

## Background

Waubay National Wildlife Refuge (NWR), comprised of 4,650 acres, is located in Day County in northeastern South Dakota. The Refuge's mix of lakes, wetlands, prairie, forests, and cropland is home to a diversity of wildlife. More than 100 bird species nest on this small piece of habitat, with 37 mammals also calling it home. Waubay NWR was established by President Roosevelt in 1935 as "a refuge and breeding ground for migratory birds and other wildlife."

Waubay Wetland Management District (WMD) protects over 250,000 acres of wetlands and prairie in six counties of northeastern South Dakota. The area's mix of native grass, planted grasses, cropland, and wetlands support a variety of wildlife. The WMD is home to 247 species of birds, 43 species of mammals, and over 20 species of amphibians and reptiles. Breeding waterfowl and grassland-dependent passerines are two groups that are especially prominent.

The availability of the Draft CCP/ Environmental Assessment (EA) for 30-day public review and comment was announced in the **Federal Register** on Wednesday, May 29, 2002 in Volume 67, Number 103. The Draft CCP/EA identified and evaluated three alternatives for managing Waubay National Wildlife Refuge Complex for the next 15 years. Alternative A, the No Action Alternative, would continue current management of the Refuge and Wetland Management District (WMD). Alternative B, the Tallgrass Prairie Alternative, would focus on protecting and restoring tallgrass prairie in the Minnesota-Red River Lowlands of the WMD. Alternative C, Enhanced Management, the preferred alternative, would increase management of Complex habitats and public use opportunities.

Based on this assessment and comments received, the preferred Alternative C was selected for implementation. The preferred alternative was selected because it best meets the purposes of the Refuge and WMD as a refuge and breeding ground for migratory birds and wild animals. The preferred alternative will also provide for enhanced public access for wildlife-dependent recreation, and provides environmental education opportunities related to fish and wildlife resources.

Dated: October 2, 2002.

### Elliott Sutta,

Acting Regional Director, Region 6, Denver, Colorado.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Endangered and Threatened Wildlife and Plants; 90-day Finding for a Petition To List the Midvalley Fairy Shrimp as Endangered

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of 90-day petition finding and initiation of status review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding for a petition to list the midvalley fairy shrimp (*Branchinecta mesovallensis*) under the Endangered Species Act of 1973, as amended. We find the petition presents substantial information to indicate that listing may be warranted. We are therefore initiating a status review of the species, and will issue a 12-month finding to determine if the petitioned action is warranted. To help ensure the review is comprehensive, we are soliciting information and data regarding this species.

**DATES:** The finding announced in this document was made on April 18, 2003. To be considered in the 12-month finding on this petition, comments and information should be submitted to us by June 30, 2003.

**ADDRESSES:** The complete file for this finding is available for inspection, by appointment, during normal business hours, at the Sacramento Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2800 Cottage Way, Sacramento, CA 95825-1846. Submit new information, materials, comments, or questions concerning this species to the Service at the above address.

**FOR FURTHER INFORMATION CONTACT:** Glen Tarr, at the address given above (telephone 916/414-6652; facsimile 916/414-6713; electronic mail: [Glen\\_Tarr@fws.gov](mailto:Glen_Tarr@fws.gov)).

#### SUPPLEMENTARY INFORMATION:

#### Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information indicating that the petitioned action may be warranted. We are to base this finding on all information available to us at the time we make the finding. To the maximum extent practicable, we must make this finding within 90 days of receiving the petition and publish the notice of the

finding promptly in the **Federal Register**. Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)). If the finding is that substantial information was presented, we are required to promptly commence a review of the status of the species, if one has not already been initiated, under our internal candidate assessment process.

On August 31, 2001, we received a petition dated August 14, 2001 submitted by the Center for Biological Diversity and VernalPools.Org. The petition requests us to list the midvalley fairy shrimp as an endangered species, to designate critical habitat for the species, and to list the species on an emergency basis. The petition presents extensive information regarding the biology of the midvalley fairy shrimp and threats to the species, which we address below. We have reached our 90-day finding on this petition in accordance with a consent decree that requires us to complete a finding by April 21, 2003 (*Butte Environmental Council v. Wayne White*, Consent Decree, CIV.S-00-797 WBS).

