

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams,

Secretary.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Delist the Vernal Pool Fairy Shrimp and Vernal Pool Tadpole Shrimp

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to remove the vernal pool fairy shrimp (*Branchinecta lynchi*) and the vernal pool tadpole shrimp (*Lepidurus packardii*) from the Federal list of threatened and endangered species pursuant to the Endangered Species Act (Act) of 1973, as amended. We find that the petition, other information the petitioner specifically requested we evaluate, and additional information available in our files did not present substantial scientific or commercial information indicating that delisting of the vernal pool fairy shrimp and vernal pool tadpole shrimp may be warranted.

DATES: The finding announced in this document was made on March 30, 2000.

ADDRESSES: Submit any data, information, comments, or questions concerning this petition to the Field Supervisor; Sacramento Fish and Wildlife Office; 2800 Cottage Way, Room W-2605; Sacramento, California 95825. The petition finding and supporting data are available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Kyle Merriam or Karen Miller at the Sacramento Fish and Wildlife Office (see **ADDRESSES** section above), or at 916/414-6600.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the 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 information indicating that the petitioned action may be warranted. To the maximum extent practicable, this finding is to be made within 90 days of the receipt of the petition, and the finding is to be published promptly in the **Federal Register**. If the finding is that substantial information was presented, we will commence a status review of the involved species.

On February 29, 1996, we received a petition, dated the same day, to delist the vernal pool fairy shrimp (*Branchinecta lynchi*) and the vernal pool tadpole shrimp (*Lepidurus packardii*). The petition was submitted by the Fairy Shrimp Study Group (petitioner), consisting of the California Chamber of Commerce, Granite Construction, Teichert Aggregates, Sares-Regis Group, the California Cattlemen's Association, the Western Growers Association, and the California Farm Bureau Federation.

In a letter dated March 8, 1996, we notified the petitioner that a response would be delayed due to lack of funds and continuing resolutions in effect from November 14, 1995, to January 26, 1996, resulting in suspension of the listing program and reassignment of listing personnel to other activities. A moratorium on listing activities, and the consequent backlog at the time the moratorium was lifted, further delayed us from responding to the delisting petition.

On October 22, 1997, the petitioner filed a case in Federal court (Court) challenging our failure to address the delisting petition (*Fairy Shrimp Study Group v. Babbitt*, case number 1:97CV02481). Most of the issues discussed by the petitioner were included in a lawsuit filed by the Building Industry Association challenging the listing of the vernal pool crustaceans (*Building Industry Association v. Babbitt*, 979 F Supp. 893 (1997)), and were addressed by the Court in that case. The Court found that we had correctly determined the status of the vernal pool crustaceans as endangered and threatened and stated that (1) decisions to review petitions are not subject to judicial review; (2) we had used the best available information in our decision to list the vernal pool crustaceans; (3) the plaintiffs had been provided adequate notice of the concept of vernal pool complexes and vernal pool populations; and (4) we had not violated our Interagency Cooperative Policy for Peer Review in Endangered Species Activities (59 FR 34270).

In a settlement with the petitioner reached on October 26, 1999, we agreed

to evaluate the best scientific and commercial information available as of that date. The data and information evaluated were to include relevant geographic information on the location of vernal pools and fairy shrimp, including information generated in section 7 consultations since February 29, 1996.

On September 19, 1994, we published the final rule to list the vernal pool fairy shrimp and vernal pool tadpole shrimp as threatened and endangered, respectively, in the **Federal Register** (59 FR 48136). The vernal pool fairy shrimp and vernal pool tadpole shrimp are crustacean species endemic to vernal pool habitats in California and southwestern Oregon. Both of these fresh-water crustaceans are about the size of a dime and live brief lives within vernal pools, seasonal wetlands that fill with water during fall and winter rains. These species were listed as a result of significant threats to their vernal pool habitats by a variety of human-caused activities, primarily urban development and conversion of land to agricultural use.

