

marketed under the existing grant of certification prior to acknowledgement by the Commission that the change is acceptable.

(3) A Class III permissive change includes modifications to the software of a software defined radio transmitter that affect the frequency, modulation type, output power or maximum field strength. When a Class III permissive change is made, the grantee shall supply the Commission with a description of the changes and test results showing that the equipment complies with the applicable rules with the new software loaded, including compliance with the applicable RF exposure requirements. The modified software shall not be loaded into equipment, and the equipment shall not be marketed with the modified software under the existing grant of certification, prior to acknowledgement by the Commission that the change is acceptable.

(4) Class III permissive changes may only be made by the original grantee. Class I and Class II permissive changes may only be made by the original grantee, except as specified further.

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[FR Doc. 01-63 Filed 1-2-01; 8:45 am]

BILLING CODE 6712-01-U

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AF67

Endangered and Threatened Wildlife and Plants; Reopening of Comment Period on the Proposed Rule To Remove the Northern Populations of the Tidewater Goby From the List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: The U.S. Fish and Wildlife Service (Service) gives notice of the reopening of the comment period for the proposed removal of the northern populations of the tidewater goby (*Eucyclogobius newberryi*) from the list of endangered and threatened wildlife. The new comment period will allow all interested parties another opportunity to submit comments on our assertions, as clarified in this notice, that the original listing rule exaggerated the risk of extinction by overestimating the rate of local population extinction, and that the northern populations of the tidewater

goby are not presently in danger of extinction or likely to become in danger of extinction within the foreseeable future. We are re-opening the comment period to clarify some points in our proposal and to solicit further public and peer-review comment.

DATES: The comment period for this proposal closes on February 2, 2001. Comments on the proposed delisting must be received by the closing date.

ADDRESSES: Written comments should be sent to the Regional Director, Regional Office, U.S. Fish and Wildlife Service, 911 NE 11th Avenue, Portland, Oregon 97232-4181. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above Service address.

FOR FURTHER INFORMATION CONTACT: Catrina Martin or Steve Morey at the above address; telephone 503/231-6131; facsimile 503/231-6243.

SUPPLEMENTARY INFORMATION:

Background

Shortly after the tidewater goby was listed as endangered in 1994, the Service initiated the recovery planning process. A contractor was hired to write a draft recovery plan and the product was a draft commonly referred to as the Swift 1995 version. This version was revised slightly in response to internal review and a revision under the authorship of Ballard and Swift was circulated among various experts and the applicable Service field offices in June 1996. Finally, in late September, 1996, a revised draft, authored by Ballard was forwarded to the Regional Office for review. In the 31 months since the listing, the Service had, in the process of drafting the recovery plan, compiled a fairly up-to-date record of what was known about the status of the goby. The goby seemed particularly responsive to climatic cycles, and the trend to extinction had not played out as projected in the 1994 listing. A number of estuaries cited in the listing rule as lacking gobies, symptomatic of the presumed range-wide decline, were in fact, inhabited by gobies. There seemed to be little actual evidence that the distribution and abundance, or overall risk of extinction had changed appreciably since 1982 when the tidewater goby was designated a category 2 candidate (47 FR 58454). Did the goby need a recovery plan, or was the original concern about extinction exaggerated? In order to decide whether to proceed with a recovery plan or to delist, a review of the merits of the original listing, and the current status of the species was initiated. The 1999

proposal to delist the goby summarizes the results of that review and concludes that delisting the tidewater goby north of Orange County is the most appropriate action.

On June 24, 1999, we published a proposed rule to remove from the list of endangered and threatened wildlife those populations of tidewater goby that occur north of Orange County, California, and to retain a distinct population segment of tidewater goby in Orange and San Diego counties as an endangered species (64 FR 33816). We proposed to delist the northern populations because our original conclusions about population trends and were either in error or not adequately supported by the best available biological information. We believe that the original listing rule (59 FR 5954) overestimated the risk of extinction and the tidewater goby may have been mistakenly listed as endangered.