#### Biology and Distribution

The midvalley fairy shrimp is a small (7 to 20 millimeter (mm) (0.28 to 0.79 inch (in))), freshwater crustacean that lives in vernal pools, vernal swales and other ephemeral water bodies near the middle of California's Central Valley (Helm 1998; Eriksen and Belk 1999; Belk and Fugate 2000). It is known from 52 occurrences in seven California counties: Sacramento, Solano, Contra Costa, San Joaquin, Merced, Madera and Fresno (California Natural Diversity Data Base (CNDDB) 2002). Midvalley fairy shrimp populations survive the seasonal desiccation of their pools by laying dormant eggs called cysts, which can withstand extreme temperatures, the digestive tracts of animals and, if necessary, years of desiccation before hatching. Since not all cysts hatch with any given refilling of their pool, the cysts form a "bank" in the soil from which new populations of adults may develop, even in pools that have not had adults for years (Eriksen and Belk 1999).

The habitat requirements and life history characteristics of the midvalley fairy shrimp are similar to those of four other shrimp species that we listed in 1994: the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*B. longiantenna*), vernal pool fairy shrimp (*B. lynchi*), and vernal

pool tadpole shrimp (*Lepidurus packardii*) (59 FR 48136; September 19, 1994). However, the midvalley fairy shrimp has a smaller overall range, and tends to use shallower pools, than these other species.

#### Analysis of Threats

As the petition points out, we acknowledged in our 1994 listing of four other vernal pool shrimp species (59 FR 48136) that California's remaining vernal pools have been under severe pressure from urban development, agricultural conversion and associated hydrological changes. The petition also points to evidence of high annual losses of vernal pool habitat prior to 1997 (Holland 1998), high population growth estimates, and threats from specific proposed development projects such as the new University of California (UC) Merced campus. We believe the petition substantially supports the case that loss of habitat may constitute a threat to vernal pool species. It is less clear, however, to what extent existing regulatory mechanisms may ameliorate that threat in the case of the midvalley fairy shrimp.

Section 7 of the Act requires Federal agencies to "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]." To that end, Federal agencies are required to consult with us on projects likely to affect listed species in the project area, and to obtain from us a biological opinion detailing the reasonable and prudent alternatives (if any) that the project applicant must take to avoid jeopardy or adverse modification (16 U.S.C. 1536). For projects affecting vernal pool habitat, we interpret this to mean that if a listed vernal pool species may occur in the same 7.5' quadrangle (the area covered by a 1:24,000 scale USGS topological map) as the project, the applicant must typically conduct 2 years of surveys to demonstrate that the listed species is not present (Service 1996). The discovery of a listed species likely to be affected by the project triggers the need for section 7 consultation and appropriate documentation.

All of the known midvalley fairy shrimp occurrences are in quadrangles that are either known to contain, or may contain, occurrences of at least one of the four listed vernal pool shrimp species mentioned under Factor A, above (CNDDDB 2002; Service in litt., 2003a; Service, in litt., 2003b). Consequently, prospective developers

requiring a Federal permit (such as a permit to fill vernal pools under section 404 of the Clean Water Act (CWA)) would already have to survey for listed species prior to developing midvalley fairy shrimp pools in those quadrangles. Although the petition argues that vernal pools with midvalley fairy shrimp and no listed species would not be protected under section 7, this is only true as applied to vernal pool complexes with no listed species rather than to single pools. We define populations of listed vernal pool shrimp according to occupied complexes rather than by single pools (Service 2002a) because cysts in individual pools may wait several years to hatch, causing adult populations to appear to move from pool to pool in a complex over time. The midvalley fairy shrimp does not typically occupy the same pools as other fairy shrimp species (Eriksen and Belk 1999). However, it is not clear to what extent listed shrimp may be expected to occupy the vernal pool complexes containing midvalley fairy shrimp. The CNDDDB mentions the presence of listed vernal pool shrimp species (typically vernal pool fairy shrimp) at 16 of the 52 midvalley fairy shrimp occurrences. Fifteen of these are in the area of the proposed UC Merced campus, while the sixteenth is in a mitigation site in Sacramento County. We have no information at this time to indicate the Act would protect midvalley fairy shrimp in most of the other 36 occurrences.

Additionally, Section 7 consultations require some form of Federal agency involvement, which for vernal pool species generally means a section 404 permit under the Clean Water Act. The recent ruling by the Supreme Court in *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers et al*, 531 U.S. 159 (2001) (SWANCC) makes the application of the CWA to vernal pools (and, by extension, the protective power of section 7 of the Act) more tenuous. The Court in SWANCC determined that use of a water body by migratory waterfowl was insufficient in itself to establish that body as part of the "waters of the United States" subject to Federal jurisdiction. The Army Corps of Engineers (ACOE) of the Department of Defense and the Environmental Protection Agency (EPA) have issued an Advance Notice of Proposed Rulemaking (68 FR 1991) to address the question of which wetlands are still subject to the CWA. The notice indicates that field staff should address wetland jurisdiction on a case-by-case basis, and should avoid certain bases of jurisdiction altogether—*i.e.* where the

sole basis for asserting CWA jurisdiction is the "Migratory Bird Rule" (51 FR 41206; November 13, 1986). It is not clear what this will mean for application of the CWA to vernal pools within the range of the midvalley fairy shrimp, although to date the ACOE has continued to assert jurisdiction over vernal pools in the area.

