



September 24, 2008

SENT VIA FACSIMILE AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

San Francisco Recreation and Park Department
501 Stanyan Street
San Francisco, CA 94117
Fax: 415-831-2096

Dirk Kempthorne
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
Fax: 202-208-5048

**RE: 60-DAY NOTICE OF INTENT TO SUE FOR VIOLATIONS OF SECTION 9 OF
THE ENDANGERED SPECIES ACT – ILLEGAL TAKE OF CALIFORNIA RED-
LEGGED FROG AND SAN FRANCISCO GARTER SNAKE**

On behalf of the Center for Biological Diversity, I am writing to request that you take immediate action to remedy the San Francisco Recreation and Park Department's (SFRPD) ongoing violations of the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, resulting from the take of threatened and endangered species. The California red-legged frog and the San Francisco garter snake are federally listed species protected under the ESA. Despite this fact, SFRPD's operations and activities have killed and harmed, and continue to kill and harm, both the California red-legged frog and the San Francisco garter snake. By authorizing and committing activities that result in frog and/or snake take, SFRPD is in violation of ESA § 9, which prohibits the taking of listed species. SFRPD must take immediate action to conform to the federal mandate of the ESA and cease harmful activities within the known habitat of these protected species. Specifically, SFRPD must stop the harmful draining of Laguna Salada, Sanchez Creek, Horse Stable Pond, and the connecting canals at Sharp Park; must end habitat alteration in and around Laguna Salada, Sanchez Creek, and Horse Stable Pond; must cease all other management activities at Sharp Park that harm California red-legged frogs and San Francisco garter snakes (e.g., mowing, yard maintenance, sediment deposition, nutrient runoff); and must develop a plan that will prevent future harmful activities in Sharp Park to frogs and garter snakes. This letter is provided as official 60-day notice under the ESA citizen suit provision, 16 U.S.C. § 1540(g), of our intent to file suit in federal court to enforce the law if you do not act within the next 60 days to remedy these legal violations.

BACKGROUND

California red-legged frog (*Rana aurora draytonii*)

The largest native frog in the American West, the California red-legged frog can reach up to five inches in length. In adults, the bellies and undersides of the hind legs are red or salmon pink; backs are brownish and flecked with spots. Juveniles, with more pronounced dorsal spotting,

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may have yellow, not red, on the underside of the legs. The California red-legged frog was listed as threatened under the ESA in 1996; the U.S. Fish and Wildlife Service (FWS) designated critical habitat in 2006, and developed a recovery plan in 2002.

Once so common it was a staple cuisine, the California red-legged frog originally declined due to overharvesting and subsequent introduction of predacious bullfrogs, which still pose a problem. Now it also falls prey to more modern threats — pesticide use, loss of its wetlands habitat to urbanization and agriculture, and global warming.

Originally found throughout California's Central Valley, and along the coast from Point Reyes National Seashore down to northwestern Baja California, today the California red-legged frog occupies a range from Sonoma and Butte counties in the north to Riverside County in the south, mostly in the western counties. They reside in about 238 streams or drainages in 23 counties, with Monterey, San Luis Obispo, and Santa Barbara counties supporting the most frogs. They now exist in about 30 percent of their historic range.

The California red-legged frog prefers aquatic habitat such as ponds, marshes and creeks with still water for breeding. It needs riparian and upland areas with dense vegetation and open areas for cover, estivation (summertime hibernation), food and basking. Frogs in cooler areas may hibernate in burrows for the winter.

Aquatic Breeding Habitat

California red-legged frogs typically lay eggs between December and early April. Eggs hatch within 6 to 14 days, depending on water temperatures, and require approximately 20 days to develop into tadpoles. Tadpoles in turn require anywhere between 11 to 20 weeks to develop into terrestrial frogs. Water bodies suitable for tadpole rearing must remain watered at least until the tadpoles metamorphose into adults, typically between July and September.

Aquatic breeding habitat is essential for providing space, food, and cover necessary to sustain all life stages of California red-legged frogs. It consists of low-gradient fresh water bodies, including natural and manmade (e.g., stock) ponds, backwaters within streams and creeks, marshes, lagoons, and dune ponds.