The factors for listing, delisting, or reclassifying species are described at 50 CFR 424.11. We may delist a species only if the best scientific and commercial data available substantiate that it is neither endangered nor threatened. Delisting may be warranted as a result of: (1) Extinction; (2) recovery; or (3) a determination that the original data used for classification of the species as endangered or threatened were in error.

The petition asserts that delisting of the vernal pool fairy shrimp and vernal pool tadpole shrimp is warranted because the original data used for classification of the vernal pool crustaceans as threatened and endangered were in error. The petition contends the listing was erroneous for four general reasons: (1) The original data and studies supporting the listing, including the original petitions to list the species, had fatal problems; (2) original information relied upon was not subjected to independent peer review; (3) new studies indicate that California has widespread vernal pool habitat that it is under little or no threat; and (4) the original listing information did not correctly establish the threats to the species and their vernal pool habitat.

We do not agree with the petitioner's assertion that the original data and studies supporting the listing, including the original petitions to list the species, had fatal problems. The petitions and information accompanying or cited in them fulfilled the requirements as set

forth in the Act and our regulations (50 CFR 424.14(b)). The Act requires us to base listing decisions on the best scientific and commercial data available. We diligently solicited all available information on the species through public notice, public comment periods, and public hearings to assure this standard was met. The petitioner did not identify any information available at the time of the listing that was not considered by us in the listing decision.

Despite the petition's focus on our assessment of historic vernal pool habitat, remaining vernal pool habitat, and habitat loss, these issues were irrelevant to the decision to list the vernal pool crustaceans, since the listing decision was not made as the result of historic habitat loss. As stated in the final rule, "The purpose of addressing historic vernal pool losses in the proposed rule was to provide a historical context to the Central Valley ecosystem inhabited by the four crustacean species. In a legal context, the extent of historic habitat loss is of academic interest only, since the five factors at 50 CFR 424.11(c) under which species may qualify for listing look prospectively to the future rather than retrospectively on the past. The relevant issues are whether the current extent of fairy and tadpole shrimp habitat is depleted and/or fragmented enough to render the species vulnerable to extinction, or whether foreseeable threats similarly threaten the species" (59 FR 48136). Section 4 of the Act, and regulations promulgated to implement the listing provisions of the Act (50 CFR part 424), set forth procedures for adding species to the Federal Lists. A species may be determined to be endangered or threatened due to one or more of the five factors described in section 4(a)(1) of the Act: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued existence.

The petitioner suggested that estimates of habitat loss, historic vernal pool habitat, and remaining vernal pool habitat cited in the final rule were incorrect. We reviewed the information cited, and find that it represented the best scientific and commercial information available on the vernal pool crustaceans and their habitats. We can find no evidence to support the petitioner's arguments that the method of determining habitat loss in Holland

(1988) was incorrect. The petitioner does not provide any alternative information about rates of habitat loss, or demonstrate this estimate was in error.

The petitioner argues that the proposed and/or final rules did not include random studies that could be extrapolated to unsampled areas or information about the locations of vernal pool crustacean populations, and questions the use of vernal pool complexes to evaluate vernal pool crustacean populations. However, the final rule does include a random study (Simovich *et al.* 1993) and describes the number and location of the known populations of the vernal pool crustaceans in adequate detail to convey relevant information about their range and distribution. The concepts of populations and vernal pool complexes were addressed throughout the listing process. The petitioner does not provide any evidence to support its claim that the methodology of Simovich *et al.* (1993) was flawed or that the results were not valid, and the petitioner does not propose a more effective method of evaluating vernal pool crustacean populations in its petition. We do not agree with the petitioner's assertion that vernal pool crustaceans are present in non-vernal pool habitats. We responded to this comment in the final rule and concluded that most of these areas represented historic vernal pool complexes that had been degraded by human activities (59 FR 48145). The petitioner presented no additional information to counter our finding.

We disagree with the petitioner's statement that the final rule did not receive peer review. We conducted extensive peer review on the listing of the vernal pool crustaceans. The petitioner did not, and has not, provided the names of individuals they believed should have reviewed the information contained in the rule, and has not provided any evidence that our method of peer review was not effective.