The petition also argues that the Act would not adequately protect midvalley fairy shrimp even if they always co-occurred with listed species, because the smaller range of the midvalley shrimp leaves it comparatively more vulnerable to habitat loss. We do not expect this to be a factor, since we typically require specific vernal pool preservation and creation ratios as mitigation for any amount of listed vernal pool species habitat directly or indirectly affected by a project (Service 1999). Projects in the San Joaquin Valley, and those likely to affect more than a single acre of vernal pool habitat used by a listed species, are subject to individual review and further requirements.

The midvalley fairy shrimp's preference for shallower vernal pools than listed species could occasionally lead to disproportionate impacts, although we expect this to be rare. The range of average pond depths occupied by midvalley fairy shrimp (5 to 15 cm) is completely included within the range of average depths of pools occupied by both vernal pool fairy shrimp and vernal pool tadpole shrimp (2 to 122 cm and 2 to 151 cm, respectively) (Helm 1998). These two listed shrimps are also the most commonly occurring of the four listed species (CNDDDB 2002), and so are the most likely to determine modifications or mitigation measures for projects that also affect midvalley fairy shrimp. The other two listed species, longhorn fairy shrimp and Conservancy fairy shrimp, occupy pools with average depths in the upper half of the range of ponding depths used by the midvalley fairy shrimp (10 to 27 cm and 10 to 40 cm, respectively). Hence it is likely that reasonable and prudent alternatives determined for the protection of one of the listed shrimp species, such as the establishment of mitigation banks for vernal pool fairy shrimp, would also provide protected habitat for the midvalley fairy shrimp. It would be possible, however, for a project to avoid habitat preferred by a listed species in favor of habitat preferred by the midvalley fairy shrimp. The petition suggests such a situation applies to the proposed UC Merced campus in eastern Merced County (see below).

The petition characterizes the UC Merced campus as a threat to the

species despite the known co-occurrence of listed shrimp species in the area. However, the petition was submitted prior to completion of a biological opinion for phase one of construction (BO or opinion) (Service 2002b). Although phase 1 construction as currently planned does not directly impact any vernal pools, the opinion recognizes the likely impacts further construction will have, and establishes a set of environmental parameters and conservation measures for the University to follow. These include preservation of extensive tracts of high quality vernal pool grasslands, judicious siting and design and use of best management practices. They also require the development of numerous conservation plans, including: A wetlands mitigation plan to prevent any net loss of wetlands functions or values; a compensation strategy for protected vernal pool crustaceans; a construction mitigation plan; and a project compensation plan to identify funding mechanisms for long-term management and monitoring of preserves. In addition to the required parameters and conservation measures, the opinion includes recommendations encouraging the university to evaluate and conserve species of concern, including the midvalley fairy shrimp. Although the university has already identified and secured 5,780 acres of land containing high quality vernal pool habitat for preservation, most of the conservation plans have not yet been completed.

Under our policy for the evaluation of conservation efforts when making listing decisions (PECE policy), we must weigh both the certainty that conservation efforts will be implemented and the certainty that they will be effective in reducing the level of threat to the species. In this case the primary threat is loss of habitat, which the BO can potentially reduce in the vicinity of the proposed campus. Because many of the plans required by the BO are not yet completed and approved, however, the opinion as it now stands does not adequately identify the conservation effort, nor are the specifics approved by all parties. These points detract from the opinion's certainty of implementation under points A1 and A9 of the PECE policy. Additionally, the certainty of the opinion's effectiveness is reduced by the current lack of explicit incremental objectives and dates (point B2); as well as by the lack of specificity in some areas regarding the steps for achieving conservation goals (point B3), the parameters for determining progress (point B4), and the provisions for

monitoring (point B5). Finally, since most of the enforceable conservation measures are established for the protection of listed species, it is not clear to what extent the midvalley fairy shrimp will benefit (point B1). The petition argues, for instance, that by moving the planned supporting community site to the southern end of the property in order to benefit listed shrimp the opinion will actually increase impacts to the midvalley fairy shrimp by concentrating construction in an area of shallow, low terrace vernal pools preferred by that species. Accordingly, the BO as it currently stands does not provide sufficient certainty that conservation efforts will be implemented nor that they will be effective in reducing the level of threat to the midvalley fairy shrimp.

