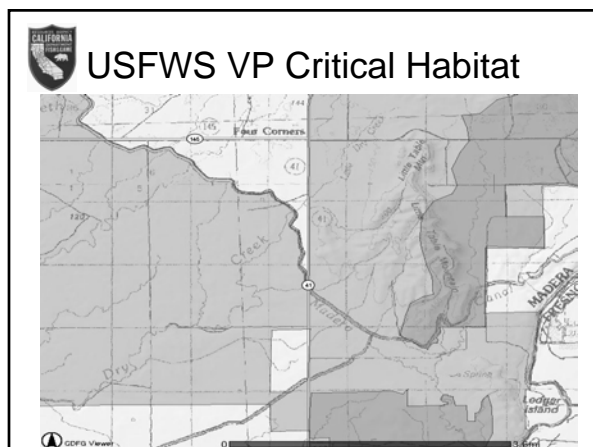
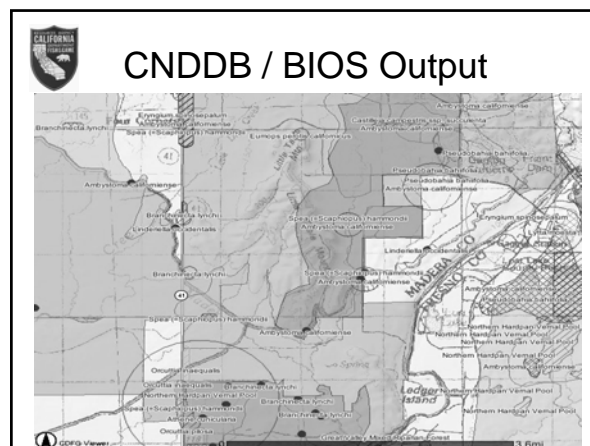
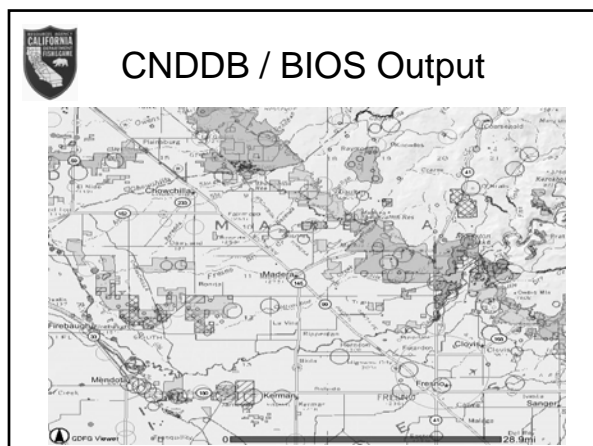


Screening

- Project Description
 - What is the Project?
 - Where is the Project located?
 - How will the Project be executed?
 - What resources could be impacted?
 - What is the surrounding landscape / habitat?
- CNDDDB Data Base and BIOS
 - Is a tool –what species have historically been found in the Project area or vicinity
 - Is not based on real time information
 - Must have reputable survey information
- Aerial photographs
- USFWS Critical Habitat for a habitat type or species
- Regional geology, USGS topo Maps, DWR hydrology maps, and other technical resources



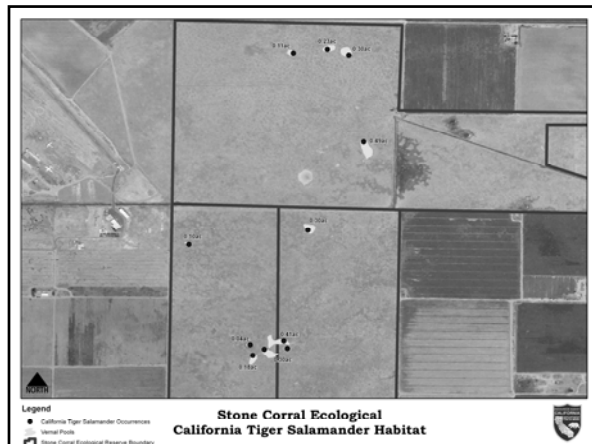
Photo by J. Vance



Survey Recommendations

- For listed and other special status plant and wildlife species:
 - Focused, repeated surveys should be conducted multiple times during the appropriate period(s) by a qualified wildlife biologist / botanist (ideally pre-CEQA).
 - Many survey protocols can be accessed on the DFG/USFWS website
 - Protocols provide insight on what each Agency is looking for
 - In the event that State listed or State candidate species are detected, a State Incidental Take Permit may be needed prior to project implementation

CTS larvae from Stone Corral ER, Photo by M. Selmon



Avoidance, Minimization, and Mitigation Measures

- Wetland / Waterbody Avoidance Buffers*
 - 250 feet from vernal pools and swales
 - 200 feet from riparian vegetation
 - 100 feet from each surface water channel that has no riparian vegetation

(*note: not adequate for CTS avoidance or large projects)

Kern County Oak woodland, near Mill Creek. Photo by J. Vance

Questions?

