

Council for Endangered Species Act Reliability
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September 8, 2008

**VIA HAND DELIVERY AND
FEDERAL eRULEMAKING PORTAL**
<http://www.regulations.gov>

Public Comments Processing
Attn: FWS-R8-ES-2008-0067
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

Re: Comments on 90-Day Finding on a Petition to Reclassify the Delta Smelt
(*Hypomesus transpacificus*) From Threatened to Endangered, 73 Fed. Reg. 39639-39643
(July 10, 2008)

Dear Reviewer:

This cover letter and the enclosed attachment constitute the comments of the Council for Endangered Species Act Reliability (“CESAR”) on the above-captioned matter (“90-Day Finding”). CESAR is a nonprofit, public interest organization whose mission is to ensure the efficient and effective enforcement of the Endangered Species Act (“ESA”), fulfill the educational goals of our members and provide educational information on the ESA and its application to the general public in the process. We support the finding of the U.S. Fish and Wildlife Service (“FWS”) that the reclassification of the delta smelt from threatened to endangered “may be warranted” and the decision to initiate a status review.

CESAR is pleased to take this opportunity to strongly urge the FWS to adhere to the requirements of the ESA, 16 U.S.C. §§1531, *et seq.*, and the Information Quality Act (Pub. L. No. 106-554, §515) (“DQA”), particularly the Office of Management and Budget’s (“OMB”) Final Information Quality Bulletin for Peer Review, 70 Fed. 2664-2677 (January 14, 2005) (“Final Bulletin”), in completing this status review of the species. Strict adherence to these laws will ensure consideration of and decision-making based solely on the best scientific and commercial data available, as required by ESA Section 4(b), and will enhance the quality and credibility of the FWS’s development of a scientific assessment where, as here, that information when disseminated will have a clear and substantial impact on important public policies and private sector decisions, as defined in the Final Bulletin.

For the reasons detailed below, CESAR supports the conclusion that the delta smelt may be endangered based on the recent continued declines in abundance indices for the species. As

presented in the 90-Day Finding, however, the FWS's current scientific assessment fails to meet the requirements of the law.

I. General Comments

A. **The Bay-Delta Is of Great Importance to California's Health and Prosperity.**

The delta smelt are endemic to the Sacramento-San Joaquin River Delta ("Delta") /San Francisco Bay area ("Bay-Delta"), which is currently designated as critical habitat for the delta smelt. The Delta is widely known to be a hub for distribution of water emptying into the Bay-Delta estuary to other regions of California, including the Central Valley and Southern California. The Bay-Delta estuary includes California's two largest rivers, the Sacramento, which flows into the Delta from the north, and the San Joaquin, which flows into the Delta from the south. Water that accumulates in these rivers flows through the Delta and is either diverted elsewhere or goes into Suisun Bay and, from there, continues to the San Francisco Bay and then the Pacific Ocean. (*See generally: In re Bay-Delta Env'tl Impact Report Coordinated Proceedings*, 133 Cal.App.4th 154, 170 (3rd DCA, 2005) (Reversed by *In re Bay-Delta Programmatic Env'tl. Impact Report Coordinated Proceedings*, 2008 Cal. LEXIS 6737 (2008) (cited here for factual background only).

The Delta consists of major transportation networks, towns, homes, and businesses and a maze of tributaries, sloughs and islands covering over 738,000 acres in five counties. Around 641,000 acres in the Delta area have been classified as some of the highest quality soils for agricultural production in California. In the San Joaquin River region, 1996 figures show over 3.7 million acres of important farmland; in the Sacramento River region over 2.4 million acres; in the Bay region, including the counties of Contra Costa, Solano, Napa, and Sonoma, approximately 493,000 acres.

