September 24, 2018

Bridget Fahey
U.S. Fish and Wildlife Service
Division of Conservation and Classification
5275 Leesburg Pike
Falls Church, VA 22041-3803

Chair
Randy Fiorini

Members
Frank C. Damrell, Jr.
Michael Gatto
Maria Mehranian
Susan Tatayon
Skip Thomson
Ken Weinberg

Executive Officer
Jessica R. Pearson


Dear Ms. Fahey,

Thank you for the opportunity to comment on the proposed regulatory reforms of the Federal Endangered Species Act (ESA).

The Delta Stewardship Council (Council) is an independent state agency charged with furthering California’s coequal goals of achieving a more reliable water supply and restoring the Sacramento-San Joaquin River Delta (Delta) ecosystem, all while protecting and enhancing the Delta’s cultural, recreational, and agricultural values.

The coequal goals are intended to ensure the sustainability of robust economic development and improved environmental conditions, while working in tandem with state and federal laws such as the ESA. To this end, the Council implements a science-based, legally-enforceable, long-term management plan known as the Delta Plan.

California’s Delta Reform Act (Water Code § 85000 et seq) refers to the Delta as the “most valuable estuary and wetland ecosystem on the west coast of North and South America.”¹ The Delta plays a crucial role supporting California’s economic vitality as a central component of the state’s water supply infrastructure and contributor to the State’s substantial agricultural productivity. However, the wildlife habitats and ecosystem services that the Delta provides have been, and continue to be, impacted by environmental degradation, historic land use conversion of wetlands, economic shifts, sea level rise, and other climate change effects. As a result, management actions that not only protect, but also enhance the Delta ecosystem are necessary.

Recognizing this need, the Delta Stewardship Council collaborates with other state and federal agencies to protect and enhance an ecosystem that supports 55 fish species and more than 750 plant and wildlife species.

¹ California Water Code § 85002

"Coequal goals" means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place."

— CA Water Code §85054
Of these, approximately 100 wildlife species, 140 plant species and 13 fish species are special status species and afforded some form of legal or regulatory protection.\(^2\)

Currently, the Council, in consultation with partner agencies and the public, is developing an amendment to the Delta Plan that considers new research and scientific information on critical issues such as climate change effects and restoration approaches within the Delta and its watershed. This refined, long-term vision for Delta restoration will prioritize project activities that provide the greatest conservation benefits to those species most in need of attention. Rather than focusing on any particular species, the goal of this approach is to improve the function and resiliency of the ecosystem. Ultimately, the amended Delta Plan will proactively enhance critical habitat and targeted portions of the Delta landscape that provide multiple benefits to the many fish and wildlife species that rely on the region.

While an ecosystem-wide approach to conservation and protection may not be the primary purpose of the ESA, the ESA remains a critically important component of the natural resource management portfolio. Over the past two decades, it has put direct conservation focus on the Delta’s most imperiled species and their habitats, contributing significantly to their persistence during this timeframe.

To that end, the Council offers the following comments on the proposed rules.

**Definition of Foreseeable Future in Listing Decisions (50 CFR § 424.11).** ESA currently defines a threatened species as “any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.” However, the term foreseeable future is not currently defined. The proposed revision to 50 CFR § 424.11, would limit U.S. Fish and Wildlife Service’s (Services) consideration to a time horizon in which the Service can “reasonably determine” “probable” threats to the species. The proposed revision goes on to state that foreseeable future will be described on a case-by-case basis, using the best available data, while considering factors like a species’ life history characteristics, threat-projection timeframes, and environmental variability. As proposed, the Services would not be required to identify the foreseeable future in terms of specific period of time.

A desired outcome that appears throughout the rulemaking package is to add clarity in the interpretation and application of the Act. However, as currently proposed, the definition of foreseeable future seems to create more turidity in terms of how one might interpret this new definition than anything else.