The petition refers to four pieces of information: Jones and Stokes (1994), Sugnet and Associates (1995), a study presented by Dave Smith of the Natural Resource Conservation Service at the 1994 Annual Conference of the California Association of Resource Conservation Districts, and comments made in 1996 by then-State Resources Secretary Douglas Wheeler "at a meeting of a governor's task force." The petitioner cites these sources to provide additional information on the vernal pool crustaceans and their remaining vernal pool habitats. The petitioner provided a copy of Sugnet and Associates (1995), and we were able to

obtain and review a copy of the first source (Jones and Stokes 1994); we were unable to obtain copies of the latter two sources and relied on the petitioner's presentation of the information. Jones and Stokes (1994) supports our findings that vernal pool habitats are threatened. Sugnet and Associates (1995) and the information attributed to Smith do not present new information about the current distribution of vernal pool habitats. The amount of remaining vernal pool habitats given by the petitioner supports rather than challenges the information presented in the final rule. The comments attributed to Wheeler do not provide any information about vernal pools or vernal pool crustaceans. None of these sources supports the petitioner's claim that vernal pool habitat is widespread and not threatened.

The petitioner states that existing regulatory mechanisms made listing the vernal pool crustaceans unnecessary. However, the final rule exhaustively describes how existing regulatory mechanisms were not sufficient to protect vernal pool crustacean habitats based on information in the administrative record. The petitioner notes that minimization measures taken for 22 projects mentioned in the final rule resulted in a net gain of vernal pools. However, many of these minimization measures were developed and implemented after the publication of the final rule listing the vernal pool crustaceans as threatened and endangered. Without the protection of the Act, many of these measures would not have been implemented.

As discussed in the final rule, we concluded that the vernal pool fairy shrimp and vernal pool tadpole shrimp were threatened and endangered as the result of urban development, conversion of native habitat to agriculture, and extinction by naturally occurring random events by virtue of the small, isolated nature of many of the remaining populations. The petitioner contends threats to vernal pool crustaceans discussed in the final rule were unverified. However, the threats described in the final rule were well supported, both with cited literature and other information available in the administrative record. The petitioner does not provide any data, arguments, or evidence to contradict our findings.

Since the petition to delist the vernal pool fairy shrimp and the vernal pool tadpole shrimp was submitted on February 29, 1996, we added new information to our files on the status of these species. We reviewed that information as requested by the petitioners, including relevant

geographic information on the location of vernal pools and fairy shrimp, and information generated in section 7 consultations and section 10 habitat conservation plans. Except for the discovery of a new population of vernal pool fairy shrimp in Jackson County, Oregon (Brent Helm, May Consulting Services, *in litt.* 1998), the current range and distribution of these species is as described in the final rule. Current information on the status of the vernal pool crustaceans indicates these species are not yet recovered. Significant threats still exist throughout their ranges, primarily urban development and conversion of land to intensive agricultural use. Habitat loss occurs from direct destruction and modification of vernal pools due to these and other activities, as well as modification of surrounding uplands that can alter vernal pool habitats indirectly. Population growth projections for California indicate the current trends of agricultural conversion and urbanization will continue to threaten the vernal pool crustacean species, particularly because areas containing vernal pools are primarily privately owned. The existing network of protected areas is not yet adequate to permanently protect these species from extinction. Continued implementation of the Act is necessary to achieve a conservation strategy that includes large areas of permanently protected vernal pool crustacean habitats that are not subject to the threats of urbanization and agricultural conversion.

Listing the fairy shrimp and the vernal pool tadpole shrimp as threatened and endangered provides for the development of a recovery plan, which is being developed. The recovery plan will describe site-specific actions necessary to achieve conservation and survival of the fairy shrimp and the vernal pool tadpole shrimp, and will establish a framework for agencies to coordinate activities and cooperate with each other in conservation efforts. The plan will also set recovery goals and priorities. After the plan is completed and implemented, we will continue to evaluate information on the status of and threats to these species, and undertake delisting actions as appropriate.

