

**AMERICAN COUNCIL OF ENGINEERING COMPANIES OF CALIFORNIA
ASSOCIATION OF CALIFORNIA WATER AGENCIES
BAY PLANNING COALITION
BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION
CALIFORNIA ALLIANCE FOR JOBS
CALIFORNIA ASSOCIATION OF REALTORS
CALIFORNIA BUILDING INDUSTRY ASSOCIATION
CALIFORNIA CATTLEMEN'S ASSOCIATION
CALIFORNIA CHAMBER OF COMMERCE
CALIFORNIA FARM BUREAU FEDERATION
CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSOCIATION
CALIFORNIA STATE ASSOCIATION OF COUNTIES
COALITION FOR HABITAT CONSERVATION
HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA
REGIONAL COUNCIL OF RURAL COUNTIES
WINE INSTITUTE**

September 30, 2008

Mr. Richard B. Rogers, President
Ms. Cindy Gustafson, Vice President
Mr. Jim Kellogg, Member
Mr. Michael Sutton, Member
Mr. Daniel W. Richards, Member
California Fish and Game Commission
1416 9th Street
P.O. Box 944209
Sacramento, CA 94244-2090

Re: Center for Biological Diversity vs. California Fish and Game Commission – Tiger Salamander

Dear Members of the California Fish and Game Commission:

Our organizations have reviewed the recent decision by the Third District of the California Court of Appeal – *Center for Biological Diversity vs. California Fish and Game Commission* - regarding a petition to list the California Tiger Salamander (CTS). All of the organizations respect the importance of protecting species from extinction and support the goals of the the California Endangered Species Act (CESA). At the same time, we also respect the role of the California Fish and Game Commission in administering CESA. For the reasons expressed in this letter, we respectfully urge the Commission to appeal this decision.

Our interest in this issue goes far beyond the narrow issue of whether the CTS should be a candidate species under CESA. We are concerned that the Court of Appeals decision has broad ramifications for the administration of CESA. It undermines CESA by disregarding the level of information required to be part of a petition to list a species as outlined in Section 2072.3 of the California Fish and Game Code. The ruling limits the Commission from exercising its statutory duty to weigh evidence that is presented to the Commission and disregards the fundamental right of the Commission to consider the status of candidacy on remand.

The issue of what standard the Commission should use in evaluating a petition for candidacy was eloquently addressed in *Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal.App.4th 1104, 1108-1109 (NRDC). The Commission has fulfilled its statutory duty by applying that standard in good faith in many cases including this one and has reached balanced decisions on numerous petitions. While the recent decision mentions the NRDC decision, we believe it modifies the NRDC standard. For example, it adopts a standard that once a petitioner makes a prima facie case for candidacy, the Commission must accept the petition unless the countervailing information and logic persuasively, wholly undercut some important component of that prima facie showing. This undermines the Commission's statutory fact finding duty as compared to the NRDC decision.

The decision is also troubling because it undercuts the statutory elements for candidacy in Section 2072.3. Section 2072.3 was specifically drafted to make sure that a petition included critically needed information to be used by the Commission to make sure that the petition was not only complete but included information to aid the Commission in the petition decision-making process. Here, the Court's decision disregards the Commission's findings that several required elements were not included in the petition by classifying them as "subordinate findings" and noting that "the critical question is not whether these subordinate findings have any merit. It is rather, whether they warrant the ultimate, statutory finding required to reject the petition."¹ Accepting a candidacy petition has immediate consequences for the regulated community. If these mandatory elements are no longer required, the practical effect of the decision would eliminate these elements from the petition.

Finally, the normal course of action to challenge an executive branch action is to remand the matter for further action in accordance with the decision. The Court's action disregards that standard and simply places itself in the role of the Commission by ordering the Commission to accept the petition without further consideration. Such an action is very troubling.

¹ Moreover, the Court seems to use the Brad Shaffer testimony at the hearing as potentially curing the deficiency in the petition. The Fish and Game Code is clear, however, that if significant new information is presented at the hearing, under 2073.7, the petition must be resubmitted to the department.

We appreciate the opportunity to express our concerns over the Appellate Court's decision in Center for Biological Diversity vs. California Fish and Game Commission and hope the Commission appeals the decision.

Sincerely,



Paul Meyer
American Council of Engineering Companies of California



Timothy Quinn
Association of California Water Agencies



Ellen Johnck
Bay Planning Coalition



Andy Henderson
Building Industry Legal Defense Foundation



Jim Earp
California Alliance for Jobs



Elizabeth Gavric
California Association of Realtors



Timothy L. Coyle
California Building Industry Association



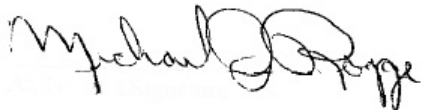
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California Cattlemen's Association



Valerie Nera
California Chamber of Commerce



Chris Scheuring
California Farm Bureau Federation



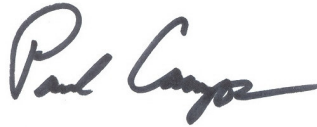
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