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### The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) to establish a Class E3 arrival extension at Riverside March Field, CA. Class E3 airspace areas are designated as arrival extensions to a Class C surface area. Class E arrival extensions are primarily designated to provide additional controlled airspace ancillary to a surface area to protect instrument operations for the primary airport, without imposing additional communications burdens on airspace users. This action is necessary at Riverside March Field to provide controlled airspace for Category E aircraft conducting circling maneuvers in conjunction with published SIAPs. Generally, Category E aircraft are very large and/or high performance. These aircraft require additional airspace when conducting circling maneuvers.

Class E3 airspace areas designated as an extension are published in Paragraph 6000 of FAA Order 7400.9M, dated August 30, 2004, and effective September 16, 2004, which is incorporated by reference in 14 CFR 71.1. The Class E3 airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect traffic procedures and air navigation, it is certified that this rule,

when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

### List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

### The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposed to amend 14 CFR part 71 as follows:

### PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

**Authority:** 49 U.S.C 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., 389.

#### § 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9M, Airspace Designations and Reporting Points, dated August 30, 2004, and effective September 16, 2004, is amended as follows:

*Paragraph 6000 Class E3 airspace designated as an extension.*

\* \* \* \* \*

#### AWP CA E3 Riverside March Field, CA [NEW]

Riverside March Field, CA

(Lat. 33°52'50" N, long. 117°15'34" W)

That airspace extending upward from the surface between the 5 mile radius and 7 mile radius of Riverside March Field and between a line 2 miles east of 150° bearing from the airport clockwise to the 216° bearing from the airport.

\* \* \* \* \*

Issued in Los Angeles, California, on July 11, 2005.

**Stephen J. Lloyd,**

*Acting Area Director, Terminal Operations, Western Service Area.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AU23

### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the California Tiger Salamander in Sonoma County

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; public hearing announcement.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the California tiger salamander (*Ambystoma californiense*) pursuant to the Endangered Species Act of 1973, as amended (Act). In total, approximately 74,223 acres (ac) (30,037 hectares (ha)) fall within the boundaries of the proposed critical habitat designation. The proposed critical habitat is located in Sonoma County, California.

**DATES:** We will accept comments from all interested parties until October 3, 2005. We will hold a public hearing on September 8, 2005, at the Flamingo Hotel in Santa Rosa, California. The public hearing will include two sessions from 1 p.m. to 3 p.m. and 6 p.m. to 8 p.m. Registration for the hearings will begin a half-hour before each session. For more information, see "Public Hearing" section below or contact Arnold Roessler of the Sacramento Fish and Wildlife Office at (916) 414-6600.

**ADDRESSES:** If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may submit written comments and information to Wayne White, Field Supervisor, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office (SFWO), Cottage Way, W-2605, Sacramento, CA 95825.

2. You may hand-deliver written comments to the SFWO, at the above address.

3. You may send comments by electronic mail (e-mail) to [fw1sonoma\\_tiger\\_salamander@fws.gov](mailto:fw1sonoma_tiger_salamander@fws.gov). Please see the Public Comments Solicited section below for file format and other information about electronic filing.

4. You may fax your comments to (916) 414-6713.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection,

by appointment, during normal business hours at the SFWO, at the above address (telephone (916) 414-6600).

**FOR FURTHER INFORMATION CONTACT:**

Wayne White, Field Supervisor, SFWO (see ADDRESSES section).

**SUPPLEMENTARY INFORMATION:**

**Public Comments Solicited**

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Comments are particularly sought concerning:

(1) The reasons why any habitat in this proposed rule should or should not be determined to be critical habitat as provided by section 4 of the Act;

(2) Comment and identification on any habitat included in this proposed rule which does not contain the primary constituent elements;

(3) Specific information on the amount and distribution of occupied California tiger salamander (CTS) habitat in Sonoma County;

(4) Specific information on the amount and distribution of any other habitat which may be essential to the conservation of the species (this rule proposed to designate significant amounts of habitat not known to be occupied at the time of listing; the Service has varying amounts of information as to whether such habitat is essential to the conservation of the species);

(5) Current, planned, or potential land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(6) The benefits related to the designation of critical habitat proposed in this rule;

(7) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities;

(8) If any proposed habitat should be excluded and the benefits of such exclusion; and

(9) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

We are also soliciting comments concerning the relative benefits of designation or exclusion of any lands as California tiger salamander critical habitat in Sonoma County (see Conservation Strategy for the Santa Rosa Plain section for specifics).

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see ADDRESSES section). Please submit Internet

comments to

*fw1sonoma\_tiger\_salamander@fws.gov* in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn: California tiger salamander in Sonoma County" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling the SFWO at phone number (916) 414-6600. Please note that the Internet address

*fw1sonoma\_tiger\_salamander@fws.gov* will be closed out at the termination of the public comment period.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours.

Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law.

There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

**Designation of Critical Habitat Provides Little Additional Protection to Species**

In 30 years of implementing the Act, the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of available conservation resources. The Service's present system for designating critical habitat has evolved since its original statutory prescription into a process that provides little real conservation benefit, is driven by litigation and the courts rather than biology, limits our ability to fully evaluate the science involved, consumes enormous agency resources, and imposes huge social and economic costs. The Service believes that additional agency discretion would allow our focus to return to those actions that provide the greatest benefit

to the species most in need of protection.

*Role of Critical Habitat in Actual Practice of Administering and Implementing the Act*

While attention to and protection of habitat is paramount to successful conservation actions, we have consistently found that, in most circumstances, the designation of critical habitat is of little additional value for most listed species, yet it consumes large amounts of conservation resources. Sidle (1987) stated, "Because the Act can protect species with and without critical habitat designation, critical habitat designation may be redundant to the other consultation requirements of section 7." Currently, only 445 species, or 36 percent of the 1,244 listed species, in the U.S. under the jurisdiction of the Service, have designated critical habitat.

We address the habitat needs of all 1,244 listed species through conservation mechanisms such as listing, section 7 consultations, the Section 4 recovery planning process, the Section 9 protective prohibitions of unauthorized take, Section 6 funding to the States, and the Section 10 incidental take permit process. The Service believes that it is these measures that may make the difference between extinction and survival for many species.

We note, however, that two courts found our definition of adverse modification to be invalid (March 15, 2001, decision of the United States Court Appeals for the Fifth Circuit, *Sierra Club v. U.S. Fish and Wildlife Service et al.*, F.3d 434, and the August 6, 2004, Ninth Circuit judicial opinion, *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*). In response to these decisions, we are reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

*Procedural and Resource Difficulties in Designating Critical Habitat*

We have been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions

with the most biologically urgent species conservation needs.

The consequence of the critical habitat litigation activity is that limited listing funds are used to defend active lawsuits, to respond to Notices of Intent (NOIs) to sue relative to critical habitat, and to comply with the growing number of adverse court orders. As a result, listing petition responses, the Service's own proposals to list critically imperiled species, and final listing determinations on existing proposals are all significantly delayed.

