

inundation patterns of the bypasses at times do not meet the life history requirements of the splittail. Inundation of bypasses in dry years would reduce the effects of drought on the splittail. We also speculate that if the bypasses were inundated at a frequency and duration that as closely as possible mimics the natural, precipitation-driven hydrograph, then the numbers of non-native fish would be reduced, as non-native fishes favor ponded and continuously inundated habitats.

Comment 34: Certain respondents felt that compensation should be provided to land owners when habitat restorations affected land use.

Our Response: If habitat restorations affect land use, there is a separate process available to landowners for redress. While we do not anticipate that efforts to restore the habitat will result in substantial changes in the land use practices in the bypasses, the regulations governing listing [50 CFR § 424.11(b)] state that listing of a species as threatened or endangered is made “* * * solely on the basis of the best available scientific and commercial information regarding a species’ status, without reference to possible economic or other impacts of such a determination.” Accordingly, we do not consider or address this issue in our listing decision.

Comment 35: Several respondents commented that our classification of the Yolo Bypass as a threat in the January 12, 2001, notice (66 FR 2828) would undermine potential ecosystem restoration actions that would benefit the splittail.

Our Response: In this notice, we have determined that the Sutter and Yolo bypasses are not in and of themselves threats.

The bypasses remain important splittail spawning and rearing habitat during wet periods. Sommer *et al.* (1997) and Sommer *et al.* (2001a, 2001b) found that the bypasses as they exist today, and when flooded, already provide substantial amounts of habitat.

Comment 36: A respondent claimed that this determination could not be promulgated because it was not likely to include the required critical habitat designation or the preparation of a recovery plan.

Our Response: We have determined that listing as a threatened species is not warranted for the splittail, and therefore the designation of critical habitat is not warranted.

Comment 37: A respondent claimed that we must consider the cumulative impacts of multiple species listings and critical habitat designations.

Our Response: The ESA does not allow us to consider cumulative impacts of multiple species listings and critical habitat designations when making a listing determination.

Comment 38: A respondent stated that sport fishing take of other listed species, specifically salmonids, is a significant source of mortality of splittail caught unintentionally and asked if the listing of splittail would include measures to protect the species from this threat.

Our Response: We concur that sport fisheries can be a source of mortality for splittail caught unintentionally. However, since we have determined that listing as a threatened species is not warranted for the splittail, this notice does not include restrictions on sportfishing.

Comment 39: Several respondents objected to our statements regarding the entrainment risks present in the bypasses based upon Sommer *et al.*’s (1997) findings that entrainment is not a significant threat within the bypasses. It is thought that the splittail’s evolutionarily-derived ability to emigrate prior to stranding reduces the risk of stranding. Respondents felt that the magnitude of the entrainment threats presented by the bypasses was overestimated when we cited in the January 12, 2001, notice (66 FR 2828), the death of a number of juvenile splittail in an approximately 0.8 hectare (ha) (2 acre (ac)) borrow pit as statistically-significant and that the classification of “natural sinks” as a threat was in error.

Our Response: We have considered these data and now agree that entrainment in the Yolo Bypass is less than was originally thought. Information presented at the January 29, 2001, CALFED Splittail Science Conference indicates that a modest degree of topographic variability within an inundated area may be beneficial, as it may create a diversity of flow patterns and velocities which in turn may allow juvenile splittail to evade predation and forage more effectively during egress.

Comment 40: A respondent described that many of the non-native species of the Delta have arrived via the discharge of ballast water from seagoing vessels and asked if the listing of the splittail would result in the regulation of maritime trade.

Our Response: As we have determined that listing as a threatened species is not warranted for the splittail, this notice does not include restrictions on maritime trade.

Comment 41: A respondent stated that we should consider only project-induced effects associated with existing projects and their associated operations.

The respondent discouraged assessments of effects to splittail that would occur based upon implementation of projects that will be constructed and/or operated in manners that cannot be substantially verified at present, such as those in CALFED and the CVPIA.

Our Response: We agree and have revised and reevaluated the threats presented by existing conditions and projects (see Summary of Factors Affecting the Species section).

Comment 42: Several respondents believed that full implementation of the CALFED Program would preclude the need to list the splittail and indicated that over \$10 million had been spent on actions that could improve conditions for splittail.

Our Response: We agree that actions taken under the CALFED program have contributed to the current improvements in habitat that affects the splittail and anticipate that other actions of that type are foreseeably likely to occur. (We refer the respondent to the sections entitled Summary of Factors Affecting the Species.)

Comment 43: Various respondents informed us of the contents of an April 24, 2001, *Sacramento Bee* article wherein Dr. Peter B. Moyle, a recognized expert in aquatic ecology, fisheries science, and the splittail, discussed the February 8, 1999, listing of the splittail as threatened. Respondents related Dr. Moyle’s statement that “Things were getting better” and argued that it constituted an opinion that the species should not have been, and by inference, should not now be listed.

Our Response: We have read the article in question. We cannot conclude that Dr. Moyle was making a statement on the listing status of splittail. However, we do note that ecosystem improvements are a primary reason why we are removing the listing. We have cited several of Dr. Moyle’s scientific publications and conclusions within this document.

Summary of Factors Affecting the Species

After a thorough review and consideration of all the best scientific and commercial information available, we have determined that the listing of the Sacramento splittail as a threatened species should be removed. We followed procedures found at section 4(a)(1) of the Act and regulations (50 CFR part 424) implementing the listing provisions of the Act. 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).