The petition also addresses the extent to which the CWA and the California Environmental Quality Act (CEQA) protect the midvalley fairy shrimp, concluding that in the absence of protected species or critical habitat neither statute is likely to prevent significant habitat loss. The CWA allows fill of up to 0.2 ha (0.5 ac) of wetlands without individualized permits, and does not require notification for many projects involving less than 0.04 ha (0.1 ac). Similarly, CEQA has not been implemented in such a way as to consistently require mitigation for vernal pool losses. We agree that these statutes fail to provide an adequate level of protection for the species.

Finally, of the 52 known occurrences of the midvalley fairy shrimp, 3 are in National Wildlife Refuges, 2 are in mitigation banks and 2 are in Nature Conservancy conservation easements (CNDDDB 2002; Service in litt. 2003c) that may receive some protection. These seven occurrences are likely to receive increased local protection. Roughly 10 other occurrences are based on the survey we commissioned in 2001 that produced inaccurate and incomplete data. This leaves at least 35 occurrences that are well documented but lack local protections. Eighteen of these 35 occurrences are on the proposed UC Merced campus, and 15 of those are known to co-occur with listed species. As discussed above, the protections provided for these occurrences are tenuous due to the uncertainty of continued ACOE assertion of jurisdiction over isolated vernal pools and the pending nature of the protections identified under the biological opinion for phase 1 of UC Merced construction. We therefore believe that existing regulatory mechanisms are not sufficient at this time to protect the species as a whole

from the acknowledged habitat pressures discussed above.

The petition also argues that because midvalley fairy shrimp populations tend to be small and isolated, they may suffer from inbreeding depression (decline of population fitness due to inbreeding) and from local extirpations, after which they are unable to recolonize. However, fairy shrimp cysts are "passively dispersed with high probability by shore birds and other animals" (Fugate 1998). Fugate (1998) goes on to note that under the most likely model, North American fairy shrimp species tend to become effectively isolated from each other at distances of 1,000 to 2,000 kilometers (km) (621 to 1,243 miles (mi)). The farthest distance between midvalley fairy shrimp occurrences documented in the CNDDDB (2002) is approximately 257 km (160 mi). Naturally, local features will affect these generalized figures, and a population of shrimp in a vernal pool complex that has become too degraded may be in greater danger of genetic abnormalities or extirpation. However, the petition does not present such site-specific evidence, nor are we aware of any.

#### Emergency Listing

The petition also requests us to list the midvalley fairy shrimp as endangered on an emergency basis. Under section 4(b)(7) of the Act, and regulations at 50 CFR 424.20, we may list a species on an emergency basis if the threats to the species constitute an emergency posing a significant risk to the well-being of the species. We believe the existing regulatory mechanisms discussed above are sufficient at this time to prevent the threat of habitat loss from constituting an emergency.

#### Finding

We have reviewed the petition, literature cited in the petition, other pertinent literature, and information available in Service files. We conclude the species may be threatened by habitat loss, and that existing regulatory mechanisms may not be sufficient to protect the species. Accordingly, we find the petition presents substantial information to indicate that listing the midvalley fairy shrimp may be warranted.

We have also reviewed the available information to determine if the existing and foreseeable threats pose an emergency. We have determined that an emergency listing is not warranted at this time.

The petition also requests us to designate critical habitat for this species. We always consider the need for critical habitat designation when

listing species. If we determine in the 12-month finding determines that listing the midvalley fairy shrimp is warranted, we will address the designation of critical habitat in the subsequent proposed listing rule.

#### Public Information Solicited

When we make a finding that substantial information exists to indicate that listing a species may be warranted, we are required to promptly commence a review of the status of the species. To ensure that the status review is complete and based on the best available scientific and commercial information, we are soliciting information on the midvalley fairy shrimp. We request any additional information, comments, and suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested parties concerning the status of the midvalley fairy shrimp. We are seeking information regarding historic and current distribution, the species' biology and ecology, ongoing conservation measures for the species and its habitat, and threats to the species and its habitat.

If you wish to comment, you may submit your comments and materials concerning this finding to the Field Supervisor (see **ADDRESSES** section). Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold a respondent's identity, as allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

#### References Cited

- Belk, D. and M. Fugate. 2000. Two new *Branchinecta* (Crustacea: Anostraca) from the Southwestern United States. *Southwest Naturalist* 45(2):111–117.
- California Natural Diversity Data Base. 2002. California Department of Fish and Game, Natural Heritage Division. Sacramento, CA. 1 pp.