The 1994 rule that listed the tidewater goby as endangered painted a picture of rapid local disappearances leading to extinction. The decline of the goby was considered to be so precipitous and the threats so severe that the conclusion of the summary of factors affecting the species was: "The tidewater goby is in imminent danger of extinction throughout its range and requires the full protection of listing as endangered under the Act to survive" (59 FR 5954). Our 1999 delisting proposal explains that the original listing inappropriately combined older permanent extinctions with temporary, drought-related extinctions to give an exaggerated impression of the rate of decline. The proposed delisting rule also argues that the original listing mistakenly assumes that because of reduced opportunities for gobies to naturally recolonize via dispersal, the species was headed toward extinction or listing under the Act. The relationship between extinction and dispersal is illustrated in the original listing with the following statement: "The number of extirpated localities of gobies has left the remaining populations so widely separated throughout most of the species' range that recolonization is unlikely." The delisting proposal explains that gobies are now present in the majority of the approximately twenty estuaries where they were reported as lost between 1984 and 1990. In most places, gobies reappeared as might have been expected, shortly after the end of drought conditions. These recolonizations confirm that the goby's well-established pattern of local extinction and reappearance still exists.

Other than habitat destruction, drought, and the disruption of population dynamics, the original rule listed a number of threats to explain the rapid rate of population extinction. These included: (1) Indirect losses due to changes in salinity; (2) surface water and groundwater diversions; (3) discharge of agricultural and sewage effluents; (4) siltation; (5) cattle grazing and feral pig activity; (6) non-native predators and competitors; and (7) river flooding and heavy rainfall. The delisting proposal discusses the strengths and weaknesses of the links that were drawn in the original listing rule between these threats and the presumed systematic decline of the goby and concludes that there is not a defensible link between the threats, either singly or in combination, and a systematic decline of the tidewater goby.

The most important argument in the delisting proposal is that extinction is not imminent, nor was it at the time of listing. The threats in the original listing are environmental perturbations that, at high levels throughout the range, either singly or in combination, could lead to systematic declines of the goby and extinction. However, the proposed delisting rule presents evidence that there is no systematic decline of gobies suggesting their extinction, and that the link drawn between the presumed threats and the extinction of the goby in the original listing is unsupported.

Even though we concluded that the original listing rule was in error, the southern populations in Orange and San Diego counties were concurrently proposed as an endangered DPS. Three criteria had to be met by the southern gobies to be recognized as endangered. First, they had to be markedly separated from other tidewater gobies. Second, they had to be significant to the rest of the species. Finally, they had to meet the Act's standards for listing a species as endangered. The first and second criteria were met on genetic and geographic grounds (see 64 FR 33819). The third criterion, the endangered status of the southern gobies, was met because so few southern populations exist that the risk of chance extinction is high. Under the best of conditions (e.g., the current wet cycle), only eight fluctuating populations exist, and all but one of these has declined to the point of local extinction in the recent past. Thus, chance demographic effects, a variety of natural or human-caused threats to habitat quality, or chance combinations of these make the extinction of gobies in Orange and San Diego counties a very real, and not altogether remote, possibility. This

argument about extinction risk hinges on the small number of populations in the south. It cannot be applied in the north, where many or all of the same threats exist (see 64 FR 33820–33824), but where the larger number of populations makes the risk of chance extinction vanishingly small.

We solicited comments from the public during two comment periods, June 24 to August 23, 1999 and February 15 to March 31, 2000. We solicited review of the delisting proposal from four outside reviewers, according to our policy on peer review (59 FR 34270), but received only one response. We also solicited comments from the California Department of Fish and Game pursuant to section 4(b)(5)(A)(ii) of the Endangered Species Act, but they did not comment. We believe, as explained below, that clarification of the proposal and a reopening of the comment period is warranted to provide the public with a meaningful opportunity to comment, and, because of the importance of peer review and the State's input, we are taking this opportunity to solicit comments from them again.

