

San Luis & Delta-Mendota Water Authority



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VIA FEDERAL E-RULEMAKING PORTAL

Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2018-006
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Division of Policy and Directives Management
U.S. Fish & Wildlife Service
MS:BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments Re: Proposed Revision of Regulations for Interagency Cooperation, Prohibitions to Threatened Wildlife and Plants, and Listing Species and Designating Critical Habitat

To Whom it May Concern:

The San Luis & Delta-Mendota Water Authority (“Water Authority”) submits the following comments in response to the following notices regarding proposed revisions to regulations by the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”):

1. Revision of the Regulations for Interagency Cooperation, 83 Fed. Reg. 35178 (July 25, 2018), Docket No. FWS-HQ-ES-2018-0009;
2. Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174 (July 25, 2018), Docket No. FWS-HQ-ES-2018-007; and
3. Revision of the Regulations for Listing Species and Designating Critical Habitat 83 Fed. Reg. 35193 (July 25, 2018), Docket No. FWS-HQ-ES-2018-0006.

The Water Authority appreciates the opportunity to provide these comments on the proposed revisions to regulations regarding implementation of the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* (“ESA”). The Water Authority is a public agency with its principal office is located in Los Banos, California. It was formed in 1992 as a joint powers authority, and has twenty-eight member agencies. Twenty-six of these agencies contract with the United States for the delivery of water from the federal Central Valley Project (“CVP”). The CVP is operated and managed by the United States Bureau of Reclamation (“Reclamation”).

Most of the Water Authority's member agencies depend upon the CVP as the principal source of water they provide to users within their service areas. That water supply serves approximately 1.2 million acres of agricultural lands within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara Counties, a portion of the water supply for nearly 2 million people, including in urban areas within Santa Clara County referred to as Silicon Valley, and more than 90,000 acres of managed wetlands and wildlife refuges within the largest continuous wetland in the western United States.

The Water Authority and its member agencies have a significant stake in the effective, consistent, and efficient implementation of the ESA, implementation informed by the best available science and data. The reliability and quantity of CVP water supplies available to many of the Water Authority's member agencies has been significantly diminished over the past twenty-five years. This loss is due in significant part to implementation of the ESA, specifically measures adopted under the ESA to change the operations of the CVP for the intended benefit of listed California native fish species. Even though the most significant of those measures have been in effect for ten years or more, those measures have not improved the abundance of those listed fish species, which by some measures is now at near record lows. It is frustrating to member agencies to see that the substantial losses they have sustained have apparently not yielded benefit for the fish.

The Water Authority supports the efforts by FWS and NMFS to clarify their existing ESA regulations. Over the decades since the ESA was adopted some confusion has arisen regarding its scope and intended application. The proposed revisions should help guide more consistent and focused application by FWS and NMFS, better inform stakeholders regarding what they should expect in the consultation and listing processes, and improve protections for listed species through improved analysis and decision making. Our specific comments in response to each notice are below.

A. Proposed Revision of Regulations for Interagency Cooperation

1. Single, Combined Consultation Involving Both FWS and NMFS

While not part of the proposed revisions to the regulations on interagency consultation, the notice requests comment on using a single consultation that results in a single biological opinion, for Federal agency actions that affect some species under the jurisdiction of FWS and other species under the jurisdiction of NMFS. 83 Fed. Reg. at 35179. That is the circumstance with operation of the CVP by Reclamation. The CVP affects species such as the Delta Smelt, under the jurisdiction of FWS, as well as salmon species under the jurisdiction of NMFS, such as the Sacramento River winter-run Chinook salmon. Based on the experience of separate consultations regarding the CVP, the Water Authority believes there is a need for a single consultation process.

In the case of operations of the CVP, FWS and NMFS separately consulted with Reclamation. FWS issued a biological opinion in 2008, and NMFS issued a separate opinion in 2009. The biological opinions yielded measures to change operations of the CVP that conflicted. The FWS opinion prescribed greater outflow to San Francisco Bay, for the benefit of the Delta

Smelt. That requirement tends to reduce levels of storage in CVP reservoirs. The NMFS opinion prescribed higher levels of storage in the CVP's largest reservoir, Lake Shasta, to provide cooler water temperatures for salmon spawning downstream. Hence the measures required by each biological opinion were at odds with each other. A single process and consultation would require the agencies to work through any such conflicts as part of the consultation process.

