

# LETTER B

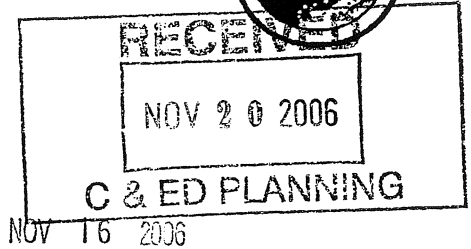




## United States Department of the Interior

### FISH AND WILDLIFE SERVICE

Sacramento Fish and Wildlife Office  
2800 Cottage Way, Room W-2605  
Sacramento, California 95825-1846



In reply refer to:  
1-1-07-TA-0039

Mr. Paul Liu, Senior Planner  
City of Modesto  
P.O. Box 642  
1010 Tenth Street  
Third Floor  
Modesto, California 95353

Subject: Draft EIR for the Proposed Tivoli Specific Plan Project (SCH  
#2005072125)

Dear Mr. Liu:

This responds to the October 12, 2006, (received in our office on October 13, 2006) Draft Environmental Impact Report (EIR) for the Tivoli Specific Plan Project. We received the supplemental Tivoli Specific Plan Final Administrative Draft – Screen Check on November 2, 2006. The proposed project includes approximately 454 acres of residential, infrastructure, and municipal development in the City of Tivoli. Our comments address issues related to the Endangered Species Act of 1973, as amended (Act).

We believe that ground disturbance on this site may result in impacts to federally-listed species. A list of species that may occur in the project area is enclosed for your reference. According to the California Natural Diversity Database (CNDDDB), two occurrences of federally-listed species occur within two miles of the project boundary: one of the threatened vernal pool fairy shrimp (*Branchinecta lynchi*) (CNDDDB Element Occurrence Index 64166), and one of the endangered vernal pool tadpole shrimp (*Lepidurus packardii*) (CNDDDB Element Occurrence Index 43432). Both of these occurrences were described as in ephemeral pools in a disturbed environment. In addition, the threatened California tiger salamander breeds in vernal pools, and has been observed to disperse up to 1.24 miles (2 kilometers) into uplands from their breeding pools (Source: Interim Guidance on Site Assessment and Field Surveys for Determining Presence or a Negative Finding of the California Tiger Salamander – October 2003). Therefore, the project should be assessed for impacts to uplands as well as breeding pools. We are concerned that habitat for these and/or other vernal pool species may be present in the project area.

B.1

Section 9 of the Act and its implementing regulations prohibit the “take” of federally-listed species of wildlife. Take is defined by the Act as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” any such wildlife species. Take may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR Section 17.3). Harass is defined as an intentional or negligent act that creates the likelihood of injury to a listed species by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to breeding, feeding, or sheltering. Harm is defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering.

B.2

Take incidental to an otherwise lawful activity may be authorized by one of two procedures. If a Federal agency is involved with the permitting, funding, or carrying out of this project, then consultation between that agency and the Service pursuant to section 7 of the Act is required if it is determined that the proposed project may affect a federally-listed species. If a Federal agency is not involved with the project, and federally-listed species may be taken as part of the project, then an “incidental take” permit pursuant to section 10 of the Act should be obtained. The Service may issue such a permit upon completion by the permit applicant of a satisfactory habitat conservation plan for the listed species that would be affected by the project.

Please be aware that that obtaining local permits does not release the applicant from responsibility under section 9 of the Act. It may be in the best interest of the applicant and/or landowner to perform surveys using Service-approved protocols for the list of species enclosed. In the event that one of these species or their habitat is present, or there is a likelihood that any portion of the project will result in direct or indirect impacts to these species, the applicant and/or landowner should immediately contact the Service to determine the appropriate course of action under the Act.

It is stated in the EIR that approximately 2.51 acres of wetlands occurs in the project area. If disturbance of vernal pools or other potentially jurisdictional waterbodies is proposed, the U.S. Army Corps of Engineers (Corps) should be contacted. The Corps is responsible for initiating consultation under section 7 of the Act as part of its project review, for those species which may be affected. If, however, the Corps does not include the entire project area as part of its permit evaluation, you may be required to obtain authorization under section 10 of the Act directly from the Service as described above.

B.3

Mr. Paul Liu

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Please contact Jana Milliken or Susan Jones of the Sacramento Fish and Wildlife Office at (916) 414-6600, if you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Peter A. Cross". The signature is written in a cursive style with a large initial "P" and "C".