- Eriksen, C. and D. Belk. 1999. Fairy shrimps of California's puddles, pools and playas. Mad River Press, Inc., Eureka, CA. 181 pp.
- Fugate, M.. 1998. *Branchinecta* of North America: population structure and its implications for conservation practice. Pages 140–146 in C.W. Witham, E. Bauder, D. Belk, W. Ferren, and R. Ornduff, eds. Ecology, Conservation and Management of Vernal Pool Ecosystems. California Native Plant Society, Sacramento, CA.
- Helm, B. 1998. Biogeography of eight large branchiopods endemic to California. Pages 124–139 in C.W. Witham, E.T. Bauder, D. Belk, W.R. Ferren Jr., and R. Ornduff, eds. Ecology, Conservation, and Management of Vernal Pool Ecosystems—Proceedings from a 1996 Conference. California Native Plant Society, Sacramento, CA.
- United States Fish and Wildlife Service. 1996. Interim survey guidelines to permittees for recovery permits under section 10(a)(1)(A) of the Endangered Species Act for the listed vernal pool branchiopods. 10 pp. (Available at <http://ventura.fws.gov/SurveyProt/shrimp.htm>).
- United States Fish and Wildlife Service 1999. Programmatic formal endangered species act consultation on issuance of 404 permits for projects with relatively small effects on listed vernal pool crustaceans within the jurisdiction of the Sacramento Field Office, California. February 28, 1999. 13 pp.
- United States Fish and Wildlife Service. 2002a. Critical habitat designation for four vernal pool crustaceans and eleven vernal pool plants in California and southern Oregon; proposed rule. 67 FR 59884.
- U.S. Fish and Wildlife Service. 2002b. Formal section 7 consultation on the University of California, Merced Campus and Infrastructure Project (199900203). Sacramento Fish and Wildlife Office, Sacramento, CA. 175 pp.
- United States Fish and Wildlife Service. 2003. Policy for evaluation of conservation efforts when making listing decisions. 68 FR 15100.

#### In Litt. References

- United States Fish and Wildlife Service. 2003a. Map of midvalley fairy shrimp occurrences, and occurrences of four other listed shrimp species, documented in CNDDDB 2002.
- United States Fish and Wildlife Service. 2003b. Endangered and threatened species that may occur in or be affected by projects in the selected quads listed below. (Species list generated from internal Service database).
- United States Fish and Wildlife Service. 2003c. Electronic map of midvalley fairy shrimp occurrences from CNDDDB 2002 overlaid on public lands as downloaded from the California Spatial Information Library (<http://casil.ucdavis.edu/casil/legacy.ca.gov/govcon/>).

#### Author

The primary author of this document is Glen Tarr (see **ADDRESSES** section).

#### Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 18, 2003.

Steve Williams,

Director, Fish and Wildlife Service.

[FR Doc. 03–10310 Filed 4–28–03; 8:45 am]

BILLING CODE 4310–55–P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Availability of Draft Revised Environmental Assessment, Management Plan, and Implementation Guidance for Take of Nestling American Peregrine Falcons in the Contiguous United States and Alaska for Falconry

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** This notice is to announce the availability of a Draft Revised Environmental Assessment, Management Plan, and Implementation Guidance document on take of nestling American Peregrine Falcons (*Falco peregrinus anatum*) for falconry. We published a final Environmental Assessment in April 2001. The draft Revised Environmental Assessment, Management Plan, and Implementation Guidance was done to correct an error in the modeling on which the earlier Environmental Assessment was based and to use population data since delisting to assess the effects of take of nestlings for falconry.

**DATES:** Comments on the Environmental Assessment, Management Plan, and Implementation Guidance are due by June 30, 2003.

**ADDRESSES:** The document is available from, and written comments about it should be submitted to, Chief, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 634, Arlington, Virginia 22203–1610. The fax number for a request or for comments is 703–358–2272. You can request a copy of the Environmental Assessment by calling 703–358–1714. The Assessment also is available on the Division of Migratory Bird Management web pages at <http://migratorybirds.fws.gov>.

**FOR FURTHER INFORMATION CONTACT:** Dr. George Allen, Division of Migratory Bird Management, U.S. Fish and Wildlife Service, at 703–358–1714.

**SUPPLEMENTARY INFORMATION:** The American peregrine falcon (*Falco*