

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R8-ES-2010-0093; MO 92210-0-0009]

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To Revise Critical Habitat for Vernal Pool Fairy Shrimp and Vernal Pool Tadpole Shrimp

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding to revise critical habitat.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on a petition to revise critical habitat for vernal pool fairy shrimp (*Branchinecta lynchi*) and vernal pool tadpole shrimp (*Lepidurus packardii*) under the Endangered Species Act of 1973, as amended (Act). Following a review of the petition, we find that the petition does not present substantial scientific information indicating that revision of the critical habitat for vernal pool fairy shrimp and vernal pool tadpole shrimp may be warranted. Therefore, with the publication of this notice, we have determined that a 12-month finding on this petition is not warranted and will not be conducted.

DATES: The finding announced in this document was made on February 10, 2011. You may submit new information concerning this species or its habitat for our consideration at any time.

ADDRESSES: This finding is available on the Internet at <http://www.regulations.gov> at Docket Number [FWS-R8-ES-2010-0093]. Supporting documentation we used in preparing this finding is available for public inspection, by appointment, during normal business hours at the Sacramento Fish and Wildlife Office, 2800 Cottage Way W-2605, Sacramento, CA 95825. New information, material, comments, or questions concerning this species or its habitat may be submitted to us at any time.

FOR FURTHER INFORMATION CONTACT: Susan Moore, Field Office Supervisor, or Karen Leyse, Listing Coordinator, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way W-2605, Sacramento, CA 95825, by telephone at 916-414-6600, or by facsimile at 916-414-6713. People who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(D) of the Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to revise critical habitat for a species presents substantial scientific information indicating that the revision may be warranted. In determining whether substantial information exists, we take into account several factors, including information submitted with, and referenced in, the petition and all other information readily available in our files. Our listing regulations at 50 CFR 424.14(c)(2)(i) further require that, in making a finding on a petition to revise critical habitat, we consider whether the petition contains information indicating that areas petitioned to be added to critical habitat contain the physical and biological features essential to, and that may require special management to provide for, the conservation of the species.

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. The Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

To the maximum extent practicable, we are to make this finding within 90 days of our receipt of the petition and publish our notice of the finding promptly in the **Federal Register**. We are to base this finding on information provided in the petition, supporting information submitted with the petition, and information otherwise available in our files. If we find that a petition presents substantial information indicating that the revision may be warranted, we are required to determine how we intend to proceed with the requested revision within 12 months after receiving the petition and promptly publish notice of such intention in the **Federal Register**.

Petition History

On August 29, 2008, we received a petition dated August 28, 2008, from ECORP Consulting, Inc., on behalf of Conservation Resources, requesting that we revise critical habitat for vernal pool fairy shrimp (*Branchinecta lynchi*) and vernal pool tadpole shrimp (*Lepidurus packardii*). The petition clearly identified itself as such and included the requisite identification information for the petitioner, as required in 50 CFR 424.14(a). The petitioners did not use the current unit numbers for the critical habitat units when referring to critical habitat units; however, the map and location description provided in the petition indicate that the critical habitat units referred to are critical habitat Unit 14A for the vernal pool fairy shrimp and Unit 9B for the vernal pool tadpole shrimp designated in the final rule published in the **Federal Register** on February 10, 2006 (71 FR 7119-7120, 7153, 7194). The petition requested that, pursuant to the Act, the Service modify the boundaries of these units to include the northern 2,800 acres (ac) (1,133 hectares (ha)) of the parcel referred to as Gill Ranch (ECORP 2008, p. 1).

Previous Federal Actions

The vernal pool fairy shrimp and the vernal pool tadpole shrimp were listed as threatened and endangered, respectively, on September 19, 1994 (59 FR 48136). Critical habitat for 4 vernal pool crustaceans and 11 vernal pool plant species in California and southern Oregon, including the vernal pool fairy shrimp and vernal pool tadpole shrimp, was originally designated in a final rule published in the **Federal Register** on August 6, 2003 (68 FR 46684).

The 2003 final critical habitat for the 4 vernal pool crustaceans and 11 vernal pool plant species in California and southern Oregon totaled approximately 744,070 ac (301,114 ha), and excluded 5 entire counties (Butte, Madera, Merced, Sacramento, and Solano Counties) from the designation of critical habitat due to economic reasons under section 4(b)(2) of the Act. In total, approximately 494,583 ac (200,151 ha) of critical habitat was identified within the five counties, but later excluded.

In January 2004, the Butte Environmental Council and several other organizations filed a complaint alleging that we violated the Act (*Butte Environmental Council et al. v. Norton. et al., Case No. CIV S-04-0096 WBS KJM (E.D. Cal.)*). On October 29, 2004, the court signed a Memorandum and Order in that case remanding the final designation to the Service. In particular, the court ordered us to: (1) Reconsider

the noneconomic exclusions from the final designation of critical habitat, and publish a new final determination as to those lands within 120 days; and (2) reconsider the economic exclusion of the five California counties based on potential economic impacts, and publish a new final determination no later than July 31, 2005.

A final rule for critical habitat reevaluating the noneconomic exclusions from the 2003 final rule was published in the **Federal Register** on March 8, 2005 (70 FR 11140), and a final rule evaluating economic exclusions from the 2003 final rule was published in the **Federal Register** on August 11, 2005 (70 FR 46924). A final rule containing administrative revisions with species-by-unit designations was published in the **Federal Register** on February 10, 2006 (71 FR 7118). This final rule provided 35 critical habitat units designated for the vernal pool fairy shrimp totaling 597,821 ac (241,930 ha), and 18 critical habitat units designated for the vernal pool tadpole shrimp totaling 228,785 ac (92,586 ha). The March 8, 2005, confirmation of the noneconomic exclusions (70 FR 11140) addressed the first requirement of the October 2004 court-ordered remand, while the August 11, 2005, final critical habitat rule (70 FR 46924) addressing the economic exclusions under section 4(b)(2) of the Act addressed the second requirement of the October 2004 court-ordered remand.