The accelerated schedules of court ordered designations have left the Service with almost no ability to provide for adequate public participation or to ensure a defect-free rulemaking process before making decisions on listing and critical habitat proposals due to the risks associated with noncompliance with judicially imposed deadlines. This in turn fosters a second round of litigation in which those who fear adverse impacts from critical habitat designations challenge those designations. The cycle of litigation appears endless, is very expensive, and in the final analysis provides relatively little additional protection to listed species.

The costs resulting from the designation include legal costs, the cost of preparation and publication of the designation, the analysis of the economic effects and the cost of requesting and responding to public comment, and in some cases the costs of compliance with the National Environmental Policy Act (NEPA). None of these costs result in any benefit to the species that is not already afforded by the protections of the Act enumerated earlier, and they directly reduce the funds available for direct and tangible conservation actions.

## Background

A physical description of the California tiger salamander and other information about its taxonomy, distribution, life history, and biology is included in the Background section of the final rule to list California tiger salamander as a threatened species, published in the **Federal Register** on August 4, 2004 (69 FR 47212). Additional relevant information may be found in the final rules to list the Santa Barbara County Distinct Population Segment (DPS) (65 FR 57242, September 21, 2000) and the Sonoma County DPS California tiger salamander (68 FR 13498, March 13, 2003), and the proposed rules to designate critical habitat for the California tiger salamander in Santa Barbara County (69 FR 3064, January 22, 2004) and the

Central population of the species range (69 FR 48570, August 10, 2004) as well as the final rule to designate critical habitat for the California tiger salamander in Santa Barbara County (69 FR 68568, November 24, 2004). The information contained in those previous **Federal Register** documents was used in developing this rule.

*Critical Habitat and Private Lands:* The California tiger salamander in Sonoma County occurs primarily on private lands. Approximately 80–95 percent of imperiled species in the United States occur partly or solely on private lands where the Service has little or no management authority (Hilty and Merenlender 2003, Wilcove *et al.* 1996). In addition, recovery actions involving the reintroduction or positive management of listed species on private lands usually require the voluntary cooperation of the landowner (Bean 2002, James 2002, Knight 1999, Main *et al.* 1999, Norton 2000, Shogren *et al.* 1999). Therefore, “a successful recovery program is highly dependent on developing working partnerships with a wide variety of entities, and the voluntary cooperation of thousands of non-Federal landowners and others is essential to accomplishing recovery for listed species” (Crouse *et al.* 2002). Because large tracts of land suitable for conservation of threatened and endangered species are owned by private landowners, successful recovery of many listed species is especially dependent upon working partnerships and the voluntary cooperation of non-Federal landowners (Crouse *et al.* 2002, James 2002, Wilcove and Chen 1998).

The designation of critical habitat on privately-owned lands can have both negative and positive impacts on the conservation of listed species (Bean 2002). There is a growing body of documentation that some regulatory actions by the Federal Government, while well-intentioned and required by law, can under certain circumstances have unintended negative consequences for the conservation of species on private lands (Brook *et al.* 2003, Bean 2002, Conner and Mathews 2002, James 2002, Koch 2002, Wilcove *et al.* 1996). Some landowners fear a decline in value of their properties because of their belief that the Act may restrict future land-use options where threatened or endangered species are found. Consequently, endangered species are perceived by many landowners as a financial liability, which sometimes results in anti-conservation incentives to these landowners (Brook *et al.* 2003, Main *et al.* 1999).

According to some researchers, the designation of critical habitat on private

lands significantly reduces the likelihood that many landowners will support and carry out conservation actions (Bean 2002, Brook *et al.* 2003, Main *et al.* 1999). The magnitude of this negative outcome is amplified in conservation situations, such as on privately-owned lowlands in California, where it is insufficient simply to prohibit harmful activities. Instead, it is necessary in many cases to encourage and carry out proactive management measures to prevent extinctions and promote recovery (Bean 2002).

Consideration of this concern is especially important in areas where species have been extirpated and their recovery requires access and permission for reintroduction efforts, or where interventionist activities are necessary for conservation (*e.g.*, fire management or control of invasive species). Simply preventing “harmful activities” will not slow the extinction of many listed species. For example, some species need reintroduction within their former range to fully recover, or they need protection from invasive nonnative species.

In the case of the California tiger salamander in Sonoma County, natural repopulation is likely not possible without human assistance and landowner cooperation. Examples of such proactive activities that benefit the California tiger salamander include enhancement or creation of breeding ponds and control of nonnative predators. These are the types of proactive, voluntary conservation efforts that are necessary to prevent the extinction and promote the recovery of many other species (Wilcove and Lee 2004, Shogren *et al.* 1999, Wilcove and Chen 1998, Wilcove *et al.* 1998).

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and “any other relevant impact” of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. Under certain circumstances, such as those occurring on private lands as outlined above, a designation of critical habitat can have a net negative conservation impact due to the legal, economic, and sociological concerns of private landowners. In these cases the Secretary of the Interior may exclude land from critical habitat when the benefits of excluding the area are greater than the benefits of including it in critical habitat.

### Conservation Strategy for the Santa Rosa Plain

California tiger salamander occurs primarily on private lands in Sonoma County. At the time of its listing, local jurisdictions, land owners, and developers were apprehensive as to how the listing would affect their activities. Local stakeholders, including local governments, landowners, and the environmental community, met with the Service to discuss possible cooperative approaches to protecting the California tiger salamander and listed plant species (*Blennosperma bakeri* (Sonoma sunshine), *Lasthenia burkei* (Burke's goldfields), *Limnanthes vincularis* (Sebastopol meadowfoam), and *Navarretia leucocephala* ssp. *plieantha* (many-flowered navarretia). The goal of such an approach would be to develop an alternative to a critical habitat designation that provides special management for those physical and biological characteristics that are essential to the conservation of the species while allowing planned land uses to occur within the county. The potential result of the plan would be to avoid critical habitat designation due to the fact that special management or protection would not be necessary. Another potential result would be that the benefits from the local plan would exceed benefits of that would result from the designation of critical habitat, and therefore, the Secretary could consider excluding areas covered by the plan pursuant to section 4(b)(2).

Consistent with the Secretary's "4C's" policy, Conservation through Cooperation, Communication and Consultation, it is the Service's goal to identify and support innovative cooperative conservation approaches that have a similar or greater likelihood of providing for the conservation of listed species when compared to traditional regulatory approaches such as designation of critical habitat. In our determination of whether habitat is in need of "special management or protection," the Service will evaluate the Sonoma County draft conservation strategy for CTS to determine whether its implementation is likely to occur and if so, whether its implementation provide a similar or greater level of conservation benefits to the CTS in Sonoma County when compared to a final designation of critical habitat.

In recognition of the ongoing local conservation planning, this proposed designation includes all occupied and unoccupied habitat in Sonoma County with the potential to support CTS. While we do not currently have the information to justify inclusion of all of

these lands in the final designation, we intend to rely on the public comments to assist in our determination of which of the lands not identified as occupied at the time of listing are essential to the conservation of the species. We believe this approach has two benefits. First, it will provide the maximum public comment on the benefits and potential contribution to CTS conservation from the maximum area available. Second, this approach does not undermine the local effort to encourage participation by local landowners and local government in the Sonoma County CTS Conservation Strategy. Our proposed designation is intentionally broad in order to identify all potential lands available to the CTS and so as not of unintentionally affect the local planning process.