Big Table ER, Photo by J. Vance

State Status of California Tiger Salamander and Permitting under the California Endangered Species Act

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CTS Listing History

- June 11, 2001: The Fish and Game Commission (FGC) received a petition from the Center for Biological Diversity (CBD) to list CTS as an endangered species under CESA. On December 7, 2001 the FGC formally rejected the petition (Cal. Reg. Notice Register 2002, No. 9-Z, p. 469.)
- The FGC received a second petition from CBD to list CTS. On December 2, 2004, the FGC rejected this petition because there was insufficient information about CTS population trends and abundance and that the petition "unpersuasively" relied on the loss of native wetland habitat to indicate declines in CTS (Cal. Reg. Notice Register 2004, No. 52-Z, p. 1754.)
- February 28, 2005: CBD files a petition for writ of mandate in the superior court, appealing the Commission's decision

CTS listing history, continued.

- December 14, 2006: The trial court directed the FGC to enter a decision accepting the petition. FGC appealed
- September 2, 2008: The Third District Court of Appeal upheld the Superior Court's decision. (*Center for Biological Diversity v. California Fish and Game Commission* (2008) 166 Cal.App.4th 597.)
- February 5, 2009: The FGC formally accepted the petition, and on February 10, 2009 CTS becomes a State Candidate Species pursuant to Fish and Game Code 2068

CTS Listing, Next Steps

- The FGC's acceptance of a petition initiates a 12-month review of the species' status by the Department, pursuant to Fish and Game Code Section 2074.6
- This status review will help to determine whether the species should be listed as threatened or endangered. 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.

CTS Listing, Next Steps, cont.

- DFG has assembled an internal CTS review team, who will help draft the Status Review. HQ and Regional reps
- Subject experts being identified for external peer review of Status Review
- Within 12 months of the petition's acceptance, the Department must provide the FGC a written report that indicates whether the petitioned action is warranted (FGC Section 2074). The FGC 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 FGC 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)

Take of CESA Candidate Species

- CESA prohibits unauthorized take of a candidate species, just as it prohibits take of threatened and endangered species, from the time the FGC notifies interested parties and the general public of its acceptance of the petition
- 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 Fish and Game Code Section 2084 or the Department authorizes the take through the issuance of an Incidental Take Permit under Fish and Game Code Section 2081 or by other means authorized by CESA
- Fish and Game Code Section 86 defines "Take" as to hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill

CTS 2084 Regulations

- Pursuant to Section 2084 of the Fish and Game Code, the FGC may authorize, subject to the terms and conditions it prescribes, the taking of any candidate species while DFG and FGC evaluate whether the species should be listed as threatened or endangered under CESA
- The FGC has relied on the authority in Section 2084 to permit take of candidate species on six previous occasions

CTS 2084 Regulations (as adopted)

Section 749.4, Title 14, CCR regulation authorizes take of CTS during the candidacy period under the following conditions where such take is incidental to an otherwise lawful activity:

- Incidental Take Authorized Pursuant to the Federal Endangered Species Act
- Lake or Streambed Alteration Agreements where: (i) take occurs as the result of an activity covered by a lake or streambed alteration agreement issued by DFG pursuant to Fish and Game Code section 1602, subdivision (a)(4)(B); (ii) the take occurs within the area specifically covered by the lake or streambed agreement; and (iii) the agreement holder is in compliance with the terms and conditions prescribed by the agreement at the time incidental take occurs

CTS 2084 Regulations, continued

- Agricultural Activities: Incidental take of CTS as a result of routine and ongoing agricultural operations on land in an existing agricultural use is authorized as set forth in this paragraph.
 - (A) For purposes of this paragraph "routine and ongoing agricultural operations" shall have the same meaning as defined by California Code of Regulations, Title 14, section 786.1, subdivision (b), except routine and ongoing agricultural operations shall not include: (i) the conversion of agricultural land to a nonagricultural use, excluding the conversion of land in existing agricultural use to conserve, restore, protect, or enhance fish or wildlife habitat; (ii) the conversion of rangeland or natural lands to more intensive agricultural uses, including but not limited to, the conversion or rangeland or natural lands to permanent crops, dry land farming, row crops, and/or any cultivated row crops unless the alterations to the land were commenced before the candidacy period; (iii) the use of toxic or suffocating gases to control ground-burrowing rodents; (iv) the improvement, upgrade, or construction of new roads; or (v) the intentional introduction into a stock pond of species that may prey on California tiger salamander adults, larvae, or eggs.