Areas influenced by the Delta hub include the Central Valley, which stretches nearly 500 miles from Redding in the north to Bakersfield in the south and more than 100 miles from the Sierra Nevada in the east to the coastal ranges in the west, and Southern California, home to two-thirds of the state's population and approximately 2.1 million acres of important farmland. Delta water deliveries help to sustain a \$36.6 billion farming industry and a significant contribution to California's \$1.6 trillion gross state product by a combination of Silicon Valley companies in the Bay region and energy, tourism and entertainment industries south of the Delta. (*See Legislative Analyst's Office Cal Facts 2006, California's Economy and Budget in Perspective, available at http://www.lao.ca.gov/2006/cal_facts/2006_calfacts_econ.htm.*)

Average annual precipitation in the state is a meager 24 inches, ranging from as little as zero in the southern desert regions to as much as 100 inches in the mountainous north coast regions. The overall runoff in the state varies from year to year, for example, with a low of 15 million acre-feet in 1977 and a high of 135 million acre-feet in 1983. Sixty percent of the state's precipitation is transpired by trees and other vegetation. Half of the approximately 71 million acre-feet of water left ends up as runoff that gathers in streams and other watercourses and flows through the Delta.

Due to the need to prevent seasonal flooding that caused serious damage to farms and cities along the Sacramento and San Joaquin Rivers and to ensure a reliable water supply for various water users, the federal Central Valley Project (“CVP”) was built beginning in 1937, with the first water deliveries in 1940. Later, in order to address the need to redistribute water supply from areas of surplus to areas of deficiency, the State Water Project (“SWP”) was built beginning in 1967, with first water deliveries in 1971.

The ecology of the Bay-Delta is continually evolving and changing as it has been since its discovery. There are a number of factors affecting the wildlife and fishery habitat and the quality of drinking water and other water supply needs for consumption by residential, farming and municipal and industrial users. These factors are broadly acknowledged and include both natural phenomena, e.g., organic carbon, saltwater intrusion, disease, and predation; and human activities, e.g., waste discharges, introduction of invasive species, unscreened diversions, overfishing of some species, fish barriers, and channel alterations, among other things. Government agencies have convened a number of fora and attempted various woefully ineffective efforts to address the current conditions in the ecology of the Delta with the consequent ESA listing of the delta smelt, among other species (e.g., salt marsh harvest mouse, valley elderberry longhorn beetle, and various salmonid species.)

In an attempt to evaluate existing drought conditions in California and assess hydrologic and climatic variability over time that may be related to human-caused climate change, the Department of Water Resources recently published *California Drought, An Update, in April 2008*, available at <http://www.water.ca.gov/drought/>. The discussions, study recommendations and models presented there need to be a part of the scientific assessment made by the FWS during the status review and any later rulemaking.

B. Regulatory Efforts to Protect the Delta Smelt and Provide For Improved Water Quality and Water Supply Reliability Have Been Ineffective Due to Ongoing Misdirection by the Agencies.

Until 2007, the most prominent forum for regulatory agencies charged with core regulatory responsibilities in the Bay-Delta was collectively known as CALFED, a conglomeration of 18 state and federal agencies with management or regulatory authority over the Bay-Delta, including the California Resources Agency, the State Water Resources Control Board, the Department of Water Resources, California Department of Fish and Game, the U.S. Bureau of Reclamation, National Marine Fisheries Service, the U.S. Fish and Wildlife Service, The Army Corps of Engineers, and the Environmental Protection Agency. This group was convened for two primary reasons: the March 1993 listing of the delta smelt as a threatened species and the litigation deadlock being experienced by various agricultural, environmental and urban water users with respect to Delta water problems. In June 1994, these agencies signed an agreement (the Framework Agreement) to coordinate their activities in three areas: 1) operating the CVP and SWP to meet environmental mandates; 2) establishing water quality standards; and 3) developing a long-term strategy for managing the Delta.

In December 1994, the CALFED agencies signed a document known as the Bay-Delta Accord that set interim water quality standards and constrained operation of the water projects for a three year period, later extended to 2000. The Accord committed additional fresh water

flows to the Delta and was intended to protect the supplies to water users in the event additional water commitments were required by further species listings under the ESA. During that same month, the State Water Resources Control Board issued a draft water quality plan for the Delta, later finalized in 1995. As a result of the Framework Agreement and the Bay-Delta Accord, the CALFED agencies launched the ambitious CALFED Program with the stated objective of coordinating management of California's most precious resource, water. CALFED has to date spent billions of dollars in state bond money, federal appropriations and contributions by water users with very little to show for it.

