



MEMORANDUM

TO: SLDMWA Water Resources Committee Members and Alternates

FROM: Scott Petersen, Water Policy Director

DATE: September 14, 2020

RE: Update on Water Policy/Resources Activities

BACKGROUND

This memorandum is provided to briefly summarize the current status of various agency processes regarding water policy activities, including but not limited to the (1) Reinitiation of Consultation on Long-Term Operations (“ROC on LTO”), (2) State Water Resources Control Board Action, including the Bay-Delta Water Quality Control Plan update, (3) San Joaquin River Restoration Program, (4) Delta Conveyance, (5) Delta Stewardship Council, and (6) Water Blueprint for the San Joaquin Valley.

POLICY ITEMS

Endangered Species Act Regulations

Critical Habitat Designation (Comments due Oct. 8)

On September 8, 2020, the U.S. Fish and Wildlife Service (FWS), released a proposed rule¹ to amend portions of the regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions set forth a process for excluding areas of critical habitat under section 4(b)(2) of the Act, which mandates consideration of the impacts of designating critical habitat and permits exclusions of particular areas following a discretionary exclusion analysis. The FWS’ proposed rule aims to articulate clearly when and how FWS will undertake an exclusion analysis, including identifying a non-exhaustive list of categories of potential impacts for FWS to consider. The proposed rulemaking would respond to applicable Supreme Court case law, reflect agency experience, codify some current agency practices, and make some modifications to current agency practice. The intended effect of this proposed rule is to provide greater transparency and certainty for the public and stakeholders.

Definition of “Habitat” (Comments submitted Sept. 4)

On July 31, 2020, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services”), published a draft rule² to propose to

¹ <https://www.federalregister.gov/documents/2020/09/08/2020-19577/endangered-and-threatened-wildlife-and-plants-regulations-for-designating-critical-habitat>

² <https://www.fws.gov/endangered/esa-library/pdf/proposed-definition-of-habitat-web-version.pdf>

add a definition of “habitat” to the regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act).

FWS and NMFS are proposing the regulatory definition of “habitat,” in light of the Supreme Court’s holding in *Weyerhaeuser Co. v. U.S. FWS* regarding the relationship between “habitat” and “critical habitat.” While critical habitat is defined in the ESA, habitat is not. In *Weyerhaeuser*, the Supreme Court said that the ESA “does not authorize the Secretary to designate [an] area as critical habitat unless it is also habitat for the species.”

To avoid confusion and unintended consequences, the FWS and NMFS provided two potential definitions of habitat for consideration and comment:

- *[Proposed Definition] “The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species”; and*
- *[Alternative Definition] “The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.”*

The Water Authority has identified several general principles that the FWS and NMFS should adhere to when determining whether a particular area is habitat for a species and provided comments on the proposed definitions (“Exhibit A”).

Reclamation Directives and Standards

Documents out for Comment

- [Watercraft and Dredging, RSHS 28 \(comments due 09/14/2020\)](#)
- [Administrative Control of Funds System for the Prevention of Antideficiency Act \(ADA\) Violations, BGT 02-01 \(comments due 09/21/2020\)](#)
- [Accessibility to Information and Communication Technology: Section 508 of the Rehabilitation Act, IRM 05-08 \(comments due 10/04/2020\)](#)

State Water Resources Control Board (State Water Board) Activity

Documents out for Comment

Aquatic Weed Control Permit Proposed Amendment

BACKGROUND

The State Water Board adopted the Aquatic Weed Control Permit³ on March 5, 2013. In section III.B of the Permit, the State Water Board delegates authority to the Executive Director to:

³ Water Quality Order 2013-0002-DWQ (as amended by Water Quality Orders 2014-0078-DWQ, 2015-0029-DWQ, 2016-0073-EXEC, and 2017-0015-EXEC); General permit No. CAG990005.

1. Amend the Permit to add new active ingredients currently registered by California Department of Pesticide Regulation for the control of aquatic weeds; and
2. Grant a regulatory exception to dischargers from complying with California Toxics Rule constituents for pesticide active ingredients that are priority pollutants, in accordance with section 5.3 of the State Water Board Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (Policy).