Non-Breeding Aquatic Habitat

Aquatic non-breeding habitat is essential for providing the space, food, and cover necessary to sustain California red-legged frogs. Nonbreeding aquatic habitat consists of those aquatic elements identified above, and also includes, but is not limited to, other wetland habitats such as intermittent creeks, seeps, and springs. California red-legged frogs can use large cracks in the bottom of dried ponds as refugia to maintain moisture and avoid heat and solar exposure. Without these non-breeding aquatic features, California red-legged frogs would not be able to survive drought periods, or be able to disperse to other breeding habitat.

Upland Habitat

Upland and riparian habitats associated with aquatic habitat are essential to maintain California red-legged frog populations. Upland and riparian habitats provide food and shelter sites for California red-legged frogs and assist in maintaining the integrity of aquatic sites by protecting them from disturbance and supporting the normal functions of the aquatic habitat. Upland habitat associated with occupied wetland habitat often contains blackberry and other upland perennial species that provide for shelter from predatory species, and forage habitat.

San Francisco garter snake (*Thamnophis sirtalis tetrataenia*)

The San Francisco garter snake (“SFGS”) was designated as endangered under the ESA in 1967, and FWS published a five-year review for the species reaffirming endangered status in 2006. All known populations of the SFGS occur in San Mateo County near freshwater marshes, ponds, and slow-moving streams along the coast.

As explained in the Recovery Plan for the SFGS, because of its very distinctive coloration, the SFGS is considered one of the most beautiful snakes in North America. While most garter snakes have a conspicuous pale yellow or orange vertebral stripe and a pale stripe low on each side, the SFGS has a wide dorsal stripe of greenish-yellow edged with black, bordered on each side by a broad red stripe which may be broken or divided, followed by a black stripe. The belly is greenish-blue in color and the top of the head is red.

Essential habitat for the SFGS includes open grassy uplands and shallow marshlands with emergent vegetation, and the presence of Pacific tree frog and California red-legged frog breeding populations, as prey items. Habitat loss and habitat fragmentation are the principal reasons for decline of the SFGS. This includes loss and adverse modification of wetland and adjacent upland habitat by urban, industrial, and recreational development, as well as agricultural conversion, stream and creek channelization, removal of emergent riparian vegetation, and riprapping of streambanks and shorelines.

Sharp Park (as described in the San Francisco Recreation And Park Department Final Draft, February 2006, Significant Natural Resource Areas Management Plan)

Sharp Park is located in the town of Pacifica in San Mateo County. The park borders the Pacific Ocean and is bisected by Highway 1. The Sharp Park Golf Course and Laguna Salada are on the western side of Highway 1. An archery range and extensive canyon are on the eastern side.

At just over 400 acres, Sharp Park is the second-largest park in overall acreage in the San Francisco Recreation and Park Department system; only Lake Merced is larger. The Natural Areas account for approximately 237 acres within Sharp Park and encompass the upper canyon areas, portions of Sanchez Creek, and the Laguna Salada wetlands and associated vegetation. The vegetation of Sharp Park is dominated by invasive forest and a golf course, but also contains significant areas of wetlands and scrub vegetation.

As one of the largest SFRPD parks that has habitat which supports endangered species, Sharp

Park has high natural resource and recreational values that include: a free-flowing creek (Sanchez Creek) and large brackish lake (Laguna Salada); being situated between two regionally significant open spaces (Milagra and Sweeney ridges); regionally important wildlife habitat and connections between habitat; populations of California red-legged frog (*Rana aurora draytonii*), San Francisco garter snake (*Thamnophis sirtalis tetrataenia*), mission blue butterfly (*Icaricia icarioides missionensis*), and San Francisco forktail damselfly (*Ischnura gemina*); attractive habitat for resident and migratory birds; significant stands of coastal scrub habitat; large expanses of wetland habitat; and coastal access and views.

Arrowhead Lake is an irrigation reservoir regulated to provide irrigation water in the dry season. Discharge from Arrowhead Lake flows through the Sharp Park Golf Course to Horse Stable Pond near the ocean. Water is pumped from Horse Stable Pond to the ocean via an automated system installed to maintain a stable elevation in the pond. The other major water feature is Laguna Salada. In its original condition, Laguna Salada was similar to other tidal lagoons along coastal California: it trapped winter runoff until the water overtopped the dunes and formed a connection to the ocean. Construction of the golf course modified this seasonal connection to the ocean and completion of the levee prevented the exchange of tidal water except for rare events when storms breached the levee.

