ENGEO VIEW

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5.4 Million Acres Proposed as "Critical Habitat" For The California Red-Legged Frog

The U.S. Fish and Wildlife Service (Service) proposed on September 11, 2000, to designate nearly 5.4 million acres in 31 counties stretching across California from Tehama in the north to San Diego in the federal Endangered Species Act. The land ultimately designated will come under restrictions complicating and limiting its use and development. The proposal encompasses nearly all of San Mateo County, roughly half of Marin, Alameda, and Contra Costa counties, and sizeable chunks of Santa Clara, San Benito, Merced, Monterey, San Luis Obispo, Santa Barbara, and Ventura counties.

The Endangered Species Act protects listed species and their habitat primarily in two ways. First, the act prohibits anyone from "taking" an endangered or threatened species without a permit. Congress defined "take" to include kill, harm, or harass. The Service, in turn, defined "harm" by regulation to include significant habitat modification that actually kills or injures wildlife by significantly impairing essential behavioral patterns like breeding, feeding or sheltering. Second, the act calls on federal agencies, in "consultation" with the Service to ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or result in the adverse modification of the designated "critical habitat" of any such species. Critical habitat refers to those portions of a listed species' range containing physical or biological features that are essential to conservation of the species and that may require special management or protection. The Service designates critical habitat for a species through administrative procedures allowing public participation and calling for consideration of economic and scientific information.

The Service listed the California red-legged frog as threatened in 1996 without designating any critical habitat, finding that such a designation was not prudent since publication of specific locations where it is found would increase the risk of vandalism and collection. Environmental groups contested the validity of this finding, and last year a federal district court agreed and ordered the Service to make a designation by December 29, 2000.

While acknowledging that its proposal covers nearly 5.4 million acres, the Service emphasizes that it really means to designate only those areas with the "primary constituent elements" of critical habitat for the frog, i.e. (1) suitable aquatic habitat, (2) associated uplands, and (3) suitable dispersal habitat connecting suitable aquatic habitat. Since the frog can live for a time in uplands around ponds and streams and can travel some distance overland to get from one pond or stream to the next, these three elements cover a lot of ground. According to the Service, the aquatic component consists of two or more breeding sites, at least one with a permanent water source, within 1.25 miles of each other. Such sites consist of still or slow-moving aquatic features with minimum water depths of 8 inches, with the exception of lakes and ponds inhabited by non-native predators (bullfrogs and fish), that are essential for providing space, food, and cover needed to sustain eggs, tadpoles, juveniles, and adult frogs. Associated uplands consist of all areas within 500 feet (or no further than the watershed boundary) of suitable aquatic habitat. Dispersal habitat is any upland or aquatic area, free of barriers (like busy roads), 500 feet wide, and essential for connecting suitable breeding sites within 1.25 miles of each other.

The Service says that it had planned to more precisely map those areas that possess these primary constituent elements, but it lacked the time to do so under the court order. By its proposal, the Service appears intent on shifting this burden to landowners by establishing what amounts to presumption that land within the covered areas is critical habitat unless the owner shows that it lacks the primary constituent elements. The Service takes care to say, though, that existing features and structures, like buildings, roads, and urban landscaped areas, are not considered critical habitat.

The designation may lead to various limitations on the use and development of affected lands. Most obvious, any activities requiring approval by federal agency that may affect critical habitat would trigger consultation with the Service, which typically results in restrictions. These include (1) activities in waters and wetlands regulated by the U.S. Army Corps of Engineers, (2) sale, exchange, or lease of lands owned by a federal agency, (3) delivery, transfer, or use of water supplied from facilities of the Bureau of Reclamation of the Corps of Engineers, and (4) grazing, recreation, mining, and logging on federal lands. Indirect, but nonetheless real, land-use restrictions could result from consultations between the Service and the Environmental Protection Agency (EPA) when the EPA reviews and approves air and water quality standards developed by state regulatory agencies. The designation also may prompt cities and counties to add restrictions of their own.

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ILLEGAL WETLANDS REGULATION LIVES ON

The Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACE) moved last month to "clarify" the Tulloch Rule on wetlands regulation, even though three federal court decisions have invalidated it.

"In coming up with this so called clarification, the Corps is simply putting a new label on an old, illegal regulation," said National Association Home Builders (NAHB) President Robert Mitchell "The agencies must have forgotten that Sec. 404 of the Clean Water Act regulates activities that add material into wetlands, not removal activities such as excavation."

The Tulloch Rule was crafted by environmental organizations and the Army Corps of Engineers in the early 1990s in the wake of threatened legal action and questions regarding the kinds of activities that could be legitimately regulated under the Clean Water Act. Under the CWA's Sec. 404 program, the Corps and the EPA can regulate the "discharge" of dredged and fill material into wetlands. From its inception, the Clean Water Act did not regulate activities involving the removal of materials.

In 1993, however, the Corps issued the Tulloch Rule to regulate certain land removal activities in wetlands, including those that only resulted in small amounts of dirt and materials falling off a shovel or backhoe back into a wetland . The Corps consi "incidental fallback" as an addition to the wetland, wi therefore be regulated as if it were a discharge activity tha materials to a wetland.

Under this expansive interpretation of "discharge" more of the activities undertaken by builders, land developers and other landowners would have required a permit under the CWA.

NAHB, the National Mining Association, the American Road Transportation Builders Association, the National Aggregates Association and the American Forest and Paper Association sued the Corps of Engineers over the rule, contending that it violated the congressional intent of the Clean Water Act and unlawfully exceeded the agencies' authority. The chief issue was whether "incidental fallback under the CWA, noting that Sec. 404 refers to discharge activities that add materials to wetlands, not activities that remove soils from wetlands. That decision has been affirmed twice since then, most recently in 1998 in a unanimous decision by the U.S. Court of Appeals for the District of Columbia that the Corps decided not to appeal to the Supreme Court.

Last month's clarification of the Tulloch Rule by the EPA and the Corps identified the types of activities that are likely to result in a discharge or addition of dredged materials and would therefore require a Sec. 404 permit. The proposed rule would "establish a rebuttable presumption that mechanized landclearing, ditching, channelization, in-stream mining and other mechanized excavation activities produce more than incidental fallback and result in a regulable discharge of dredged material subject to environmental review."

The proposal could force landowners to prove that they have not dded materials to wetlands as a result of their removal activities. he new Tulloch definition would also require more people to obtain wetlands permits, a costly and time-consuming process.

"The legal lesson on Tulloch is quite clear", Mitchell added. "Agencies that try to legislate through regulation and go beyond what Congress intended are destined to create illegal, invalid regulations."

Reprinted courtesy of the National Association of Home Builders

DEVELOPERS ARE GOING ELECTRONIC

In a survey conducted by ENGEO, private development executives differed considerably from other construction professionals as to the use of electronic Personal Data Assistants (PDAs). Private developers are much more likely to be using these devices to organize their lives at work than architects, engineers, consultants, contractors and public employees, who are more likely to use tools such as day planners and desk-top computers for work organization.

ENGEO conducted this survey in order determine the use of electronic information technology in the construction industry. Over 700 executives of land development companies were surveyed, along with over 300 public agency employees, 200 general contractors, and over 400 architects, engineers and consultants (A/E/C). Each individual was asked to answer a yes/no question as to whether they used a PDA. Forty-nine percent of developer respondents are now using PDAs. Within the A/E/C community, PDA usage among the respondents is 38%. Almost 29% of the general contractor respondents indicated that they currently use a PDA. With public employees, PDA usage is 27%.

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