Section 5.3 of the Policy allows for short-term or seasonal exceptions from its requirements for resource or pest management conducted by public entities or mutual water companies. To qualify for an exception from complying with priority pollutant standards, a public entity must fulfill the requirements listed in section 5.3 of the Policy for State Water Board consideration to grant the exception. Among other requirements, entities seeking an exception to complying with water quality criteria for priority pollutants must submit documents in compliance with the California Environmental Quality Act (CEQA).

The State Water Board is proposing to amend the Aquatic Weed Control Permit to add the Chowchilla Water District to the existing list of dischargers in Attachment G of the Permit that are excepted from complying with specified California Toxics Rule criteria in accordance with section 5.3 of the Policy. The proposed exception for the Chowchilla Water District is for an exception to comply with California Toxics Rule criteria for acrolein and copper. The District has satisfactorily completed the required CEQA process to qualify for a California Toxics Rule exception for copper and acrolein.

The State Water Board will accept written comments regarding this item, including any request for a hearing. Written comment letters and hearing requests must be received no later than 12:00 p.m. (noon) on Monday, September 28, 2020.

[Bay Delta Water Quality Control Plan Update](#)

The State Water Board is currently considering updates to its 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (“Bay Delta Plan”) in two phases (Plan amendments). The first Plan amendment is focused on San Joaquin River flows and southern Delta salinity (“Phase I” or “San Joaquin River Flows and Southern Delta Salinity Plan Amendment”). The second Plan amendment is focused on the Sacramento River and its tributaries, Delta eastside tributaries (including the Calaveras, Cosumnes, and Mokelumne rivers), Delta outflows, and interior Delta flows (“Phase II” or “Sacramento/Delta Plan Amendment”).

During the December 12, 2018 Water Board Meeting, the Department of Water Resources (“DWR”) and Department of Fish and Wildlife presented proposed “Voluntary Settlement Agreements” (“VSAs”) on behalf of Reclamation, DWR, and the public water agencies they

serve to resolve conflicts over proposed amendments to the Bay-Delta Plan update.⁴ The State Water Board did not adopt the proposed VSAs in lieu of the proposed Phase 1 amendments, but as explained below, directed staff to consider the proposals as part of a future Delta-wide proposal.

Phase 1 Status: The State Water Board adopted a resolution⁵ to adopt amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and adopt the Final Substitute Environmental Document during its December 12, 2018 public meeting.

Phase 2 Status: In the State Water Board's resolution adopting the Phase 1 amendments, the Water Board directed staff to assist the Natural Resources Agency in completing a Delta watershed-wide agreement, including potential flow and non-flow measures for the Tuolumne River, and associated analyses no later than March 1, 2019. Staff were directed to incorporate the Delta watershed-wide agreement as an alternative for a future, comprehensive Bay-Delta Plan update that addresses the reasonable protection of beneficial uses across the Delta watershed, with the goal that comprehensive amendments may be presented to the State Water Board for consideration as early as possible after December 1, 2019. As the State Water Board further refines this update, there will be opportunity for public comment.

The effort has made significant progress since an initial framework was presented to the State Water Board on December 12, 2018.

On March 1, 2019, the California Department of Water Resources and the Department of Fish and Wildlife submitted documents⁶ to the State Water Board that reflect progress since December to flesh-out the previously submitted framework to improve conditions for fish through targeted river flows and a suite of habitat-enhancing projects including floodplain inundation and physical improvement of spawning and rearing areas.

Since the March 1 submittal, significant work has taken place to develop the package into a form that is able to be analyzed by State Water Board staff for legal and technical adequacy. On June 30, 2019, a status update with additional details was submitted to the Board for review.

⁴ Available at <https://water.ca.gov/-/media/DWR-Website/Web-Pages/Blogs/Voluntary-Settlement-Agreement-Meeting-Materials-Dec-12-2018-DWR-CDFW-CNRA.pdf>.

⁵ Available at https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2018/rs2018_0059.pdf.

⁶ Available at http://resources.ca.gov/docs/voluntary-agreements/2019/Complete_March_1_VA_Submission_to_SWRCB.pdf

Additionally, on February 4, 2020, the State team released a framework for the Voluntary Agreements to reach “adequacy”, as defined by the State team.