Peter A. Cross  
Deputy Assistant Field Supervisor

Enclosure

cc w/o enclosure:

Annee Ferranti, California Department of Fish and Game, Fresno, California

Comment B.1

Sacramento Fish & Wildlife Office  
Federal Endangered and Threatened Species  
that Occur in or may be Affected by Projects in the  
RIVERBANK (442B)  
U.S.G.S. 7 1/2 Minute Quad  
Database Last Updated: October 27, 2006  
Document Number: 061114122546

**Species of Concern** - The Sacramento Fish & Wildlife Office no longer maintains a list of species of concern. However, various other agencies and organizations maintain lists of at-risk species. These lists provide essential information for land management planning and conservation efforts. See [www.fws.gov/sacramento/es/spp\\_concern.htm](http://www.fws.gov/sacramento/es/spp_concern.htm) for more information and links to these sensitive species lists.

**Red-Legged Frog Critical Habitat** - The Service has designated final critical habitat for the California red-legged frog. The designation became final on May 15, 2006. See our [map index](#).

## Listed Species

### *Invertebrates*

*Branchinecta lynchi*

vernal pool fairy shrimp (T)

*Desmocerus californicus dimorphus*

valley elderberry longhorn beetle (T)

*Lepidurus packardii*

vernal pool tadpole shrimp (E)

### *Fish*

*Hypomesus transpacificus*

delta smelt (T)

*Oncorhynchus mykiss*

Central Valley steelhead (T) (NMFS)

Critical habitat, Central Valley steelhead (X) (NMFS)

*Oncorhynchus tshawytscha*

Central Valley spring-run chinook salmon (T) (NMFS)

winter-run chinook salmon, Sacramento River (E) (NMFS)

### *Amphibians*

*Ambystoma californiense*

California tiger salamander, central population (T)

*Rana aurora draytonii*

California red-legged frog (T)

### *Reptiles*

*Thamnophis gigas*  
giant garter snake (T)

## Birds

*Haliaeetus leucocephalus*  
bald eagle (T)

## Candidate Species

### Fish

*Oncorhynchus tshawytscha*  
Central Valley fall/late fall-run chinook salmon (C) (NMFS)

### Key:

- (E) *Endangered* - Listed (in the Federal Register) as being in danger of extinction.
- (T) *Threatened* - Listed as likely to become endangered within the foreseeable future.
- (P) *Proposed* - Officially proposed (in the Federal Register) for listing as endangered or threatened.
- (NMFS) Species under the Jurisdiction of the National Marine Fisheries Service. Consult with them directly about these species.
- Critical Habitat* - Area essential to the conservation of a species.
- (PX) *Proposed Critical Habitat* - The species is already listed. Critical habitat is being proposed for it.
- (C) *Candidate* - Candidate to become a proposed species.
- (X) *Critical Habitat* designated for this species

## Important Information About Your Species List

### How We Make Species Lists

We store information about endangered and threatened species lists by U.S. Geological Survey 7½ minute quads. The United States is divided into these quads, which are about the size of San Francisco.

The animals on your species list are ones that occur within, or may be affected by projects within, the quads covered by the list.

- Fish and other aquatic species appear on your list if they are in the same watershed as your quad or if water use in your quad might affect them.
- Birds are shown regardless of whether they are resident or migratory. Relevant birds on the county list should be considered regard-less of whether they appear on a quad list.

### Plants

Any plants on your list are ones that have actually been observed in the quad or quads covered by the list. Plants may exist in an area without ever having been detected there. You can find out what's in the nine surrounding quads through the California Native Plant Society's online Inventory of Rare and Endangered Plants.

### Surveying

Some of the species on your list may not be affected by your project. A trained biologist or botanist, familiar with the habitat requirements of the species on your list, should determine whether they or habitats suitable for them may be affected by your project. We recommend that

your surveys include any proposed and candidate species on your list.

For plant surveys, we recommend using the [Guidelines for Conducting and Reporting Botanical Inventories](#). The results of your surveys should be published in any environmental documents prepared for your project.

### **Your Responsibilities Under the Endangered Species Act**

All plants and animals identified as listed above are fully protected under the Endangered Species Act of 1973, as amended. Section 9 of the Act and its implementing regulations prohibit the take of a federally listed wildlife species. Take is defined by the Act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any such animal.