*Description of Sonoma County CTS Conservation Strategy Alternative:* A local conservation strategy for the Sonoma County CTS was initiated due to concerns over how the listing of the CTS and its critical habitat designation may affect development and other local economic activities. Two teams were formed to develop and implement this strategy: the Santa Rosa Plain Conservation Strategy Team (Conservation Team) and the Implementation Committee.

The Conservation Team includes representatives of the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, the California Department of Fish and Game, County and Cities, the North Coast Regional Water Quality Control Board, local governmental agencies, the Laguna de Santa Rosa Foundation, the environmental community, and the private landowner community. The purpose of this team was to develop a Santa Rosa Plain Conservation Strategy (Conservation Strategy) for the Santa Rosa Plain that conserves and enhances enough habitat for the California tiger salamander in Sonoma County and listed plants to provide for long-term conservation, while considering the need for development pursuant to the general plans for the local jurisdictions.

The Implementation Committee consists of representatives from the City of Santa Rosa, City of Cotati, City of Rohnert Park, County of Sonoma, the California Department of Fish and Game, and the U.S. Fish and Wildlife Service. The purpose of this team is to use the Conservation Strategy to develop an implementation approach that is compatible with local planning efforts.

The purpose of the Conservation Strategy is threefold: (1) To establish a

long-term conservation program sufficient to mitigate potential adverse effects of future development on the Santa Rosa Plain, and to substantively contribute to the conservation of the listed species and their sensitive habitat; (2) to accomplish the preceding in a manner that protects stakeholders' land use interests; and (3) to support issuance of an authorization for incidental take of CTS and provide coverage for listed plants that may occur in the course of carrying out project activities on the Plain.

The Conservation Strategy will:

- Be a coordinated mechanism for processing permits for projects that are in the potential range of listed species on the Plain; this process will provide consistency, timeliness, and certainty;
- Identify the basic biological requirements for the conservation of CTS and listed plants, geographic areas where preservation is recommended, criteria for selection of these conservation areas, and mitigation measures necessary to achieve the recommended conservation goals;
- Address the application of mitigation banks, the development of management plans for preserves, adaptive management, and ongoing monitoring needs.

The Implementation Team will enumerate the steps necessary to ensure successful implementation of the strategy. The implementation section will identify the scope of covered activities, the areas within the potential range likely to be impacted by development, mechanisms for review and approval for public and private projects, and potential funding sources.

As noted earlier, development of the conservation strategy included identifying the most appropriate geographic areas for conservation. Approximately 4,000 acres ranging from northwest Santa Rosa to south of Cotati have been identified as conservation areas. The conservation area boundaries identify areas where mitigation for project related impacts to the listed species and vernal pools should be directed. The boundaries and distribution of the conservation areas are based upon an analysis of the following factors: (1) Known distribution of CTS based on recorded breeding sites and adult occurrences, (2) the presence of additional suitable CTS habitat, (3) presence of large blocks of land which are natural or restorable potential habitat, (4) location of existing preserves, and (5) known location of the listed plants (although this designation focuses on the effect of the conservation strategy on the CTS, the strategy itself

addresses other listed species and areas of concern).

Conservation areas are integral to the conservation of the listed species by directing preservation efforts into the most important areas, as well as to ensure well distributed populations. At this point in their deliberations, the local jurisdictions appear to be considering all the best available scientific and commercial information in identifying those elements important to the conservation of the CTS.

This Conservation Strategy is in the final stages of development, and it is anticipated that a final Administrative Draft Conservation Strategy will be available for public review and comment the summer of 2005. We recognize that the public is not able to comment on specific aspects of the strategy without it being available for review, but we would like to solicit public comments as described below. Additional information on the conservation areas and Conservation Strategy can be found on the Santa Rosa Plain Conservation Strategy Web page at <http://ci.santa-rosa.ca.us>.

*Solicitation of comments concerning the relative benefits of designation of California tiger salamander critical habitat:* In addition to the analysis conducted when assessing potential economic impacts of the California tiger salamander in Sonoma County critical habitat designation, the Secretary will evaluate other considerations as part of the 4(b)(2) exclusion process. As part of the Secretary's deliberative process, the Service identifies the benefits of inclusion and exclusion of various areas.

As part of our designation, we will evaluate the following with respect to the Local Conservation Strategy:

- The degree to which a critical habitat designation would confer conservation benefits on the California tiger salamander when compared to the likely benefits of the alternative strategy;
- The degree to which the designation or the proposed alternative conservation strategy would educate members of the public such that conservation efforts would be enhanced;
- The degree to which a critical habitat designation or the proposed alternative conservation strategy would have a positive, neutral, or negative impact on voluntary conservation efforts on privately-owned lands; and
- The extent to which a critical habitat designation is likely to encourage or discourage future conservation activities on private lands.

The Service will evaluate whether the regulatory benefits of designation of critical habitat in Sonoma County for

the California tiger salamander outweigh the conservation benefits of implementation of the alternative conservation strategy proposed by local public and private interests. In this proposed rule, we are soliciting public comment on the relative merits of a critical habitat designation when compared to implementation of this alternative strategy. We are particularly interested in public comment on the following issues:

- What is necessary to ensure the conservation of the CTS with regard to private lands in Sonoma County;
- Identification of whether the species or its habitat requires proactive management actions, and, if so, of what type, on private lands;
- Identification of current voluntary conservation efforts or working partnerships existing on private lands and how those efforts are likely to be affected by the proposed designation;
- Whether the Service could expect an increase or decline in conservation activities on private lands that are designated as critical habitat;
- Whether a critical habitat designation of private lands already occupied by the California tiger salamander and subject to the regulatory provisions of the Act will provide additional regulatory conservation benefits to accrue on those lands;
- Whether traditional methods of regulation under the Act (*e.g.*, Section 7 consultation with the U.S. Army Corps of Engineers) are adequate to provide for the long-term conservation of the California tiger salamander on private lands in Sonoma County; and
- What conservation efforts are likely to occur on private lands in the foreseeable future and how designation of critical habitat is likely to affect those future actions?

The Service will evaluate information received on these and other issues when making a decision concerning the final designation of critical habitat. It is important to note that the Service will only consider a plan which contains provisions that all the public entities and any other parties necessary to implement those provisions have signed. A draft plan which has not been finalized provides the Service with little to no certainty of the type or the extent of the conservation measures that will be implemented. As a result, the Service would have no basis for finding that the habitat is not in need of special management or protection, or alternatively, for excluding the habitat on the basis for any but economic reasons. Any economic exclusions would be predicated on the results of the economic analysis.