Further work and analysis is needed to determine whether the agreements can meet environmental objectives required by law and identified in the State Water Board’s update to the Bay-Delta Water Quality Control Plan.

[Delta Conveyance](#)

[U.S. Army Corps of Engineers Issues Notice of Intent](#)

The U.S. Army Corps of Engineers (USACE) issued a Notice of Intent (NOI) for the development of an Environmental Impact Statement for the Delta Conveyance Project. Publication of the NOI initiates the environmental review process under the National Environmental Policy Act (NEPA). The NOI also signals the start of the federal scoping period, providing an opportunity for public and agency comment on the scope and content of the NEPA review. Information related to the NEPA scoping period, including details on how to comment, can be found on the USACE website.

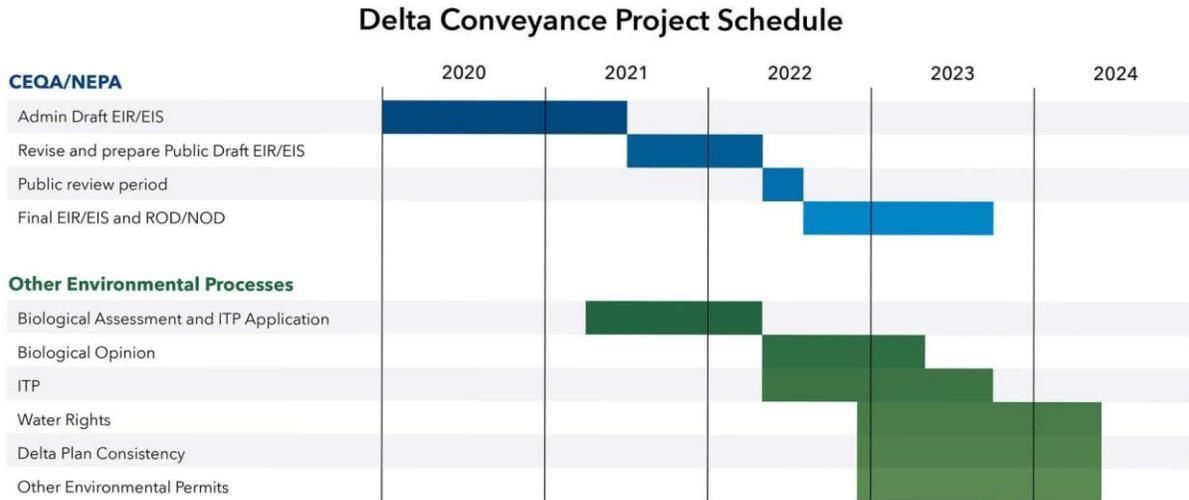
[Preliminary Cost Assessment Prepared](#)

The Delta Conveyance Design and Construction Authority has prepared a preliminary cost assessment for the Delta Conveyance Project. Cost information developed at this early stage provides a starting point to understand the program’s probable costs based on industry standard methodologies. While planning and design of the program are in the very early stages, this information is intended to aid the beneficiary public water agencies who are ultimately responsible for funding the planning, environmental review, permitting and, if approved, design and construction of a proposed Delta conveyance facility. This information will be refined over time as planning and environmental review proceed and more precise design and engineering become available. Find the presentation material [here](#) and the meeting video archive will be located [here](#) when available.

This cost assessment is related to the proposed project as it was identified in the Notice of Preparation and is not an indication of any type of project approval by the Department of Water Resources (DWR). DWR has made no decisions as to the selection of a specific alternative as the program planning and design are still in the “Initial Conceptual Design Phase” and alternatives are still being studied. A final decision regarding whether to approve the proposed Delta Conveyance Project or an alternative, including the no project alternative, will not occur until after completion of the environmental review under the California Environmental Quality Act and NEPA, and other environmental permitting processes have been completed.

Updated Schedule Now Available

An updated program schedule is available on the Delta Conveyance Project website⁷. The schedule has been modified to align the state and federal environmental review processes, as well as to accommodate additional time needed for modeling. DWR expects permitting to be complete in mid-2024.