Thus, based on our review of information on the vernal pool crustaceans added to our files since the time of listing and the information that the petitioner asked us to review, we determine there is not substantial information to indicate that delisting of the vernal pool tadpole shrimp and vernal pool fairy shrimp may be warranted.

References Cited

- Holland, R.F. 1988. What about this vernal pool business? Pages 351–355 in J.A. Kusler, S. Daly, and G. Brooks, editors. Urban wetlands, proceedings of the National Wetland Symposium. Oakland, California
- Jones and Stokes Associates. 1994. Wetland resource planning recommendations for Chico, Clovis, Fresno, and surrounding areas of Butte and Fresno Counties. Sacramento, California. iv + 73 pp. + maps + appendices
- Simovich, M., R. Brusca, and J. King. 1993. Invertebrate survey 1991–1993, PGT-PGE/Bechtel pipeline expansion project. Unpublished report to Bechtel Corporation, San Francisco, California.
- Sugnet and Associates. 1995. Habitat conservation planning for California's Central Valley grassland prairie/vernal pool landscapes. National Association of Environmental Professionals Conference, Washington, D.C. 4 pp.

Author

The primary author of this document is Kyle E. Merriam, Sacramento Fish and Wildlife Office (see **ADDRESSES** section above).

Authority

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

Dated: March 30, 2000.

Jamie Rappaport Clark,

Director, U.S. Fish and Wildlife Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[I.D. 032800B]

Fisheries of the Exclusive Economic Zone Off Alaska; Amendments 61/61/13/8 to Implement Major Provisions of the American Fisheries Act

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent; scoping period; request for comments.

SUMMARY: NMFS announces its intent to prepare an environmental impact statement (EIS) on proposed Amendment 61 to the Fishery Management Plan for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area, proposed Amendment 61 to the Fishery Management Plan for Groundfish of the Gulf of Alaska,

proposed Amendment 13 to the Fishery Management Plan for Bering Sea and Aleutian Islands King and Tanner Crab, and proposed Amendment 8 to the Fishery Management Plan for the Scallop Fishery off Alaska (FMPs). These fishery management plan (FMP) amendments would incorporate the provisions of the American Fisheries Act (AFA) into the FMPs and their implementing regulations. The scope of the analysis will include all proposed regulations and activities that would be implemented under the proposed FMP amendments.

DATES: Written comments will be accepted through May 8, 2000.

ADDRESSES: Written comments and requests to be included on a mailing list of persons interested in the EIS should be sent to Lori Gravel, NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802, or delivered to the Federal Office Building, Room 457-1, 709 West 9th Street, Juneau, AK, and marked Attn: Lori Gravel.

FOR FURTHER INFORMATION CONTACT: Kent Lind, NMFS, (907) 586-7228 or kent.lind@noaa.gov.

SUPPLEMENTARY INFORMATION: NMFS manages the U.S. groundfish fisheries in the exclusive economic zone of the Bering Sea and Aleutian Islands Management Area (BSAI) and Gulf of Alaska (GOA) under the FMPs for groundfish in the respective areas. With Federal oversight, the State of Alaska (State) manages the commercial king crab and Tanner crab fisheries in the BSAI and the commercial scallop fishery off Alaska under the FMPs for those fisheries. The North Pacific Fishery Management Council (Council) prepared, and NMFS approved, the FMPs under the authority of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* Regulations implementing the FMPs appear at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600.

EISs were prepared and filed when the FMPs for the groundfish fisheries of the BSAI and GOA were prepared and approved by NMFS in 1978 and 1981, respectively. On October 1, 1999, NMFS announced its intent to prepare a programmatic supplemental environmental impact statement that defined the Federal action under review as, among other things, all activities authorized and managed under the FMPs and all amendments thereto, and that addresses the conduct of the BSAI and GOA groundfish fisheries as a whole. Work on this programmatic SEIS