Comments
Proposed changes to Endangered Species Act
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Secretary Dirk Kempthone, Department of Interior
Secretary Carlos Gutierrez, Department of Commerce

Dear Sirs:

The California Sportfishing Protection Alliance submits the following comments in vehement opposition to the proposed rule changes ("revised definitions") to the Endangered Species Act as proposed in the above-referenced docket.

Introduction

The fisheries in California's Sacramento – San Joaquin Delta are dying. Pelagic fish (life-long residents) such as Delta smelt, splittail and longfin smelt are on the verge of extinction. Striped bass numbers are near all-time lows, and stripers are missing almost an entire year class. Young salmon are not making it downstream through the Delta, and adults returning to spawn are not making it upstream through the Delta. Sturgeon numbers are drastically depressed.

Yet in spite of this collapse, there is what many have described as widespread apathy among the broad fishing community. It's difficult to get large numbers out to meetings. Comment letters trickle in.

Rather than apathy, we would characterize the current inertia of fishermen and women regarding the collapse of the Delta as being more along the lines of stunned disbelief.

In the last year, there have been a number of large scale busts of sturgeon poaching rings in the Delta. The response among anglers has universally been one of rage. I have no doubt that, left to their own devices, many in the fishing community would have happily shot the perpetrators.

Why is there not the same level of outrage and sense of urgency regarding the overall death of the Delta? We believe that one of the main reasons is that, while the effects of poaching are immediate, in-your-face and understood by everyone, the overall death of the Delta is diffuse, and its causes are widespread, a web of interconnected problems for which blame is considerably more difficult to fix.

Direct and systemic causation

Put differently, the cause of dead sturgeon in the back of a poacher's truck is *direct*: some dirtbag killed it with no thought for anything other than naked greed. The cause of low numbers of sturgeon in the Delta overall is, rather, *systemic*: it is the product of the way business is conducted, water flow is managed, sewage and agricultural waste is disposed of, water is diverted, and much, much more. To fix it, we can't just throw a bunch of bad guys in jail. Integrated and systemic change is needed in the Delta from top to bottom.

One of the main weapons that various advocates have used in trying to turn around the collapse of Delta fisheries is the Endangered Species Act. The ESA, in its application over the last thirty-five years, has largely recognized the importance of systemic causation. This is not surprising; most ecological problems today are systemic in nature. Indeed, the notion of "critical habitat" is central to the Endangered Species Act, and recognizes that you don't need to watch a type of plant or animal die in order for it to be dead. It is not generally a single act that destroys a species, but rather the elimination or radical alteration or deterioration of the ecosystem of which it is a part.

The revisions to the Endangered Species Act proposed under FWS-R9-ES-2008-0093 are a stealth attack on the Act, on several counts: they are being attempted administratively, not in the courts or in Congress. The public comment period is half the usual length. Most importantly, they seek to achieve a severe reduction in the scope and power of the ESA by changing the definition of what can legally be considered a cause of harm to a species or its habitat.

Under the new definition, if you don't have a proverbial "smoking gun" where a federal action has directly caused the death of members of species that are listed under the Act as "threatened" or "endangered," you have to be able to show that an indirect effect was an "essential effect." If reduction of critical habitat, or the extinction of a species, was going to happen anyway, then an action that is proposed by a federal agency cannot, on that basis, be stopped, and mitigation cannot be required.

As it stands now, if there are many proverbial straws that weigh on the lives and habitat of listed species, and if it is shown that a federal action is adding another one, a project must be stopped or mitigated. The new rules change the dynamic: federal regulators must not merely show the presence of another straw, they must show that it is an "essential" straw. It must be a straw without which the proverbial camel's back would not break.

In an ecosystem like the Delta, there are hundreds of federal actions in each decade that trigger ESA consultation. The burden of proof that would have to be met to show that a cause is an "essential" cause is simply overwhelming. The net effect would be to eliminate systemic causes, ecosystem-wide problems, and leave only direct causation as being covered by the Endangered Species Act. Listed fish that are killed in the Delta pumps might still be covered. Many aspects of how and when and how much water is moved through the Delta, as well as pollutants that are discharged into the Delta, depending especially on magnitude, might very well no longer be covered. At minimum,

any effort to reduce impacts would be litigated, and the litigation itself might take a decade. Or longer.

Poisoning the process

In addition to redefining cause, the proposed rule change will make changes in process that make it harder for federal regulators to recognize the effects of actions on endangered species.