Water Blueprint for the San Joaquin Valley

The Water Blueprint for the San Joaquin Valley (Group) will hold its Executive Committee meeting on September 15 and the large Group meeting on September 17. Some 70 participants make up the Blueprint large group including Farm Bureaus, Water Authorities, Districts, Growers, Trade Associations, Fresno State, GSAs, Grasslands, Reclamation and white land interests. A comprehensive and collaborative plan is under development that the San Joaquin Valley (broad coalition) can support and advocate for with a focus on solutions in coordination with key stakeholders.

Annual 2020 invoices have been sent out and the finance committee is following up on payments. The Steering Committee for Phase II is developing a solution set. The Group and the following committees listed below are pursuing the goals of Blueprint, including funding opportunities and working in conjunction with other stakeholders.

Socio-Economic Impact Analysis (EIA) Phase I completed, Phase II being developed: A number of presentations and events have been completed while others have been rescheduled. Prior to the shelter in place order the Blueprint group had been implementing a communications plan to highlight the EIA and the impacts under a status quo approach. Phase II of the plan will look at a solution set being developed with the Technical Committee and others.

⁷ https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Delta-Conveyance/DC_Schedule_August2020_508.pdf?la=en&hash=9069D624DB200C0BC9C8B57BAA51DB7FC3CCB19B

Project Status: Stantec and MBK have been engaged for Planning and Engineering services to support the development, evaluation, and selection of activities that will be pursued with the support of the Blueprint entity, including: Implementation of SGMA in the San Joaquin Valley, Development of a water supply plan to minimize loss of working lands, degradation of groundwater quality, loss of jobs, and other regional economic impacts, Development of an environmental plan to manage land use changes for agricultural lands that unavoidably must come out of production, and Develop safe, clean affordable water supplies for disadvantaged communities.

DAC/SDAC Drinking Water Feasibility Study: The objective of the Project is to identify the technical, financial, and institutional feasibility of providing surface water deliveries from the Madera Canal and Friant-Kern Canal to recharge basins, or other types of facilities, to improve drinking water conditions (accessibility, affordability, quality and quantity) for DACs and SDACs located in the Study Area. After a pilot study is implemented, expansion of projects to other areas is anticipated.

Exhibit A

San Luis & Delta-Mendota Water Authority



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September 4, 2020

VIA FEDERAL E-RULEMAKING PORTAL

Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2020-0047
U.S. Fish & Wildlife Service
MS: PRB(3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments Re: Proposed Rule to Add Definition of “Habitat” to Regulations that Implement Section 4 of the Endangered Species Act (Docket No. FWS-HQ-ES-2020-0047)

To Whom it May Concern:

The San Luis & Delta-Mendota Water Authority (“Water Authority”) submits the following comments in response to the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service’s (“NMFS”) (collectively “Services”) proposed rule to add a definition of “habitat” to the regulations that implement the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* (“ESA”). The proposed rule was published in the Federal Register on August 5, 2020. 85 Fed. Reg. 47333 (Aug. 5, 2020). The Water Authority appreciates the opportunity to provide these comments on the proposed rule.

The Water Authority is a public agency with its principal office located in Los Banos, California. It was formed in 1992 as a joint powers authority, and has twenty-eight member agencies. Twenty-five of these agencies contract with the United States for the delivery of water from the federal Central Valley Project (“CVP”). The CVP is operated and managed by the United States Bureau of Reclamation (“Reclamation”).

Most of the Water Authority’s member agencies depend upon the CVP as the principal source of water they provide to users within their service areas. That water supply serves approximately 1.2 million acres of agricultural lands within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara Counties, a portion of the water supply for nearly 2 million people, including in urban areas within Santa Clara County referred to as the “Silicon Valley”, and wildlife refuges in the San Joaquin Valley.

The Water Authority and its member agencies have a significant stake in the effective, consistent, and efficient implementation of the ESA, implementation informed by the best available science and data. The reliability and quantity of CVP water supplies available to many of the Water Authority’s member agencies has been significantly diminished over the past twenty-five years. This loss is due, in part, to implementation of the ESA, specifically measures adopted under the ESA to change the operations of the CVP for the intended benefit of listed California native fish species.