Regarding authority, nothing in ESA section 7 would prohibit a single combined consultation involving both FWS and NMFS. Under existing assignments of program responsibilities, of course, FWS and NMFS would each have to participate in the consultation, and in issuing any resulting biological opinion, as the meaning of "Secretary" as used in section 7 depends upon program responsibilities. 16 U.S.C. § 1532(15). At a minimum, implementation would require some formal determination early in the process that it will be a joint consultation resulting in a single biological opinion, so that staff from each agency is involved early on in deciding on information needs and the appropriate mode of analysis for each species involved.

A single combined consultation would be consistent with NMFS and FWS's ESA Consultation Handbook as well, which directs that the agencies should strive to coordinate their informal and formal consultations. The Handbook notes that "[c]oordination between FWS and NMFS is critical to ensure any reasonable and prudent alternatives prescribed by both the Services ... are compatible."

2. Definition of Destruction or Adverse Modification

Overall, the Water Authority supports the clarifications to the definition of "destruction or adverse modification," a term that applies to determinations of effects on critical habitat.

The Water Authority respectfully disagrees with statements suggesting that it may be appropriate to base such a determination on effects to an area that is not currently suitable habitat, but might someday become suitable habitat if substantially modified. 83 Fed. Reg. 35181-82. The example of the recent designation of critical habitat for the dusky gopher frog raises concerns that such determinations can overstep the ESA. It will be important to heed the guidance in the preamble that this definition is not meant to allow adverse modification findings based on "speculation or desire about future changes to the critical habitat." *Id.* at 35182.

The Water Authority agrees with the clarification in the preamble that the requirement that the effect be "appreciable" applies even where a species faces severe threats prior to the proposed agency action. *Id.* As is explained there, statements to the effect that baseline conditions already "jeopardize" a species reflect confusion about the determinations required by section 7. Section 7 address the effect of the proposed agency action. While baseline conditions are relevant to the effect an action may have on a species, baseline conditions do not "jeopardize" a species or "adversely modify" critical habitat in the sense intended in section 7.

Section 7(a)(2) of the ESA provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered

species or threatened species or result in the destruction or adverse modification of [critical habitat] . . .” 16 U.S.C. § 1536(a)(2). This section prohibits agency actions from causing jeopardy or destruction or adverse modification of critical habitat. In *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917 (9th Cir. 2007), the Ninth Circuit explained:

To “jeopardize”—the action ESA prohibits—means to “expose to loss or injury” or to “imperil.” Either of these implies causation, and thus some new risk of harm. Likewise, the suffix “-ize” in “jeopardize” indicates some active change of status: an agency may not “cause [a species] to be or to become” in a state of jeopardy or “subject [a species] to” jeopardy. [Citation.] Agency action can only “jeopardize” a species’ existence if that agency action causes some deterioration in the species’ pre-action condition.

524 F.3d at 930. This same logic informs the meaning of “destruction or adverse modification” – agency actions can violate this prohibition only if they will “result in,” i.e. cause, some destruction or adverse modification of critical habitat. Further, in a biological opinion, the Secretary is required to “detail[] how the agency action affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A). ESA section 7 is thus concerned with determining what effects will be caused by a proposed agency action. Statements that baseline conditions “jeopardize” a species misunderstand and obscure the determination required by ESA section 7.

3. Definition of Effects of the Action

The Water Authority agrees with the proposed changes to the definition of “effects of the action.” The changes should simplify the determination of the effects of an action, and clarify the analysis required by ESA section 7.

The current definition requires sometimes confusing segregation of effects into “direct” effects, “indirect” effects, and “interrelated and interdependent effects.” The proposed definition properly focuses on what effects are caused by the proposed action, and what are the effects of activities caused by the proposed action, without requiring categorization. The “but for” causation requirement, and “reasonably certain to occur” standard are necessary to avoid a speculative attribution of effects to proposed actions.

The revised definition does not alter the scope of effect that should be considered by the Services, and is consistent with the ESA. That said, it may result in changes in the effects considered in practice, because it is easier to understand and apply than the existing definition.

4. Definition of Environmental Baseline

The Water Authority supports the proposal to remove the definition of “environmental baseline” from the definition of “effects of the action” and state it as a separate definition. Its current placement within the definition of effects of the action sometimes results in confusion, and obscures its importance to the analysis required by ESA section 7. The related proposed

revisions to 50 C.F.R. § 402.14(g), concerning the analytical framework for formal consultation, are likewise appropriate to clarify the appropriate process.