### Previous Federal Actions

On October 13, 2004, a complaint was filed in the U.S. District Court for the Northern District of California (*Center for Biological Diversity and Environmental Defense Council v. U.S. Fish and Wildlife Service et al.* (Case No. C-04 4324 FMS)), which in part identified the failure of designating critical habitat for the California tiger salamander in Sonoma County. On February 3, 2005, the District Court approved a settlement agreement between the parties that requires the Service to submit for publication in the **Federal Register**, on an expedited basis, a proposal for designation of critical habitat for the Sonoma County population of California tiger salamander. The agreement also requires the Service to submit for publication in the **Federal Register** a final determination on the proposed critical habitat designation on or before December 1, 2005. This proposed rule is in accordance with the settlement agreement.

For a discussion of previous Federal actions regarding the Sonoma population, please see the final rule listing the Central California tiger salamander as threatened rangewide (August 4, 2004, 69 FR 47212). Federal actions on the California tiger salamander prior to May 2004 are summarized in that final rule (69 FR 47212) and used in developing this rule. That final rule listed the California tiger salamander as threatened throughout its range, and eliminated the separate listings for the Santa Barbara and Sonoma populations.

### Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat

with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 requires consultation on Federal actions that are likely to result in the destruction or adverse modification of critical habitat. However, Section 7 provides no protection for strictly private actions on private lands that are designated as critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Designation of critical habitat does not allow government or public access to private lands.

To be included in a critical habitat designation, the habitat within the area occupied by the species at the time of listing must first have features that are "essential to the conservation of the species." Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (*i.e.*, areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b); see Primary Constituent Elements section).

Habitat occupied at the time of listing may be included in critical habitat only if the essential features thereon may require special management or protection. Thus, we do not include areas where existing management is sufficient to conserve the species. (As discussed below, such areas may also be excluded from critical habitat pursuant to section 4(b)(2).) Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species so require, we will not designate critical habitat in areas outside the geographic area occupied by the species at the time of listing. An area currently occupied by the species but not known to have been occupied at the time of listing may or may not be essential to the conservation of the species and, therefore, its inclusion will be based on a determination by the Secretary that the habitat is essential to the conservation of the species.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), and Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service, provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Service represent the best

scientific and commercial data available. They require Service biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information is generally the listing documents for the species. Additional information sources include the data in the recovery plan for the species, articles in peer-reviewed journals, data in conservation plans developed by States and counties, data included as part of scientific status surveys and studies, data in biological assessments, or other unpublished materials, public comment and scientific judgment. All information is used in accordance with the provisions of Section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658) and the associated Information Quality Guidelines issued by the Service.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery.

Areas that support populations of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available information at the time of the action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

## Methods

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available in determining areas that contain the features that are essential to the conservation of the California tiger salamander in Sonoma County. We have reviewed the overall approach to the conservation of the California tiger salamander undertaken by local, State, and Federal agencies operating within the species' range within Sonoma County and those efforts related to the conservation strategy being undertaken by the resource agencies, local governments, and representatives from the environmental and building communities (see Conservation Strategy section).

We based the extent of the proposed critical habitat for the California tiger salamander in Sonoma County on historic and current range of the species as well as the Santa Rosa Plain conservation strategy. Historic records for the species and/or its habitat have been documented throughout the Santa Rosa Plain and into the Petaluma River watershed. Additional criteria used in refining the extent of the critical habitat were the specific soil types associated with habitat for the species and below the 200-foot (61-meter) elevation. Major water courses or floodplains were used to delineate boundaries where information on their location and extent was available. In addition, we used aerial photography to examine historic and current habitat as well as land use patterns.

We have also reviewed available information that pertains to the upland and aquatic habitat requirements of this species. Based on the best available information, we included areas where the species historically occurred, or currently occurs, or has the potential to occur based on the suitability of habitat. We identified areas which represent the range of environmental, ecological, and genetic variation of the California tiger salamander in Sonoma County and contain the primary constituent elements (see Primary Constituent Elements section). In addition, to avoid influencing the local conservation planning process, we included the maximum area representing the historic range of the species with the expectation that the final rule would be significantly revised based on refinements resulting from development of additional information and public comment. Identification of the broadest possible proposal would be most likely to elicit information regarding the current presence of PCEs, the occupancy

of identified habitat, and other information regarding the benefit of designating or excluding the habitat.

This proposed unit was delineated by digitizing a polygon (map unit) using ArcView (Environmental Systems Research Institute, Inc.), a computer GIS program. The polygon was created by modifying the Potential Range of the California tiger salamander polygon as identified in the *Interim Guidance on Site Assessments and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander* (Service and California Department of Fish and Game 2003). We evaluated the historic and current geographic range and potential suitable habitat, and identified areas of nonessential habitat (*i.e.*, not containing the primary constituent elements) (see Primary Constituent Elements section). We have included areas within this unit which are already developed or are planned for development. We anticipate that public comment will help refine the mapped areas so as to avoid inclusion of areas that do not contain the PCEs or do not meet the definition of critical habitat. Those undeveloped areas within and adjacent to developed areas which do contain the PCE features would be considered as potential critical habitat for the species.

#### Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements ("PCEs")) that are essential to the conservation of the species, and whether such areas may require special management considerations and protection. These include, but are not limited to: space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing (or development) of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

The specific PCEs required for the Sonoma population are based on the biological needs of the California tiger salamander (see Background section). All areas proposed as critical habitat for the Sonoma population are within the species' historic range and contain one or more of the physical or biological

features (PCEs) identified as essential for the conservation of the species. Critical habitat for the Sonoma population includes essential aquatic habitat, essential upland nonbreeding habitat with underground refugia, and dispersal habitat connecting occupied California tiger salamander locations. In addition, the critical habitat we have proposed is designed to allow for an increase in the size of California tiger salamander populations in Sonoma County.

Based on our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history functions of the species, we have determined that the primary constituent elements for the California tiger salamander in Sonoma County are:

(1) Standing bodies of fresh water (including natural and manmade (*e.g.*, stock) ponds, vernal pools and other ephemeral or permanent water bodies which typically support inundation during winter rains and hold water for a minimum of 12 weeks in a year of average rainfall.

(2) Upland habitats adjacent and accessible to and from breeding ponds that contain small mammal burrows or other underground habitat that California tiger salamanders depend upon for food, shelter, and protection from the elements and predation.

(3) Accessible upland dispersal habitat between occupied locations that allow for movement between such sites.

We describe the relationship between each of these PCEs and the conservation of the salamander in more detail below.

The essential aquatic habitat described as the first PCE is essential for Sonoma population breeding and for providing space, food, and cover necessary to sustain early life history stages of larval and juvenile California tiger salamander. Breeding habitat consists of fresh water bodies, including natural and manmade ponds (*e.g.*, stockponds), and vernal pools. To be considered essential, aquatic and breeding habitats must have the capability to hold water for a minimum of 12 weeks in the winter or spring in a year of average rainfall because this is the amount of time needed for larvae to grow into metamorphosed juveniles so they can become capable of surviving in upland habitats. During periods of drought or less-than-average rainfall, these sites may not hold water long enough for individuals to complete metamorphosis; however, these sites would still be considered essential because they constitute breeding habitat in years of average rainfall. Without its essential aquatic and breeding habitats,

the Sonoma population would not survive, reproduce, and develop juveniles that could grow into adult individual salamanders that can complete their life cycles.