Breeding of the federally threatened California red-legged frog has been documented at Laguna Salada. During survey work conducted in the early 1990s, juvenile California red-legged frogs were common around the Horse Stable Pond and the connecting canals. For unknown reasons California red-legged frogs were more common in areas around the Horse Stable Pond than Laguna Salada itself or Sanchez Creek. Some California red-legged frogs have been observed in the lower reach of Sanchez Creek. Surveys conducted in 1999 resulted in observations of two adults and nine egg masses, indicating that a breeding population of California red-legged frogs remains at Laguna Salada and the Horse Stable Pond. Surveys for California red-legged frog egg masses have continued and in 2003, 44 egg masses and two adults were observed. In 2004, 52 egg masses were found. In 2005, 14 egg masses were found. The operation of the pumps that drain down the water in Horse Stable Pond has in the past stranded egg masses above the water line. In addition to pump operation, off-leash dogs have been observed running through the wetland.

Surveys for San Francisco garter snakes started at Sharp Park in the mid-1940s indicated that relatively large numbers of these snakes could be found in the Laguna Salada area. The population had declined by 1979 when 37 snakes were observed in the wetland adjacent to the Horse Stable Pond and 46 were observed on Mori Point. Extensive trapping efforts in the mid to late 1980s resulted in the capture of only two San Francisco garter snakes. During surveys conducted from 1990 to 1992, three San Francisco garter snakes were observed at Mori Point, but none within Sharp Park itself. San Francisco garter snakes were observed at Horse Stable Pond in 2005. Also, surveys conducted by the California Department of Fish and Game (CDFG) in 2004, using traplines, found San Francisco garter snakes in wetlands around Laguna Salada. The quality of habitat available at Laguna Salada, the Horse Stable Pond, and the adjacent wetlands remains excellent. The adjacent upland habitat at Mori Point likely provides the required estivation areas for San Francisco garter snakes. Additionally, a suitable prey base (primarily frogs) is available for this species in the area. For these reasons, it seems highly likely

that this species continues to use the Laguna Salada, Horse Stable Pond, and adjacent wetlands areas as feeding grounds.

Breeding habitat for California red-legged frog can be found in the connecting canal between Laguna Salada and Horse Stable Pond and within the pond itself. Pumping operations at Horse Stable Pond reduce the water surface elevation in this pond and expose egg masses, thereby reducing reproductive success.

The Laguna Salada area has been described as prime habitat for San Francisco garter snake. Historically, large numbers of snakes could be found here. Populations at Laguna Salada have declined in recent years, a fact partially attributed to the pet trade, a decline in prey abundance, and destruction of habitat. There are several elements that are required for habitat to be suitable for this species. Foraging typically occurs in a complex array of shallow open water and dense riparian vegetation. Foraging areas should support an abundant frog population, the snake's preferred prey. Foraging habitat should be adjacent to suitable upland estivation habitat, typically rodent burrows, where the snakes can spend the dry summer months.

STATUTORY FRAMEWORK

Under Section 9 of the ESA, it is unlawful for any person to “take” an endangered species. 16 U.S.C. § 1538(a)(1)(B). To “take” means to *harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.* 16 U.S.C. § 1532(19) (emphasis added). “Take” includes direct as well as indirect harm and need not be purposeful. *See Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 (1995). In fact, a take may even be the result of an accident. *See National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir.1994). Attempting to cause almost any level of injury to an endangered species is prohibited by law. “Take is defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” *Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294, 1300 (8th Cir. 1989). The Section 9 prohibition on “take” applies equally to threatened species, unless otherwise indicated by a species-specific rule promulgated by the FWS pursuant to ESA § 4(d). 50 C.F.R. § 17.31(a); 50 C.F.R. §§ 17.43.