The main reaction expressed in the public comment letters on the proposed delisting was that the Service, armed with little new information was, in its delisting proposal, making an unexplainable reversal of position on the status of the goby. The public comment letters also expressed concern that the delisting proposal was arguing that the goby was in less danger of extinction now than in 1994. We believe that this concern is not warranted because the delisting proposal argues instead that the goby was in fact not in danger of extinction in 1994 and is not now. We may have inadequately conveyed the basis for the proposed delisting when we failed to specifically ask for comments on the facts, arguments, interpretations, and conclusions in the original listing. Instead, using standard language for listing actions, we asked specifically for comments concerning (1) threats; (2) range, distribution, and population size; and (3) current or planned activities that could impact the species.

Following this lead, the public observed that there is little new information since the 1994 listing on risk of extinction, nor has there been appreciable recovery. The public comments were detailed and uniform. The major themes are briefly summarized as follows: (1) It is misleading to characterize status simply in terms of numbers of populations—populations vary in size, and contribute in different ways to long-term

persistence; (2) the proposal does not apply metapopulation dynamics to the tidewater goby metapopulation; (3) the potential for recolonization is inappropriately extrapolated beyond the observational base and undue emphasis was placed on the ability to recolonize; (4) regional genetic subdivisions are ignored; (5) the proposal confuses lack of evidence with lack of effect; (6) threats in the north are treated lightly while in the south they are treated seriously; (7) effects from alien fishes are underestimated; (8) the proposal incorrectly supposes that existing regulatory mechanisms are adequate; (9) combined effects of threats are ignored; (10) the proposal ignores the certainty that drought will return to the California coast. These comments represent a reasoned and informed set of suggestions for improving our analysis of current risk of extinction, and they will be considered in the final agency decision. However, none of the comments we received from the public addressed the basis of our proposed delisting; that the 1994 listing rule misinterpreted the risk of extinction so seriously that the goby was mistakenly listed as endangered.

The review of this delisting proposal is incomplete because objective scientific review was limited to a single response, the State did not comment, and the public commented only on a portion of the determination to delist the northern populations. With this notice we clarify our proposal to delist the tidewater goby and reopen the public comment period. Reopening the comment period gives the public a more meaningful opportunity to comment by providing an additional opportunity to comment on any aspect of the proposal, but particularly on the assertion that the original listing was in error. This will also provide us the opportunity to obtain additional scientific review, and a review from the California Department of Fish and Game.

It is our intent that the final action resulting from the proposal to delist the northern populations of the tidewater goby from the list of endangered and threatened wildlife, and to recognize an endangered population in Orange and San Diego Counties, be as accurate and effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party. We have already accepted comments on a wide range of topics in the proposal during two previous comment periods. However, as explained above, we are hoping to generate comments on some additional

aspects of the proposed delisting rule, especially: (1) Our assertion that the original listing rule exaggerated the risk of extinction by overestimating the rate of local population extinction; (2) any information either supporting or contradicting the information in the delisting rule that suggests that the tidewater goby was not, in 1994 when it was listed, nor is now, in danger of extinction due to a high rate of local extinctions; and (3) any new information that suggests a reasonable causal link between any of the threats, or combination of threats and a high risk of extinction of the tidewater goby.

The final decision on the current proposed rule for the tidewater goby will take into consideration the comments and any additional information we receive, and such

communications may lead to a final regulation that differs from the current proposal. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. 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. The comment period on this proposal closes on February 2, 2001. Written comments should be submitted to the Service office listed in the **ADDRESSES** section.

Author: The primary author of this notice is Steve Morey (see **ADDRESSES** section).

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

Dated: December 27, 2000.

David L. McMullen,

Acting Regional Director, Region 1, Fish and Wildlife Service.

[FR Doc. 01-66 Filed 1-2-01; 8:45 am]

BILLING CODE 4310-55-P