Upland habitats containing underground refugia are essential for the survival of adult and juvenile salamanders that have recently undergone metamorphosis. Adult and juvenile California tiger salamanders are primarily terrestrial. Adult California tiger salamanders enter aquatic habitats only for relatively short periods of time to breed. For the majority of their life cycle, California tiger salamanders depend for survival on upland habitats containing underground refugia in the form of small mammal burrows or other underground structures. California tiger salamanders cannot persist without upland underground refugia, which provide protection from the hot, dry weather typical of California in the nonbreeding season. California tiger salamanders also find food in these refugia and rely on them for protection from predators. The presence of small burrowing mammal populations is a key element for the survival of California tiger salamander as they construct burrows used by California tiger salamander. Without the continuing presence of small mammal burrows in upland habitats, California tiger salamanders would not be able to survive.

Essential dispersal habitats are generally upland areas adjacent and accessible to aquatic habitats. Essential dispersal habitats provide connectivity among California tiger salamander suitable aquatic and upland habitats. While California tiger salamander can bypass many obstacles, and do not require a particular type of habitat for dispersal, the habitats connecting essential aquatic and upland habitats need to be accessible (no physical or biological features that prevent access to adjacent areas) to function effectively. Agricultural lands such as row crops, orchards, vineyards, and pastures do not constitute barriers to the dispersal of California tiger salamanders, however, a busy highway or interstate may constitute a barrier. The extent to which any feature is a barrier is a function of the specific geography of the area and its contribution to limiting salamander access to a greater or lesser extent.

Dispersal habitats are essential for the conservation of the California tiger salamander. Protecting the ability of California tiger salamanders to move freely across the landscape in search of suitable aquatic and upland habitats is essential in maintaining gene flow and for recolonization of sites that may



become temporarily extirpated. Lifetime reproductive success for the California tiger salamander and other tiger salamanders may be naturally low. Trenham *et al.* (2000) found the average female bred 1.4 times and produced 8.5 young that survived to metamorphosis per reproductive effort. This reproduction resulted in roughly 11 metamorphic offspring over the lifetime of a female. In part, this low reproductive success may be due to the extended time it takes for California tiger salamanders to reach sexual maturity; most do not breed until 4 or 5 years of age. While individuals may survive for more than 10 years, it is possible that many breed only once. This presumed low breeding rate, combined with a hypothesized low survivorship of metamorphosed individuals indicates that reproductive output in most years may not be sufficient to maintain populations.

Dispersal habitats help to preserve the population structure of the California tiger salamander. The life history and ecology of the California tiger salamander make it likely that this species has a metapopulation structure. A metapopulation is a set of breeding sites within an area, where typical migration from one local occurrence or breeding site to other areas containing suitable habitat is possible, but not routine. Movement between areas containing suitable upland and aquatic habitats (*i.e.*, dispersal) is restricted due to inhospitable conditions around and between areas of suitable habitats. Because many of the areas of suitable habitats may be small and support small numbers of salamanders, local extinction of these small units may be common. The persistence of a metapopulation depends on the combined dynamics of these local extinctions and the subsequent recolonization of these areas through dispersal (Hanski and Gilpin 1991; Hanski 1994).

Stock ponds and vernal pools provide a significant amount of habitat for the Sonoma population remaining in the Santa Rosa Plain. More recently manmade stock ponds joined or, in some areas, replaced vernal pools as breeding habitat.

A landscape that supports a California tiger salamander population, whether vernal pool or stockpond, is typically grassland with areas of stockponds or seasonally flooded depressions with an impermeable layer that form pools which remain wetted for at least 12 weeks in a year with average rainfall.

Upland areas associated with the water bodies are an important source of nutrients to stock ponds or vernal pools.

These nutrients provide the foundation for the water body's aquatic community's food chain. These plants and invertebrate and vertebrate animals are important providers of food and habitat for salamanders (Proctor *et al.* 1967; Krapu 1974; Swanson 1974; Morin 1987; Simovich *et al.* 1991; Silveira 1996). The uplands may also provide breeding, feeding, and sheltering habitat for small mammals that adult California tiger salamanders depend upon for food, shelter, and protection from the elements and predation.

In summary, the primary constituent elements consist of three components. At a minimum, these elements will include:

- Suitable breeding locations;
- Associated uplands surrounding the breeding locations, and
- Accessible dispersal habitat connecting breeding habitat to uplands or other breeding habitat.

#### **Criteria Used To Identify Critical Habitat**

We are proposing to designate critical habitat on lands that we have determined are occupied at the time of listing and contain the primary constituent elements and have identified other additional areas that may be essential to the conservation of the California tiger salamander in Sonoma County. In recognition of the ongoing local conservation planning, this proposed designation includes all occupied and potentially unoccupied habitat in Sonoma County with the potential to support California tiger salamander. While we do not currently have the information to justify inclusion of these potentially unoccupied lands, we intend to rely on the public comments to assist in our determination of which of the lands not identified as occupied at the time of listing are essential to the conservation of the species. While we are proposing these potentially unoccupied areas, we are not and have not made a determination as to whether they are essential to the conservation of the species. In the months between publication of this proposal, and publication of a final rule, we will review the information available to us through public comment and the scientific literature to determine which of the proposed areas are essential to the conservation of the species in Sonoma County. We believe this approach has two benefits. First, it will provide the maximum public comment on the benefits and potential contribution to California tiger salamander conservation from the maximum area available. Second, this approach does not

undermine the local effort to encourage participation by local landowners and local government in the Santa Rosa Plain Conservation Strategy. The final rule will not include areas that the Secretary is unable to determine are essential. Therefore, we particularly seek public comment on particular areas that the public believes are essential and the basis for that belief.

When determining proposed critical habitat boundaries, we made every effort to avoid proposing the designation of developed areas such as buildings, paved areas, extensive vineyards, parks and golf courses, and other structures that lack PCEs for the California tiger salamander. Any such structures inadvertently left inside proposed critical habitat boundaries are not considered part of the proposed unit. This also applies to the land on which such structures sit directly. Therefore, Federal actions limited to these areas would not trigger section 7 consultations, unless they affect the species and/or primary constituent elements in adjacent critical habitat.

After identifying the PCEs, we used the PCEs in combination with information on California tiger salamander locations, geographic distribution, vegetation, topography, geology, soils, distribution of California tiger salamander occurrences within and between vernal pool types, watersheds, current land uses, scientific information on the biology and ecology of the California tiger salamander, and conservation principles to identify essential habitat. As a result of this process, the proposed critical habitat unit possesses a combination of occupied and potential aquatic and upland habitat types, landscape features, surrounding land uses, vernal pool types, ponds, topography, and representation of geographical range, and environmental variability for the California tiger salamander.