It is unlawful for any person to “cause [an ESA violation] to be committed.” 16 U.S.C. § 1538(g). The term “person” includes “any officer, employee, agent, *department, or instrumentality . . . of any State, municipality, or political subdivision of a State . . . [or] any State, municipality, or political subdivision of a State . . .*” 16 U.S.C. § 1532(13) (emphasis added). The ESA “not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking. [A] governmental third party pursuant to whose authority an actor directly exacts a taking . . . may be deemed to have violated the provisions of the ESA.” *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir.1997) (holding that by issuing licenses and permits authorizing gillnet and lobster pot fishing, activities known to incidentally injure Northern right whales, Massachusetts officials had exacted a taking). *See also Defenders of Wildlife v. Administrator, EPA*, 688 F.Supp. 1334 (D. Minn. 1988), *aff’d by Defenders of Wildlife v. Administrator, EPA*, 882 F.3d 1294 (8th Cir.1989) (holding the U.S. Environmental Protection Agency (EPA) liable for take associated with the

registration of strychnine even though the administration of the pesticide, which was known to poison endangered species, was actually carried out by third parties); *Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231 (11th Cir.1998), *cert. denied*, 526 U.S. 1081 (1999) (holding that plaintiff had standing to proceed against Volusia County for take of threatened and endangered sea turtles, which were harmed by the private, artificial light sources permitted by the County's regulations); *Sierra Club v. Lyng*, 694 F.Supp. 1260 (E.D. Tex. 1988), *aff'd by Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir.1991) (holding the U.S. Forest Service liable for take because its even-aged management plan allowed private companies to harvest timber in a way that degraded the habitat of the endangered red-cockaded woodpecker); *U.S. v. Town of Plymouth, Mass.*, 6 F.Supp.2d 81 (D.Mass. 1998) (holding the Town of Plymouth liable for the take of endangered piping plovers that had either been run over or isolated from their food source by off-road vehicles, which were allowed on the beach under the Town's policies).

The ESA has a broad citizen suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person, including . . . any . . . governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA].” U.S.C. § 1540(g). A plaintiff can seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in take. *See Burlington Northern Railroad*, 23 F.3d 1508 at 1511; *Murrelet v. Pacific Lumber Co.*, 83 F.3d 1060, 1066 (9th Cir. 1996) (“A reasonably certain threat of imminent harm to a protected species is sufficient for issuance of an injunction under section 9 of the ESA.”).

NOTICE OF VIOLATION

SFRPD is violating ESA § 9. It is committing an illegal, ongoing take of California red-legged frog and San Francisco garter snake through its allowance of lake and pond drainage (e.g., Laguna Salada, Horse Stable Pond, and the connecting canals), mowing, and other activities that harm these listed species. For instance, as explicitly stated in a letter from FWS to SFRPD (Exhibit A), the “operation of a water pump [by SFRPD] . . . lowered the water level . . . and resulted in the stranding and exposure of a number of egg masses . . . [in violation of section 9 of the ESA].” More recently, a report noted that “at Horse Stable Pond, receding water levels caused by pumping has stranded egg masses and caused them to desiccate. Egg masses stranded by receding water levels in Horse Stable Pond were recorded in 2003, 2004, and 2005 (SFRPD unpubl. data). In 2008, [surveyors] observed several egg masses that had been deposited on broken cattail stalks stranded above the water line following pumping.” Draft Sharp Park Wildlife Surveys And Special Status Reptile And Amphibian Restoration Recommendations (2008). Similarly, “as in Horse Stable Pond, drawdown of water in the Canal more than a few centimeters poses a significant desiccation risk to developing eggs attached to emergent vegetation and to those deposited in shallow water.” *Id.* In short, there is documented evidence of past and recent take of California red-legged frogs, and it is our understanding that SFRPD will continue to drain water from or otherwise alter Laguna Salada, Horse Stable Pond, Sanchez Creek, and the connecting canals, and in doing so will strand egg masses and prevent frog breeding habitat from reestablishing along the perimeter of the lagoon and pond. Pumping can also cause “take” when tadpoles are caught in the pump and die, or when tadpoles are forced from the pond into the ocean where they die.

It is likewise our understanding that maintenance and mowing operations have injured or killed, and will continue to injure or kill, San Francisco garter snakes in Sharp Park. San Francisco Garter Snake 5-year Review at 17 (“a SFGS was killed last year by a lawn mower at a golf course”). Moreover, golf courses are associated with intensive chemical use which may contribute to the degradation of important aquatic habitat and movement corridors, negatively impacting not only the SFGS but its prey base as well (i.e., the red-legged frog). *Id.* As long as these harmful activities continue, SFRPD will be in violation of section 9 of the ESA.¹

CONCLUSION

The Center for Biological Diversity is dedicated to stopping the illegal killing and harming of the California red-legged frog and San Francisco garter snake. We are hopeful that SFRPD will remedy the ongoing take of these species, which results from SFRPD’s activities and/or SFRPD’s authorization of activities at Sharp Park. We ask that SFRPD alter its drainage and mowing operations, as well as its chemical use, in Sharp Park such that no additional take of federally protected species will occur. Please contact us if you believe that any of the above analysis of fact or law is incorrect or if you wish to discuss this letter further.