The August 11, 2005, final critical habitat rule identified two overlapping units for vernal pool tadpole shrimp and vernal pool fairy shrimp. These two overlapping units were specifically identified in the February 10, 2006, **Federal Register** (71 FR 7151–7153, 7192–7194) for each species as units 9A and 9B for vernal pool tadpole shrimp and units 14A and 14B for vernal pool fairy shrimp. Approximately 9,481 ac (3,837 ha) of habitat determined to contain the physical and biological features essential to the conservation of the vernal pool tadpole shrimp and vernal pool fairy shrimp within these overlapping units was excluded from the final designation based on economic impacts. See Application of Section 4(b)(2)—Economic Exclusion to 23 Census Tracts section of the August 11, 2005, **Federal Register** (70 FR 46949–46952), for our rationale on the exclusion of these areas.

On May 31, 2007, the Service published a clarification of the economic and noneconomic exclusions for the 2005 final rule designating critical habitat for 4 vernal pool crustaceans and 11 vernal pool plants in

California and southern Oregon (72 FR 30279), resulting in a final judgment from the court in favor of the Service. The Home Builders Association of Northern California and other industry groups appealed the judgment; however, on August 9, 2010, the Ninth Circuit issued a decision in favor of the Service, upholding the critical habitat designations for 15 listed vernal pool species (*Home Builders Association of Northern California v. Norton, et al.* (Case No. CV–05–00629–WBS (E.D. Cal.))).

Species Information

For current information on the biology, status, and habitat needs of the vernal pool fairy shrimp and vernal pool tadpole shrimp, refer to the Service's 5-Year Review of the vernal pool fairy shrimp (Service 2007b), the 5-Year Review of the vernal pool tadpole shrimp (Service 2007c), and the *Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon* (Service 2005) available on the Internet at http://www.fws.gov/sacramento/es/5_year_reviews.htm and http://www.fws.gov/sacramento/es/recovery_plans/vp_recovery_plan_links.htm.

Evaluation of Information for This Finding

In making this 90-day finding, we evaluated whether information regarding the revision of critical habitat for the vernal pool fairy shrimp and vernal pool tadpole shrimp, as presented in the petition and other information available in our files, is substantial, thereby indicating that the petition action may be warranted. Our evaluation of this information is presented below.

The petitioner seeks to revise the critical habitat designation by expanding unit 14A for vernal pool fairy shrimp and unit 9B for vernal pool tadpole shrimp to include approximately an additional 2,800 ac (1,133 ha), located within the Cosumnes/Rancho Seco Core Area (Sacramento County) in the Southeastern Sacramento Valley Vernal Pool Region (Service 2005). The 2,800-ac (1,133-ha) area is part of Gill Ranch, which is largely dedicated to the conservation of vernal pools and listed vernal pool species. The petition summarizes the primary constituent elements (PCEs) for vernal pool fairy shrimp and vernal pool tadpole shrimp as presented in the February 10, 2006, administrative revisions (71 FR 7142, 7183). The petition states that the 2,800 ac (1,133 ha) addressed in the petition contain the PCEs and support numerous

wetland features that are essential for reproduction, germination [sic], hatching, maturation, feeding, shelter, and dispersal of vernal pool crustaceans (ECORP 2008, p. 4–5). The information in the petition is consistent with information in our files. We agree that this area contains the physical and biological features essential to the conservation of the species. However, the 2,800-ac (1,133-ha) parcel was originally designated as critical habitat in the August 6, 2003, final rule (68 FR 46684), but was later excluded from the critical habitat designation in the August 11, 2005, final rule (70 FR 46924), when the Secretary decided to exercise his discretion under section 4(b)(2) of the Act to exclude this parcel due to economic impacts. The petition does not contain any information suggesting that the exclusion due to economic impacts was done in error, or that the economic analysis was flawed.

Finding

In making this finding, we relied on information provided by the petitioners, sources cited by the petitioners, and information readily available in our files. We evaluated the information in accordance with 50 CFR 424.14(c). Our process for making this 90-day finding under section 4(b)(3)(D) of the Act and 50 CFR 424.14(c) of our regulations is limited to a determination of whether the information in the petition meets the “substantial scientific information” threshold.

We find that the petition does not present substantial information to indicate that revision of critical habitat to include the proposed property may be warranted. The Service agrees that the property contains the PCEs, and it was designated critical habitat in the 2003 final rule (68 FR 46684). However, the 2,800 ac (1,133 ha) were excluded for economic reasons in the 2005 final rule (70 FR 46924) under section 4(b)(2) of the Act; the petition presents no information indicating that the rule excluding this property from critical habitat requires revision or that the methodology used in determining potential economic impacts was invalid.

References Cited

A complete list of references cited is available on the Internet at <http://www.regulations.gov> at Docket No. FWS–R8–ES–2010–0093 and upon request from the Sacramento Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary authors of this notice are the staff members of the U.S. Fish and

Wildlife Service, Sacramento Fish and
Wildlife Office (*see* **FOR FURTHER
INFORMATION CONTACT**).

Authority

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

Dated: January 28, 2011.

Thomas L. Strickland,

*Assistant Secretary for Fish and Wildlife and
Parks.*

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