Section 10(a)(1)(B) of the Act authorizes us to issue permits for the take of listed species incidental to otherwise lawful activities. An incidental take permit application must be supported by a habitat conservation plan (HCP) that identifies conservation measures that the permittee agrees to implement for the species to the maximum extent practicable, minimize and mitigate the impacts of the requested incidental take. These provisions ensure the management of the physical and biological elements of critical habitat for species covered under the HCP and in some cases when covered species rely on the same physical and biological characteristics provide protection and management for



non-covered species. We often exclude non-Federal public lands and private lands that are covered by an existing operative HCP and executed implementation agreement (IA) under section 10(a)(1)(B) of the Act from designated critical habitat because the benefits of exclusion outweigh the benefits of inclusion as discussed in section 4(b)(2) of the Act. We are not aware of any HCP's under development; therefore, we are not proposing any areas for exclusion.

In summary, we are proposing to designate critical habitat on lands that we have determined are occupied at the time of listing and contain the primary constituent elements and those additional areas that may or may not be essential to the conservation of the California tiger salamander in Sonoma County. We do not have adequate data at this point to make a determination as to whether these areas are essential and so are requesting that the public comment and provide any information on the areas as to whether they are or are not essential to the conservation of the species.

**Special Management Considerations or Protections**

When designating critical habitat, we assess whether the areas determined to be essential for conservation may require special management considerations or protections. Areas in need of management include not only the immediate locations where the species may be present, but additional areas adjacent to these that can provide for normal population fluctuations that may occur in response to natural and

unpredictable events. The Sonoma population of the California tiger salamander may depend upon habitat components beyond the immediate areas where individuals of the species occur, if these areas support the presence of small mammals or are essential in maintaining ecological processes such as hydrology, expansion of distribution, recolonization, and maintenance of natural predator-prey relationships. We believe that the areas proposed for critical habitat may require special management considerations or protections due to the threats outlined below:

- (1) Introduction of non-native predators such as bullfrogs and fish can be significant threats to the California tiger salamander breeding ponds in Sonoma County;
- (2) Activities that could disturb aquatic breeding habitats during the breeding season, such as heavy equipment operation, ground disturbance, maintenance projects (e.g. pipelines, roads, powerlines), off-road travel or recreation;
- (3) Activities that impair the water quality of aquatic breeding habitat;
- (4) Activities that would reduce small mammal populations to the point that there is insufficient underground refugia used by California tiger salamander in Sonoma County for foraging, protection from predators, and shelter from the elements;
- (5) Activities that create barriers impassable for salamanders or increase mortality in upland habitat between extant occurrences in breeding habitat; and

(6) Activities that disrupt vernal pool complexes' ability to support California tiger salamander breeding function.

**Proposed Critical Habitat Designation**

We are proposing to designate critical habitat for the California tiger salamander in the Santa Rosa Plain Region. The critical habitat area described below constitutes our best assessment at this time of the areas occupied at the time of listing that contain the PCEs and may require protection or special management, and those areas not identified as occupied at the time of listing but which may be found to be essential to the conservation of the species.

The approximate area encompassed within the proposed critical habitat is 74,223 ac (30,037 ha). The area estimate reflects all land within the critical habitat unit boundary. We have included areas with the unit which are already developed or planned for development. The developed areas would not contain any of the PCEs and would not be considered as proposed critical habitat for the species. Those undeveloped areas within and adjacent to developed areas which do contain the essential habitat features would be considered as proposed critical habitat for the species.

No federal lands are included in this proposed unit. Although some State lands occur within the boundaries of proposed critical habitat, the majority of the areas proposed for critical habitat occur on private lands. The approximate areas encompassed within the proposal and the associated land ownership are shown in Table 1.

TABLE 1.—APPROXIMATE AREAS WITHIN THE PROPOSED CRITICAL HABITAT AND ASSOCIATED LAND OWNERSHIP

Proposed critical habitat	Federal lands acres (hectares)	State lands acres (hectares)	Private and other lands acres (hectares)	Total acres (hectares)
Santa Rosa Plain .....	0 ac (0 ha) .....	887 ac (359 ha) <sup>1</sup> .....	73,336 ac (29,678 ha)	74,223 ac (30,037 ha)

<sup>1</sup> Land ownership within the unit includes approximately 676 ac (274 ha) of California Department of Fish and Game lands, 211 ac (85 ha) of State land Commission lands, and 26 ac (10.5 ha) of County Regional Park (Crane Creek).

We present a brief description of the designation, and reasons why areas within it may be essential for the conservation of the Sonoma population of California tiger salamander, below. To our knowledge at this point each area within the proposed designation contain aquatic, upland, and dispersal habitats and contain the primary constituent elements and those additional areas found to be essential to the conservation of the California tiger salamander.

*Proposed Designation Description*

This critical habitat designation consists of 74,223 ac (30,037 ha) located in central Sonoma County, bordered on the west by the Laguna de Santa Rosa, on the south by Skillman Road northwest of Petaluma, on the east by the foothills, and on the north by Windsor Creek. The Santa Rosa Plain and adjacent areas are characterized by vernal pools, seasonal wetlands, and associated grassland habitat. This proposed designation represents the northernmost part of the geographic

distribution of California tiger salamander and supports California tiger salamander breeding through various vernal pool complexes. The proposed designation encompasses all of the nine vernal pool complexes, each of which contain wetlands which are currently known to support breeding California tiger salamander in Sonoma County. At the time of listing, there were eight known breeding sites and fewer known occurrences of California tiger salamander within the breeding sites.

## Effects of Critical Habitat Designation

### Section 7 Consultation

Section 7 of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. In response to the 9th Circuit Court's decision on Gifford Pinchot the Service has provided direction regarding the analysis of adverse modification of critical habitat. Such alterations include, but are not limited to: Alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." We are currently reviewing the regulatory definition of adverse modification in relation to the conservation of the species.

Section 7(a) of the Act requires Federal agencies, including the Service, to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is proposed or designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402.

Section 7(a)(4) of the Act requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. We may issue a formal conference report if requested by a Federal agency. Formal conference reports on proposed critical habitat contain an opinion that is prepared according to 50 CFR 402.14, as if critical habitat were designated. We may adopt the formal conference report as the biological opinion when the critical habitat is designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)). The conservation recommendations in a conference report are advisory.

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, the action agency ensures that its actions do

not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. "Reasonable and prudent alternatives" are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat or adversely modify or destroy proposed critical habitat.

Federal activities that may affect the California tiger salamander or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (e.g., Federal Highway Administration or Federal Emergency Management Agency funding), will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal and private lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those

activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation. Activities that may destroy or adversely modify critical habitat may also jeopardize the continued existence of the California tiger salamander. Federal activities that, when carried out, may adversely affect critical habitat for the California tiger salamander include, but are not limited to:

(1) Actions that would significantly compromise the function of vernal pools, swales, ponds, and other seasonal wetlands as described in Primary Constituent Elements section (see #1). Such activities could include, but are not limited to, constructing new structures, vineyards, and roads; disking; grading; and water diversion. These activities could destroy California tiger salamander breeding sites, reduce the hydrological regime necessary for successful larval metamorphosis, and/or eliminate or reduce the habitat necessary for the growth and reproduction of the California tiger salamander.

(2) Actions that would significantly fragment and isolate aquatic and upland habitat. Such activities could include, but are not limited to, constructing new structures and new roads. These activities could limit or prevent the dispersal of California tiger salamanders from breeding sites to upland habitat or vice versa due to obstructions to movement composed of structures, certain types of curbs, or increased traffic density. These activities could compromise the metapopulation structure of the Sonoma population by reducing opportunities for recolonization of some sites that may have experienced natural local extinctions.