Over the decades since the ESA was adopted, some confusion has arisen regarding its scope and intended application, including the application of its definition of “critical habitat” to areas that are unoccupied by the species. The Water Authority supports the Services’ efforts to clarify the standard for designation of unoccupied areas as critical habitat.

A. Comments on the Application of the Definition of “Habitat”

1. The Definition of “Habitat” Should Only Apply to Critical Habitat Designations

The preamble to the proposed rule discusses the proposed definition only as applied to critical habitat designations pursuant to section 4 of the ESA. The Services apparently do not intend for the definition to be utilized in the application of other sections of the ESA, such as section 9’s take prohibition, section 7’s consultation requirements, or section 10’s permits. That apparent intention should be made explicit. In its final rule, the Services should expressly clarify that the definition of “habitat” will only be applied in the course of designating critical habitat pursuant to section 4 of the ESA. The Services should clarify that identifying an area as habitat imposes no new or additional regulatory burdens on that area or its owners.

2. The Services Should Always Make a Habitat Determination Before Designating an Area as Unoccupied Critical Habitat

Overall, the Water Authority supports the Services’ guidance in the preamble regarding how and when the definition of “habitat” will be applied. 85 Fed. Reg. at 47335. The Water Authority agrees that limiting consideration of whether an area is “habitat” to cases in which unoccupied areas are at issue is a prudent way to promote efficient critical habitat designation.

The Water Authority respectfully disagrees, however, with the Services’ plan, in cases in which unoccupied areas are at issue, to limit its consideration of whether an area is “habitat” to situations where “genuine questions exist.” 85 Fed. Reg. at 47335. The Water Authority understands that the Services’ intent with this approach is to further promote the efficiency of critical habitat designations. However, based on its own experience with ESA regulation, the Water Authority is concerned this approach will result in reduced efficiency. Under the “genuine question” standard, the Services may be required to expend valuable resources both (1) determining whether a “genuine question” exists and defending that determination, and (2) making a habitat determination and defending that determination. The Water Authority urges the Services to consider whether it will be more efficient to forego the step of determining whether a “genuine question” exists and, instead, analyze and make a “habitat” determination whenever they are considering including unoccupied areas in a designation. Under this approach, the Services would

maintain discretion regarding the depth of analysis required for the habitat determination depending upon the number and complexity of the issues associated with the unoccupied areas under consideration.

Relatedly, the Water Authority urges the Services to be explicit as possible in its analysis of whether areas are “habitat” by identifying the attributes necessary to support the species, explaining why those attributes are necessary, and making conclusions regarding the extent those attributes are present. Including such analyses in the proposed listing for a species will result in a more informed habitat determination.

3. Clarification on the Relationship Between “Range,” “Habitat,” and “Critical Habitat”

The terms “range,” “habitat,” and “critical habitat” are all used in the ESA. Federal action agencies and interested stakeholders would all benefit from an explanation as to how each of these concepts are distinct and how the new definition of “habitat” fits within hierarchy of these terms. For example, the Services should clarify that “range” is broader than “habitat” and that “critical habitat” is a subset of “habitat.”

B. Comments on the Proposed and Alternate Definition of “Habitat”

1. The ESA Provides Mechanisms for Revising Critical Habitat Boundaries in Response to Changed Conditions

In the preamble, the Services indicate that they are interested in receiving comment on the second sentence of the alternative definition as it expressly limits unoccupied habitat for a species to areas “where the necessary attributes to support the species presently exist,” and explicitly excludes areas that have no present capacity to support individuals of the species. 85 Fed. Reg. at 47334 (emphasis in original). The Water Authority supports the second sentence of the alternate definition because it better ensures that designations of unoccupied areas are not based on speculation about future conditions.