Take may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or shelter (50 CFR §17.3).

### **Take incidental to an otherwise lawful activity may be authorized by one of two procedures:**

- If a Federal agency is involved with the permitting, funding, or carrying out of a project that may result in take, then that agency must engage in a formal [consultation](#) with the Service.

During formal consultation, the Federal agency, the applicant and the Service work together to avoid or minimize the impact on listed species and their habitat. Such consultation would result in a biological opinion by the Service addressing the anticipated effect of the project on listed and proposed species. The opinion may authorize a limited level of incidental take.

- If no Federal agency is involved with the project, and federally listed species may be taken as part of the project, then you, the applicant, should apply for an incidental take permit. The Service may issue such a permit if you submit a satisfactory conservation plan for the species that would be affected by your project.

Should your survey determine that federally listed or proposed species occur in the area and are likely to be affected by the project, we recommend that you work with this office and the California Department of Fish and Game to develop a plan that minimizes the project's direct and indirect impacts to listed species and compensates for project-related loss of habitat. You should include the plan in any environmental documents you file.

### **Critical Habitat**

When a species is listed as endangered or threatened, areas of habitat considered essential to its conservation may be designated as critical habitat. These areas may require special management considerations or protection. They provide needed space for growth and normal behavior; food, water, air, light, other nutritional or physiological requirements; cover or shelter; and sites for breeding, reproduction, rearing of offspring, germination or seed dispersal.

Although critical habitat may be designated on private or State lands, activities on these lands are not restricted unless there is Federal involvement in the activities or direct harm to listed wildlife.

If any species has proposed or designated critical habitat within a quad, there will be a separate line for this on the species list. Boundary descriptions of the critical habitat may be found in the Federal Register. The information is also reprinted in the Code of Federal Regulations (50 CFR 17.95). See our [critical habitat page](#) for maps.

### **Candidate Species**

We recommend that you address impacts to candidate species. We put plants and animals on our candidate list when we have enough scientific information to eventually propose them for listing as threatened or endangered. By considering these species early in your planning process you may be

able to avoid the problems that could develop if one of these candidates was listed before the end of your project.

**Wetlands**

If your project will impact wetlands, riparian habitat, or other jurisdictional waters as defined by section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act, you will need to obtain a permit from the U.S. Army Corps of Engineers. Impacts to wetland habitats require site specific mitigation and monitoring. For questions regarding wetlands, please contact Mark Littlefield of this office at (916) 414-6580.

**Updates**

Our database is constantly updated as species are proposed, listed and delisted. If you address proposed and candidate species in your planning, this should not be a problem. However, we recommend that you get an updated list every 90 days. That would be February 12, 2007.

Addresses for cc:s

Annee Ferranti  
California Department of Fish and Game  
San Joaquin Valley and Southern Sierra Region  
1234 East Shaw Avenue  
Fresno, California 93710

**Responses to Letter B: US Fish and Wildlife Service – Peter A. Cross, San Joaquin Valley  
Deputy Assistant Field Supervisor**

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**Response to Comment B.1**

The comment states that the threatened vernal pool fairy shrimp (*Branchinecta lynchi*), the endangered vernal pool tadpole shrimp (*Lepidurus packardii*), and the threatened California tiger salamander (*Ambystoma californiense*) may be present in the project area. As described on pp. IV.H.7-IV.H.8 in the Draft EIR, aquatic habitats on the project site are irrigated pasture and anthropogenic freshwater marsh. The site lacks suitable habitat for vernal pool species such as the vernal pool fairy shrimp, vernal pool tadpole shrimp, and California tiger salamander. Furthermore, there are no published records or known extant populations of California tiger salamanders within the species' observed dispersal range of 1.24 miles.

**Response to Comment B.2**

The comment identifies the parameters of a “take” under the Endangered Species Act. Take under Section 9 of the Act is not expected, as federally-listed wildlife species are not known to inhabit or forage on the project site.

**Response to Comment B.3**

The comment contends that if disturbance of vernal pools or other federal, jurisdictional water bodies in the project site is proposed the U.S. Army Corps of Engineers should be contacted. The project site does not include vernal pools or other federal, jurisdictional water bodies. The aquatic habitats on the site are isolated from regional waterways and do not constitute Waters of the U.S. The Army Corps of Engineers has been notified of the proposed project and has not asserted jurisdiction over the isolated, anthropogenic freshwater marsh.