All lands proposed for designation as critical habitat are within the geographic area occupied by the species, and may be used by the California tiger salamander, whether for foraging, breeding, growth of larvae and juveniles, dispersal, migration, genetic exchange, or sheltering. Areas within the Santa Rosa Plain proposed critical habitat unit that contain the primary constituent elements may be essential to the conservation of the California tiger salamander. Federal agencies already consult with us on activities in areas currently occupied by the species or if the species may be affected by the action to ensure that their actions do not jeopardize the continued existence of the species. Consultations could arise if a project is proposed within a temporarily unoccupied portion of a critical habitat unit and primary constituent elements of the designated

critical habitat may be adversely affected by the project.

Pursuant to section 4(b)(2) of the Act, we must consider relevant impacts in addition to economic ones. Lands within the designation of critical habitat for the Sonoma population are not owned or managed by the Department of Defense, there are currently no habitat conservation plans for the California tiger salamander in Sonoma County, and the designation does not include any Tribal lands or trust resources.

#### Economic Analysis

An analysis of the economic impacts of proposing critical habitat for the California tiger salamander in Sonoma County is being prepared. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at <http://www.fws.gov/pacific/sacramento>, or by contacting the Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

#### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the data used, specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final rule may differ from this proposed rule.

#### Public Hearing

Section 4(b)(5)(E) of the Act requires that a public hearing be held if it is requested within 45 days of the publication of a proposed rule. Given the high likelihood of a request, we have scheduled a public hearing to be held on August 4, 2005, at the Flamingo Hotel, 2777 Fourth Street in Santa Rosa, California from 1 p.m. to 3 p.m. and 6 p.m. to 8 p.m. Registration will begin a

half-hour before each session. Anyone wishing to make oral comments for the record at the public hearing is encouraged to provide a written copy of their statement and present it to us at the hearing. In the event there is a large attendance, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration.

Persons needing special accommodations in order to attend and participate in the public hearing should contact Patti Carroll at (503) 231-2080 as soon as possible. In order to allow sufficient time to process requests, please call no later than one week before the hearing date.

#### Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, and so forth) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the proposed rule? (5) What else could we do to make this proposed rule easier to understand?

Send a copy of any comments on how we could make this proposed rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may e-mail your comments to this address: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

#### Required Determinations

##### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule in that it may raise novel legal and policy issues, but it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the tight timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed this rule. We are preparing a draft economic analysis of this proposed action, which will be available for public comment, to determine the economic consequences of designating the specific area as critical habitat. This economic analysis

also will be used to determine compliance with Executive Order 12866, Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 12630.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are listed above in the section on Section 7 Consultation. The availability of the draft economic analysis will be announced in the **Federal Register** and in local newspapers so that it is available for public review and comments. When available, the draft economic analysis can be obtained from the Internet Web site at <http://www.fws.gov/pacific/sacramento> or by contacting the Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Our assessment of economic effect will be completed prior to final rulemaking based upon review of the draft economic analysis prepared pursuant to section 4(b)(2) of the ESA and E.O. 12866. This analysis is for the purposes of compliance with the Regulatory Flexibility Act and does not reflect our position on the type of economic analysis required by *New Mexico Cattle Growers Assn. v. U.S. Fish & Wildlife Service* 248 F.3d 1277 (10th Cir. 2001).

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, the Service lacks the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, the RFA finding is deferred until completion of the draft economic analysis prepared pursuant to section

4(b)(2) of the ESA and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, the Service will publish a notice of availability of the draft economic analysis of the proposed designation and reopen the public comment period for the proposed designation for an additional 60 days. The Service will include with the notice of availability, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. The Service has concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that the Service makes a sufficiently informed determination based on adequate economic information and provides the necessary opportunity for public comment.

#### *Executive Order 13211*

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule to designate critical habitat for the Sonoma population is not a significant regulatory action under E.O. 12866, and it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

#### *Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments" with two exceptions. It excludes "a

condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) We do not believe that this rule will significantly or uniquely affect small governments. The lands being proposed for critical habitat are mostly private lands with some other local government lands. Given the distribution of this species, small governments will not be uniquely affected by this proposed rule. Small governments will not be affected at all unless they propose an action requiring

Federal funds, permits, or other authorization. Any such activity will require that the involved Federal agency ensure that the action is not likely to adversely modify or destroy designated critical habitat. However, as discussed above, Federal agencies are currently required to ensure that any such activity is not likely to jeopardize the species, and no further regulatory impacts from the designation of critical habitat are anticipated. Because we believe this rule will not significantly or uniquely affect small governments, a Small Government Agency Plan is not required. We will, however, further evaluate this issue as we conduct our economic analysis and revise this assessment if appropriate.

#### *Takings*

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), the rule is not anticipated to have significant takings implications. A takings implication assessment is not required. As discussed above, the designation of critical habitat affects only Federal agency actions. Although private parties that receive Federal funding, or assistance or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Due to current public knowledge of the species' protection, the prohibition against take of the species both within and outside of the designated areas, and the fact that critical habitat provides no incremental restrictions, we do not anticipate that property values will be affected by the proposed critical habitat designation. While real estate market values may temporarily decline following designation, due to the perception that critical habitat designation may impose additional regulatory burdens on land use, we expect any such impacts to be short term. Additionally, critical habitat designation does not preclude development of HCPs and issuance of incidental take permits. Owners of areas that are included in the designated critical habitat will continue to have opportunity to use their property in ways consistent with the survival of the California tiger salamander. Once the economic analysis is available, we will review and revise this preliminary assessment as warranted.

**Federalism**

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with DOI and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State of California resource agencies. The designation of critical habitat in areas currently occupied by the California tiger salamander imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

**Civil Justice Reform**

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Endangered Species Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in

understanding the habitat needs of the California tiger salamander.

**Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)**

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

**National Environmental Policy Act**

It is our position that, outside the Tenth Circuit, we do not need to prepare environmental analyses as defined by the NEPA in connection with designating critical habitat under the Endangered Species Act of 1973, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This assertion was upheld in the courts of the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. Ore. 1995), cert. denied 116 S. Ct. 698 (1996)).

**Government-to-Government Relationship With Tribes**

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of Interior's Manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal tribes on a government-to-government basis. We have determined that there are no Tribal

lands essential for the conservation of the California tiger salamander. Therefore, designation of critical habitat for the Sonoma population of the California tiger salamander has not been designated on Tribal lands.

**References Cited**

A complete list of all references cited in this rulemaking is available upon request from the Field Supervisor, Sacramento Fish and Wildlife Office (see **ADDRESSES** section).

**Author**

The primary author of this package is the Sacramento Fish and Wildlife Office staff.