CTS 2084 Regulations, continued

- Incidental take of CTS not addressed in the previous 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
- The Commission may modify or repeal this regulation in whole or in part as provided by law, including modification or repeal based on a determination that any activity or project may cause jeopardy to the continued existence of California tiger salamander

Fish and Game Code Sections Authorizing Take of Listed Species

- **2080.1 Consistency Determinations**
 - 2081(a) Research or Management MOU
- **2081(b) Incidental Take Permit**
- **2084 Taking of Candidate Species**
 - 2086 Voluntary Local Ag Program
 - 2087 Routine and Ongoing Ag Activity "Accidental Take"
 - 2090 State Agency Consultation (Sunsetted 1999)
 - 2112 Recovery Strategy
 - 2835 Natural Community Conservation Plans

Incidental Take Permit Process

- Incidental Take Permit (ITP) Applications are to be submitted to Regional Manager
- Required ITP Application contents are found in section 783.2 of the California Code of Regulations.
- DFG has 30 days to respond, in writing, to an application. If DFG does not respond, the application is deemed complete.

ITP Process, cont.

Processing Times

- 90 days when DFG is responsible agency (60 day extension if necessary)
- 120 days if DFG is lead agency (60 day extension if necessary)
- Note: time lines are from date of acceptance of complete ITP application or from approval of CEQA document, whichever is later

Issuance

- Regulatory timeframes are directory – project proponent may not proceed until a permit is issued, even if DFG is past the regulatory deadline
- DFG issues permit by signature of Regional Manager, Permittee must acknowledge and return copy to DFG to have coverage
- DFG must make CESA and CEQA Findings (see Cal Code Regs §783.5 (c)(2))

ITP Issuance Criteria

- Take is incidental
- Take is minimized
- Take is fully mitigated
- Funding is ensured and adequate to implement measures required to minimize and fully mitigate, including compliance and effectiveness monitoring
- No permit may be issued if jeopardy would result
- Note: No regulatory equivalent under CESA to federal "No Surprises" assurances.

Common Issues that Arise During Incidental Take Permitting Under CESA

- Required analysis of the extent to which the project could result in take of species proposed to be covered by the permit.
- Coordinating related review by the federal government and addressing differences in take definitions and permitting standards.
- Fully protected species and State non-listed species proposed for listed species proposed for coverage.
- Form of security provided for required financial assurances and issues related to who holds the long-term endowment.

Consistency Determinations, continued

- Enacted in 1998 (at the same time as 2081(b) took effect) as an effort to allow a streamlining option for permitting
- It is a concurrence by DFG that the applicant's federal incidental take authorization can be used for state incidental take authorization in lieu of a separate state permit
- Can be used when the federal agency has issued an incidental take statement (in a biological opinion) or incidental take statement (in conjunction with an HCP), *and*
- When all species are listed under both ESA and CESA, *and*
- When the measures contained in the federal ITS or ITP meet the state ITP issuance criteria in 2081(b)

Consistency Determination Process

- Applicant writes letter of request to DFG Director; attaches copy of BO/ITS or of HCP/ITP (if there is no ITS or ITP, there is no CD)
- Date received starts 30-day clock
- Regional staff is primary lead for preparation— early coordination is critical
- Determinations are signed by the DFG Deputy Director
- Note: DFG *must* take action on a CD request – consistent, inconsistent, or applicant withdraws. If inconsistent, Applicant has to get a 2081(b) permit for take coverage

Consistency Determinations, continued

- Measures intended to meet the CESA issuance criteria can be in the BO itself or in the ITS (Section 7)
- Common fatal flaws: missing or deferred funding, DFG missing in approval loop, lack of timelines, inadequate analysis or inadequate mitigation, presence of or authorization to take fully protected species
- Note on Funding: Funding assurances (Security) must be of a form that allows DFG full access to draw on it (i.e. letter of credit held by DFG)

Consistency Determinations, continued

- If DFG determines the federal authorization is consistent, Applicant receives a "Determination" that documents the elements of that authorization that meet the CESA issuance criteria. Note: DFG cannot change or add any conditions to meet CESA fully mitigate standard
- If DFG determines the federal authorization is not If consistent, the Applicant will first be allowed the opportunity to withdraw the request. If the Applicant does not withdraw, DFG will issue a determination of "Inconsistency" and the Applicant will have to obtain State coverage by applying for a CESA permit (2081(b))

For Smooth Permitting:

- Talk to DFG about required CEQA document content to support ITP issuance
- Don't assume that FESA compliance will satisfy CESA requirements
- Allow plenty of time
- Coordinate early and often with your Regional DFG contact
- Engage DFG and USFWS together early