The current rules require any federal agency that is proposing a federal action to prepare a Biological Assessment if the action "may affect" species listed under the Endangered Species Act as threatened or endangered. The Biological Assessment is a document that specifically and explicitly points out to the National Marine Fisheries Service or the Fish and Wildlife Service (collectively, "the Service") any effects that the action is "reasonably certain" to have on listed species. Under the proposed rule change, the federal action agency could use, in place of a Biological Assessment, a document that it assembled for other purposes, as long as the information about effects on listed species was contained in it. While this might make it easier for the action agency, it makes is more difficult and time-consuming for the Service, which then has to distill and reassemble on it own the information relevant to listed species. It also tends to narrow consideration of the context of effects on listed species, and favors limiting consideration of effects to direct causation.

The explanation for the proposed rule change states:

> We propose to add language to the ''effects of the action'' definition to define ''indirect effects'' as those effects ''for which the proposed action is an essential cause, and that are later in time, but still are reasonably certain to occur.'' Further, we propose to add language to establish that reasonably certain to occur, ''is the standard used to determine the requisite confidence that an effect will happen. A conclusion that an effect is reasonably certain to occur must be based on clear and substantial information.''

When the proposed rules seek to assure that, "A conclusion that an effect is reasonably certain to occur must be based on clear and substantial information,'' they carry out a linguistic sleight of hand. The issue is not clarity, but the definition of cause. Effectively, a systemic cause is defined as not "substantial." The only kind of cause that is recognized is an "essential," or in other words, a direct one.

The explanation for the proposed rule change further states:

> Under the current regulations … an action agency must consult if the action ''may affect'' a listed species or critical habitat, although the action agency can submit a proposed ''not likely to adversely affect'' determination to the Service. The Service can then concur with that determination and the consultation obligation is satisfied for the action agency.

> To achieve the goal of reducing unnecessary consultations, the proposed language allows a Federal action agency to make a ''not likely to adversely affect'' determination without concurrence from the Services in limited circumstances.

The proposed new rules would fundamentally change the process, the nature and requirements of consultation. As the law exists today, a federal action agency must consult – go through a defined, formal process which includes producing a Biological Assessment – with a Service in order to determine whether an action that "may affect" listed species and their habitat will indeed have a detrimental effect on listed species or their habitat.

Under the new rules, the action agency itself is allowed to make that determination. In the past, *the consultation* determined whether or not there was jeopardy or damage to critical habitat. Under the new rules, the party that wishes to pursue a federal action would determine whether *it even needs to consult* based on whether it itself, and not the Service, thinks there may be jeopardy or damage to critical habitat. Effectively, a federal entity which proposed a project in the past had to *defend* the notion that its project would do no harm to listed species. If the rules are changed, it will merely have to *assert* that it will do no harm.

The rationale for the proposed rule suggests that it is appropriate for other federal agencies to take on some of the role that was up till now reserved to the Services. The rationale suggests that after 35 years of experience, the other federal agencies know a problem when they see it. The reality is that even if the Services are in the future headed up by more aggressive leadership, directors of other federal agencies will still have the opportunity to evade consultation. This forces the Services to go out and find possible problems, rather than have potential problems be presented to them as a matter of process.

A real life example

The operators of a federally licensed hydroelectric project are required by their license to engage in a formal and public review of the effects of their project on fisheries downstream of their dam in California's Central Valley. There are *Onchorhynchus mykiss* in the river downstream of its dam, and the river has no downstream physical barriers between it and the ocean. Some of the fish in the river have been shown in a study to have either gone to the ocean and returned to the river to spawn, or to be the offspring of sea-run fish. Sea-run ("anadromous") *O mykiss* (called "steelhead" rather than "rainbow trout") are listed as threatened under the ESA. However, resident *O mykiss*, "rainbow trout," that live their entire lives in a river are not listed.

The operators of this hydroelectric project have steadfastly maintained that they should not have to consult with the National Marine Fisheries Service about the effects of their project on steelhead. They don't believe that steelhead should be listed, because steelhead are "the same" as rainbow trout. They also think that since only a small number of rainbow trout have been documented in this river that have life histories of migrating to

the ocean, they shouldn't have to consult. These operators have engaged in extensive legal actions to avoid ESA consultations.

Under the proposed new rules, the Federal Energy Regulatory Commission (FERC) would have the first cut at deciding whether it had to go through a consultation. FERC typically appoints the operator of hydroelectric projects as its representative in preparing a Biological Assessment. But according to these hydroelectric project operators, there are no listed species in the waters affected by its project, so the operators' first step would likely be to recommend to FERC that it do no consultation at all.

Moreover, FERC itself, or simply an official within it, could decide that there were no "clear", i.e. direct, causes of possible take or jeopardy to any listed species or its habitat on the river. FERC, in support of the operators of the hydroelectric project, could then rule that a consultation was not required. It could also rule that the presence of a listed species was not conclusive, and determine by dictum that no consultation was therefore required.