Consultation regarding ongoing agency action has proven to be challenging. The consultations on the ongoing operations of the CVP provides an example of the challenges. The analysis done for those consultations has not well delineated the difference between the effects Reclamation has an ability to avoid from those it does not. The effects from the existence of CVP dams, for example, was not distinguished from the effects of discretionary project operations. The potential revisions to the definition of environmental baseline described in the preamble, at 83 Fed. Reg. 35184, would highlight the necessity for such an analysis. The Water Authority recognizes that it is difficult to fashion a generally applicable rule that will ensure the proper analysis in each case. The potential revisions are a reasonable effort at doing so. Even with those revisions in the definition, however, the test will come in implementation.

Correctly identifying the effects of a proposed action is essential to effective implementation of ESA section 7. By identifying what actions are effects of the action, versus effects of baseline conditions, the Services and the action agency can focus upon and address those effects. The CVP, for example, operates in an environment in which many factors affect listed species. Absent a careful delineation of baseline effects versus effects of the proposed action, impacts to the species can be inappropriately attributed to the proposed action. In that event, changes to the proposed action intended to reduce those supposed effects may be ineffective or misdirected, because they do not address the factors that are actually significantly affecting the species. The proposed revisions regarding environmental baseline therefore should improve outcomes for listed species, by better focusing analysis on what effects will be added by the proposed action.

B. Proposed Revision of Regulations for Listing Species and Designation of Critical Habitat

1. Foreseeable Future

The Water Authority supports the proposed revision to section 424.11(d) to define “foreseeable future.” A determination of the threat of extinction made for purposes of a listing decision should not turn on speculation or surmise. The proposed definition will help avoid that by requiring that the future conditions relied upon to support a determination that a species is threatened with extinction are “probable.”

The additional requirement that the Services describe how it determined the foreseeable future for a species on a case-by-case basis is also useful. A requirement to be explicit in analysis typically improves decision making, and the explanation will inform the public of how the Services made a decision whether to list a species. The explanation will also usefully inform future decision making regarding the listing status of a species or its critical habitat, by creating a record on which to evaluate past projections of future conditions as the future actually unfolds and conditions change or develop.

2. Unoccupied Areas as Critical Habitat

The recent designation of critical habitat for the dusky gopher frog has been controversial because it includes privately held property that is currently unoccupied by the frog, does not currently include all the characteristics necessary to support the frog and will not absent substantial human intervention, and there is no reasonable prospect that the owner will make those habitat modifications necessary to make it suitable habitat. The designation is the subject of legal challenges, and the United States Supreme Court will likely soon rule on whether that designation exceeded FWS's authority under the ESA. Based on the discussion in the preamble regarding a threshold lower than "likely" for unoccupied areas thought to be particularly valuable for conservation (83 Fed. Reg. 35198-99), it is not apparent whether the revisions proposed now would prevent a future designation similar to the designation for the dusky gopher frog. If the Supreme Court rules for petitioners regarding that designation, FWS and NMFS may need to revisit these proposed changes to bring the regulation into conformity with the ESA.

C. Proposed Revision to Regulations for Prohibitions to Threatened Wildlife and Plants

The Water Authority supports FWS's proposal to end its practice of automatically extending the take prohibition to all species newly listed as threatened species, and instead use its authority under ESA section 4(d) to adopt take regulations on a species-specific basis. In California, NMFS has successfully used the alternative approach of tailoring the take prohibition pursuant to ESA section 4(d). For example, by regulation NMFS excuses incidental take of certain salmonid species by smaller water diversions if the diversions include fish screens that meet specified criteria. That approach saves NMFS staff time and expense of individually permitting smaller diversions. The diverters likewise save time and expense, and have greater certainty regarding the time and expense involved in complying with the ESA. Species likely benefit from greater compliance, because the time and expense of compliance is reduced. It does require more work up front to craft a species-specific regulation, but that investment will likely prove well worthwhile for FWS, the regulated community, and the subject species.

Conclusion

The Water Authority appreciates this opportunity to comment on the proposed revisions to regulations. On the whole, the revisions should improve implementation of the ESA for the Services, Federal action agencies, and interested stakeholders, and should improve outcomes for listed species.

Regards,



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