The primary reason for CALFED'S failure to address the challenges presented by water quality and water supply conditions in the Bay-Delta is the lack of early investment in rigorous scientific study of the area. In fact, CALFED ignored every opportunity to examine all potential causes of the changing conditions in the estuary in favor of blaming the SWP and CVP export pumps and finding support for the assumptions that would lead to that single culprit. In fact, as discussed in detail below, a 2005 Independent Science Review Board, convened by CALFED itself, found that CALFED's energy and focus was erroneously devoted to trying to prove those assumptions were accurate.

Meanwhile, litigation over the Bay-Delta continued in spite of CALFED's efforts, and sometimes partly because of it. In July 2007, U.S. District Court Judge Oliver Wanger issued Findings of Fact and Conclusions of Law concerning a lawsuit filed by environmental litigants challenging the 2005 Biological Opinion issued by the FWS on Operating Criteria and Procedures ("OCAP") for coordinated operation of the SWP and CVP. The court's findings highlight the glaring scientific uncertainties and the agencies' ongoing and inexcusable failure to ascertain the true needs of listed species in the Bay-Delta and the water users who depend upon the Delta as a hub for water supplies. Uncertainties pinpointed by the court include whether a group of agency fishery biologists' recommendations to reduce pumping would be **necessary and effective to protect the delta smelt from extinction**; unresolved sharply conflicting evidence regarding whether other causes of delta smelt decline, including but not limited to, other water diversions, effects of ocean tides, presence of toxics, absence of delta smelt prey, and existence of non-native predators are **materially causing a decline in the species**.

When evaluating what is at stake in trying to resolve the Bay-Delta conflicts and the jeopardy status of the species, the court considered such things as the potential catastrophic loss of water supplies to urban water users, including but not limited to, cities, fire protection agencies, hospitals and health providers, schools, laboratories, and potable water supplies for human consumption; potential catastrophic loss of water supplies to contractors dependent on SWP and CVP water supplies; potential physical damage to the San Luis Reservoir due to gross reduction of its water supplies and being removed from service for over one year; economic damage to crops in the range of \$23 million to \$1 billion. (*See NRDC v. Kempthorne, 1:05-CV-1207 (E.D. Cal. July 3, 2007)*).

Clearly, given the above discussion, anything the FWS considers or decides with respect to reclassifying the delta smelt must involve a highly influential scientific assessment under the DQA because it has a potential impact of more than \$500 million in any year and it is novel, controversial, precedent setting, or has significant interagency interest. (Final Bulletin, *supra*, at p. 2675).

II. Specific Comments

A. **The 90-Day Finding Is Long Overdue.**

In March of 2006, the Secretary of the Interior (“Secretary”) received the Center for Biological Diversity’s, *et al*, emergency petition to list the delta smelt as endangered. In the nearly two years that have passed since then, the Secretary has had ample formal notice of the declines in abundance indices for the species and has failed to act responsibly. The administrative record pertaining to Bay-Delta issues is voluminous as derived from numerous court actions, biological opinions, biological assessments, CALFED activities, independent studies, and public comments on agency actions, among other things. The FWS has ignored a large part of the scientific data available on the causes of fishery conditions in the Bay-Delta and stubbornly asserted that export pumping is the cause of the decline in abundance indices, thereby supporting implementation of draconian measures requiring severe curtailments in export water supplies in the face of overwhelming statistical and empirical evidence that such cutbacks will not solve the problems with the species.

B. **Delta Smelt Are Endangered Due To Federal Agencies’ Failure To Pursue Rigorous and Systematic Exploration Of The Causes Of Abundance Indices Declines During The 15 Years Since It Was First Listed.**

The attached document entitled Detailed Comments on the 90-Day Finding For Delta Smelt contains CESAR’s additional specific comments in this matter.

III. Conclusions

For the reasons stated above and in the attachment, CESAR strongly urges the FWS to adhere to the legal requirements of the ESA and the DQA in evaluating this petition to reclassify the delta smelt.

Thank you for the opportunity to comment.

Sincerely,



Craig Manson
Executive Director
Council for Endangered Species Act Reliability

Encl (as noted)