For instance, it is unclear to what extent, if any, the proposed amendments consider climate change impacts – an issue where a large body of scientific work clearly indicates that the earth’s climate is changing and will continue to change at an increasingly rapid pace\(^3\). In anticipation of rapidly progressive climate change impacts, Governor Brown’s California Water Action Plan identifies three broad objectives: developing more reliable water supplies, restoring important species and habitats, and providing a more resilient, sustainably managed water resources system (water supply, water quality, flood protection, and environment) that can better withstand inevitable and unforeseen pressures in the coming decades. The Delta, for instance, is already experiencing the effects of climate change in the forms of earlier runoff, higher sea levels, and the leading edge of more extreme events.\(^4\)

---

\(^2\) Delta Plan, p.11


The extent to which climate change will be considered under this proposed definition of *foreseeable future* should be clear and explicit to improve the transparency and the public’s understanding of a listing decision. To that end, the Council suggests that the definition be revised to make explicit that the impact of climate change will be considered during a listing decision.

**Listing Decisions: Economic Impact Consideration (50 CFR § 424.11).** Currently, the ESA requires listing decisions to be based solely on the best scientific and commercial data. 50 CFR § 424.11 (b) goes on to state that “...a determination [shall be made]...without reference to possible economic or impacts of such determination.” The proposed rule would allow listing decisions to include economic data that the Services determine may be of interest to the public.

While the Services note determinations will continue to be based solely on biological considerations, inclusion of economic data, even as an incidental element to a listing decision, would add confusion to the process, and at the very least, create the perception that such critical decisions are being influenced by factors beyond what is allowable or intended under the Act. In the interest of transparency, the Services should reconsider the value that economic impact information would add to a process that already explicitly prohibits consideration of such factors for listing decisions.

**Designation of Critical Habitat (50 CFR § 424.12).** For listed species, ESA requires the Services to identify habitat that is essential to the species’ survival, unless they determine that a critical habitat designation is not “prudent.” Further, 16 U.S. Code § 1533 (b)(2) requires the Services to consider the economic impact, the impact on national security, and any other relevant impact, when specifying any area as critical habitat. The Secretary of Interior may also exclude any area from critical habitat if they determine that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. Critical habitat may consist of habitat that is occupied by the target species and habitat that is unoccupied. As proposed, the Services would limit the scope of what can be considered when designating unoccupied habitat to include whether such habitat is essential to a species’ survival.

California’s Delta Reform Act defines restoration as “the application of ecological principles to restore a degraded or fragmented ecosystem and return it to a condition in which its biological and structural components achieve a close approximation of its natural potential, taking into consideration the physical changes that have occurred in the past and the future impact of climate change and sea level rise”⁵. This approach to restoration is strongly supported by the current body of scientific research, where there is broad recognition that ecological systems are dynamic, and restoration and management approaches should consider targeting resilience and adaptive capacity given changing environmental conditions.⁶ In other words, critical habitat for a particular species today will undoubtedly change and evolve over time.

To that end, the Council, as California’s state agency charged with balancing actions in the Delta that consider a planning horizon extending to the year 2100, encourages the Services to balance the needs of today with what will be required in the future, by preserving adaptive capacity in critical habitat whenever possible.

---

⁵ [California Water Code § 85066](https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionId=0%3A8%3A5066&divisionId=00100&partId=0&titleId=0)

Conclusion. In the Background portion of the proposed revisions to 50 CFR Part 402, the Services cite the Fifth Circuit of Appeals review of the regulatory definition of destruction and adverse modification. Specifically, the Services state the following, “Citing legislative history and the Act itself, the court was persuaded that Congress intended the Act to enable listed species not merely to survive, but to recover from their endangered or threatened status.” Seeking ways to streamline and improve the mechanics of the Act, as appears to be the motive behind many of the elements in the proposed rules, is a laudable goal. However, such revisions should be guided by the best available scientific evidence, maintain adaptive environmental capacity to respond to climate and other environmental changes, and be consistent with, rather than override or conflict with, the spirit and intent of the Act.

Once again, we appreciate the opportunity to comment. Should you have any questions, please contact me at (916) 445-5553 or Ryan Stanbra, Legislative and Policy Advisor, at (916) 445-0641.

Sincerely,

[Signature]

Jessica R. Pearson
Executive Officer

---