Sincerely,

A handwritten signature in cursive script that reads "Justin Augustine".

Justin Augustine

¹ Take of the San Francisco garter snake also violates the California Fish and Game Code, section 5050 (fully protected species), and section 2080 (endangered species). Therefore, in addition to ESA violations, SFRPD is in violation of state law when it conducts activities at Sharp Park that result in the “take” of the San Francisco garter snake.

EXHIBIT A



UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
OFFICE OF LAW ENFORCEMENT
2800 COTTAGE WAY, ROOM W2928
SACRAMENTO, CA 95825



Telephone: (916) 414-6660

Fax: (916) 414-6715

February 1, 2005

HAND DELIVERED

Sean Sweeney, Golf Program Manager

City of San Francisco Recreation and Parks Department
San Francisco, CA 94117

Dear Mr. Sweeney,

This letter concerns the threatened California red-legged frog (*Rana aurora draytonii*) and "Horse Stable Pond" at Sharp Park Golf Course in San Mateo County, California. This animal is protected under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.). The California red-legged frog was listed as threatened on May 23, 1996 (6/FR 25832).

It is our understanding that beginning in early 2003 through 2004 and presently, the operation of a water pump that is controlled by the City and County of San Francisco Recreation and Parks Department (during the winter rainfall events) lowered the water level at Horse Stable Pond and resulted in the stranding and exposure of a number of egg masses of the California red-legged frog. This action apparently caused the death of an unknown quantity of embryonic tadpoles of the completely aquatic early stage of this animal's lifecycle.

Section 9 of the Act prohibits the take of any federally listed animal species by any person subject to the jurisdiction of the United States. As defined in the Act, take is defined as "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." "Harm" has been further defined to include habitat destruction when it injures or kills a listed species by interfering with essential behavioral patterns, such as breeding, foraging, or resting. Thus, not only is the California red-legged frog protected from such activities as collecting, but also from

actions that damage or destroy its habitat. The term "person" is defined as "...an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal government, of any State, municipality, or political subdivision of a State, or any other entity subject to the jurisdiction of the United States."

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 the project and a listed species is going to be adversely affected, then initiation of formal consultation between that agency and the Service pursuant to section 7 of the Act is required. Such consultation would result in a biological opinion addressing the anticipated effects of the project to the listed species and may authorize a limited level of incidental take. If a Federal agency is not involved in the project, and federally listed species may be taken as part of the project, then an incidental take permit pursuant to section 10(a)(1)(B) of the Act should be obtained. The Service may issue such a permit upon completion of a satisfactory conservation plan for the listed species that would be taken by the project.

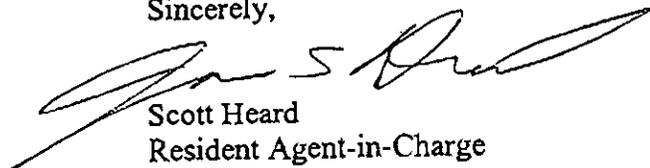
In order to avoid further potential violations of the Endangered Species Act, we recommend that you obtain authorization for incidental take through either Section 7 or 10(a)(1)(B), as appropriate for the California red-legged frog, and also the endangered San Francisco garter snake (*Thamnophis sirtalis tetrataenia*) which also has been documented to inhabit the area.

Enclosed for your convenience and future reference is a copy of Title 16, United States Code, Section 1531 et seq., as well as a copy of Title 50, Code of Federal Regulations, Section 17.

Should you have any questions or wish to seek assistance or further clarification, please feel free to contact Special Agent Marilee Brown at 916-414-6665.

Your compliance and cooperation on this matter would be greatly appreciated.

Sincerely,



Scott Heard
Resident Agent-in-Charge

cc. Special Agent Brown
Special Agent Ken McCloud
Chief of Endangered Species – Sacramento, CA

Encl. 16 USC 1538 et seq.
50 CFR Part 17