The Services may receive comments opposing a requirement that the necessary attributes to support a species presently exist, based on a concern that this would exclude areas that presently have no capacity to support the species but may in the future, due to changed conditions caused by, e.g., restoration or climate change. This is not a compelling reason for foregoing promulgation of the alternate definition. The ESA provides for revising critical habitat boundaries in response to changed conditions. First, section 4 of the ESA authorizes the Secretary to revise critical habitat designations *sua sponte*. 16 U.S.C. § 1533(a)(3)(A) (“The Secretary...may, from time-to-time thereafter as appropriate, revise such designation.”). Thus, the Secretary can revise the designation if conditions change in the future. Second, if the Secretary does not act on their own initiative, any interested person may petition to revise a critical habitat designation. *Id.* at § 1533(b)(3)(D). Section 4 sets deadlines by which the Services must process petitions to revise designations. *Id.* at § 1533(b)(3)(D). Section 4 states that the Services must, to the maximum extent practical, publish in the Federal Register (1) their findings as to whether a revision to critical habitat may be necessary (within 90 days of the petition), and (2) a determination of how they intend to proceed should they determine a revision may be warranted (within 12 months of the petition). *Id.* The

ESA provides that such revisions shall be made “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” *Id.* at § 1533(b)(2).

If the alternate definition of habitat is promulgated, an area that becomes suitable habitat under the definition after a critical habitat has been designated may be added to a species’ critical habitat through the mechanisms for revising critical habitat designations that the ESA already has in place. With these mechanisms in place, the concerns about not including areas that might someday become habitat are unfounded. The better approach is to ensure that designations of unoccupied areas are not based on speculation about future conditions.

2. Both the Term “Depends Upon” and “Use” Are Ambiguous and Could be Interpreted Too Broadly if Not Clarified in the Final Rule

In the preamble, the Services indicate that they are interested in receiving comment on whether “depend upon” as included in the proposed definition versus “use” as included in the alternate definition better describes the relationship between a species and its habitat. 85 Fed. Reg. at 47334. The Water Authority recognizes that it is difficult to fashion a definition of habitat that both fits within the ESA’s regulatory framework and accounts for broad concepts of habitat in ecology. That difficulty is reflected here. The Water Authority believes that “depends upon” and “use” each have strengths and weaknesses, but that both are ambiguous and could be misinterpreted if their scope is not explicitly clarified in the preamble to the final rule.

The term “depends upon” in the proposed definition could be helpful if interpreted to mean that a meaningful or significant connection between a species’ life history and a particular area must exist in order for that area to be habitat for that species. Generally speaking, the Water Authority supports this interpretation of the term “depends upon.” However, the term “depends upon” could be interpreted far more broadly; its outer limits potentially difficult to discern. For example, does the effect of the Amazon rainforest on world climate mean that a species thousands of miles away “depends upon” that area? If not, how strong or direct an effect must an area have on a species for the Services to conclude that species “depends upon” that area? The Water Authority does not support such an expansive interpretation of the term “depends upon,” and urges the Services to provide clarification on this point if it chooses to use the term “depends upon” in the definition of habitat.

The term “use” in the alternate definition could be helpful if interpreted as conveying the concept that in order for an area to be habitat for a particular species, that area must be capable of being physically used by that species to sustain itself. In this sense the term “use” may be less ambiguous than the term “depends upon” which, under certain interpretations, could allow for areas that a species would be incapable of physically using to sustain itself to, nonetheless, be habitat. However, the term “use” could also be interpreted broadly to encompass areas to which a species merely has an incidental or passive connection, making it difficult to discern between a species’ range and its habitat.

In short, both “use” and “depends upon” have potential value in the definition of habitat, but both are somewhat ambiguous. The Water Authority requests that in the preamble of the final

rule, the Services provide an explanation as to the intended scope of whichever term is included in the definition.

C. Application of Definition to Critical Habitat Revisions

The Water Authority agrees with the Services’ proposal to apply the definition of “habitat” prospectively and not to designations that were made final on or before the date on which the rule becomes effective. 85 Fed. Reg. at 47335. However, as explained above, the ESA provides for revisions to critical habitat designations. It is unclear whether, once it becomes effective, the definition of “habitat” would apply to the revision of a currently existing critical habitat designation. The Water Authority respectfully requests that the Services clarify this point in their final rule.

D. Conclusion

The Water Authority appreciates this opportunity to comment on the proposed rule to add a definition of “habitat” to the regulations that implement the ESA. If you have any questions regarding these comments, please contact me or the Water Authority’s General Counsel, Rebecca Akroyd, at (209) 826-9696.

Sincerely,



J. Scott Petersen
Director of Water Policy
San Luis & Delta-Mendota Water Authority