**List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

**PART 17—[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. The entry for "Salamander, California tiger" in § 17.11(h), which was proposed to be further revised on August 10, 2004 at 69 FR 48570, is further revised as follows:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*  
(h) \* \* \*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
AMPHIBIANS							
*	*	*	*	*	*		*
Salamander, California.	<i>Ambystoma californiense</i> .	U.S.A. (CA) .....	U.S.A. (CA) .....	T	667E, 702, 744	17.95(d)	17.43(c)
*	*	*	*	*	*		*

3. In critical habitat for the California tiger salamander (*Ambystoma californiense*) in § 17.95(d), which was proposed to be revised on August 10, 2004, at 69 FR 48570, is proposed to be further amended by revising the heading

and adding paragraphs (63) through (67) as follows:

**§ 17.95 Critical habitat—fish and wildlife.**

\* \* \* \* \*

(d) Amphibians.

\* \* \* \* \*

California Tiger Salamander (*Ambystoma californiense*)

\* \* \* \* \*

California Tiger Salamander in Sonoma County

(63) Critical habitat units are depicted for Sonoma County, California, on the maps below.

(64) The primary constituent elements (PCEs) of critical habitat for the Sonoma County population of the California tiger salamander (CTS) are the habitat components that provide:

(i) Standing bodies of fresh water, including natural and manmade (e.g., stock) ponds, vernal pools, vernal pool complexes, and other ephemeral or permanent water bodies that typically become inundated during winter rains and hold water for a sufficient length of time (i.e., 12 weeks in a year of average rainfall) necessary for the species to complete the aquatic portion of its life cycle.

(ii) Upland habitats adjacent and accessible to and from breeding ponds that contain small mammal burrows, or other underground habitat that California tiger salamanders depend upon for food, shelter, and protection from the elements and predation.

(iii) Accessible upland dispersal habitat between occupied locations (paragraphs 1 and 64 (i) for this proposed designation) that allow for movement between such sites.

(65) Critical habitat does not include manmade structures existing on the effective date of this rule and not containing one or more of the primary constituent elements, such as buildings, flood control channels, airport buildings, structures and runways, highways, the land on which such structures are located, and other developed areas not containing one or more of the primary constituent elements.

#### Critical Habitat Map Unit

(66) Data layers defining map units were created on a base of USGS 7.5' quadrangles, and critical habitat units were then mapped using Universal Transverse Mercator (UTM) coordinates.

(67) Unit 1: Santa Rosa Plain Unit, Sonoma County, California.

(i) From USGS 1:24,000 quadrangle map Healdsburg, Sebastopol, Santa Rosa, Two Rock, Cotati, Petaluma, and Mark West Springs, California, land bounded by the following UTM 10 NAD 83 coordinates (E,N): 523679,4258509; 523834,4258467; 524018,4258341; 524190,4258157; 4293,4257939; 524443,4257767; 524695,4257629; 524890,4257468; 525074,4257239; 525235,4257066; 25441,4256848; 525510,4256779; 525740,4256378; 525889,4256217; 526256,4255953; 26451,4255873; 526807,4255574;

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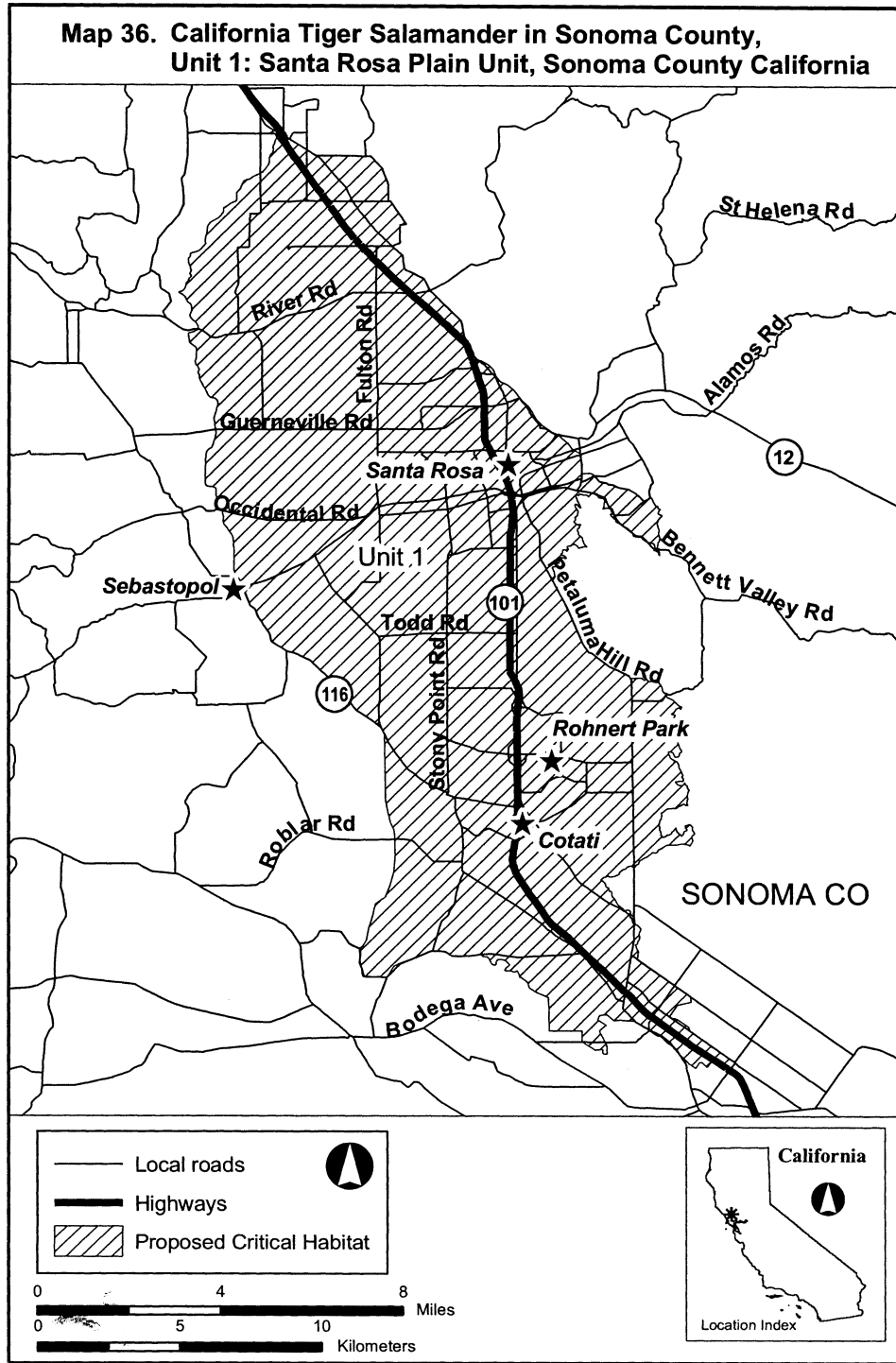
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returning to 52367,4258509.

(ii) **NOTE:** Unit 1 (Map 36) follows:

**BILLING CODE 4310-55-P**



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Dated: July 21, 2005.  
**Craig Manson,**  
*Assistant Secretary for Fish and Wildlife and Parks.*  
 [FR Doc. 05-14992 Filed 8-1-05; 8:45 am]  
**BILLING CODE 4310-55-C**