In order to protect steelhead in the affected river under any of the scenarios given in this example, the National Marine Fisheries Service would have to go to court to compel consultation. Not only is this expensive and demanding of legal resources, it is time-consuming and likely to be appealed. It could easily take five years, by which time there might well be many fewer, or even no steelhead left in the river.

The name of the river, by the way, is the lower Tuolumne, and all of the legal gambits we have suggested above either have happened or are imminent. The critical difference between the existing rules and the proposed rule change is that NMFS attorneys and attorneys for conservation groups have at present a fighting chance to protect steelhead in the river using the Endangered Species Act. Under the proposed new rules, they have almost no chance. The difference could also be stated this way: under the present rules, the steelhead have a fighting chance. Under the proposed new rules, the likely scenario is extirpation.

The proposed new rules suggest that it if an agency allows the death of a plant or animal that is part of a listed species (or, in the language of the ESA, "take"), or the reduction of critical habitat, that it can be punished. This supports the viewpoint that the way one avoids bad things is by a system of rewards and punishments. But the idea of the ESA is not to punish people after there is take or reduction of habitat; the goal is to manage so that those things don't happen in the first place.

In addition, this viewpoint presupposes that the burden of proof will be upon the Service to show that there has been take; in other words, we are back to having to show direct causation. If there is a combination of issues that may have contributed to the death of steelhead from the example described above, it would be necessary to show that a specific action resulted in the death of a specific fish. As it stands now, the combination of low flows, high water temperatures, lack of shallow rearing habitat for young fish in non-summer months, lack of high flows to help fish get from the river to the ocean, ocean

conditions, and so on, all contribute to poor numbers of steelhead returning to the river to spawn. It is difficult, though not impossible, to show that low flows in the river in the summer caused take. However, looking at the matter proactively, from the point of view of the present options available to NMFS, the Service can require higher flows in the river to eliminate at least that part of the problem. It might not be definitive, or in the terms of the present proposed rule, "essential," but it can substantially improve the chance of increased survival for the steelhead that are present in the river.

Informal consultation: further dismemberment of the process

Under the ESA as currently enforced, there is also a second process known as "informal consultation" which is employed on some occasions when a federal agency is unsure whether an action it is proposing fall into the category in which it "may affect" listed species or their critical habitat. Rather than prepare a Biological Assessment, the agency meets and confers with one of the Services regarding its proposed action. In some cases, studies or other interim management actions are undertaken to determine possible affects of the proposed agency action on listed species. At the end of the informal consultation, which has no defined timeline, the action agency is either required to enter into formal consultation, and prepare a Biological Assessment, or it is absolved by the Service from doing so.

Under the proposed rule change, a Service engaged to perform an informal consultation would have only two months to decide whether a formal consultation was required, with a possible extension of another two months. Not only does this limit the amount of information that can be gathered about the situation, it also pressures the Service to have a rapid response and make a rapid decision about a case where informal consultation takes place. The Services, however, have long been notoriously, and in our opinion deliberately, underfunded and understaffed. Shortening the deadlines only increases the likelihood that the Services cannot timely comply with informal consultation requirements. The proposed new rules say that if a Service does not issue a decision about the need for formal consultation within the allotted time, the agency is relieved of the need to engage in formal consultation. The net result will be an increased demand for informal consultation in the hope that process will allow agencies to skate, and an increased number of cases where formal consultation does not in fact occur.

The entire scenario suggests a situation where a man, after cutting off the feet of his acquaintance, asks the acquaintance with impatience, "Excuse me. Why are you walking so slowly?"

Conclusion

These changes proposed to the Endangered Species Act are not about clarity, or eliminating unnecessary consultations, or the experience gained in thirty-five years of the Endangered Species Act. They are part of a concerted effort to change the fundamental way that science is viewed and used in our society. They seek to weaken the ability of scientists to protect our natural resources.

The proposed revisions of the Endangered Species Act will result in the extirpation of anadromous salmonids (salmon and steelhead) and sturgeon from many of the rivers and streams in California's Central Valley. There are always many factors in an ecosystem, all the more in a complex and extensive one. To insist on the fool's errand of determining "essential" causation dooms the Central Valley to overwhelming dominance by the ultimate exotic species: the red herring.

The Endangered Species Act is one of the few remaining tools that responsible fisheries advocates can call on to keep the fisheries in California's Central Valley from going the way of the California grizzly bear. The blatant attempt on the part of outgoing ideologues to circumscribe the Act is at once shameless and shameful.

We look forward to the day when those in charge of the Fish and Wildlife Service and the National Marine Fisheries Service diligently and vigorously do their jobs, and allow the dedicated personnel whom they administer to do their jobs without having their hands tied by radical conservative ideology.

The revisions to the Endangered Species Act proposed in the above-referenced docket should be withdrawn. If adopted, they will fail to protect our natural heritage and will undermine the legislative intent of the Act.

Respectfully submitted,

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