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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R8-ES-2024-0131; FXES1111090FEDR–256–FF09E21000]

RIN 1018–BH71

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the San Francisco Bay-Delta Distinct Population Segment of the Longfin Smelt

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the San Francisco Bay-Delta distinct population segment (DPS) of the longfin smelt (*Spirinchus thaleichthys*), a fish species from the San Francisco Bay estuary in California, under the Endangered Species Act of 1973, as amended (Act). In total, approximately 91,630 acres (37,082 hectares) in California fall within the boundaries of the proposed critical habitat designation. We also announce the availability of an economic analysis of the proposed designation of critical habitat for the species.

DATES: We will accept comments received or postmarked on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. eastern time on the closing

date. We must receive requests for a public hearing, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** by **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal: *https://www.regulations.gov*. In the Search box, enter FWS-R8-ES-2024-0131, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment."

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R8-ES-2024-0131, U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov*. This generally means that we will post any personal information you provide us (see **Information Requested**, below, for more information).

Availability of supporting materials: Supporting materials, such as the species status assessment report and 100-word summary of this proposed rule, are available at *https://www.regulations.gov* at Docket No. FWS-R8-ES-2024-0131. For the proposed critical habitat designation, the coordinates or plot points or both from which the maps are generated are included in the decision file for this critical habitat designation and are available at *https://www.regulations.gov* at Docket No. FWS-R8-ES-2024-0131.

FOR FURTHER INFORMATION CONTACT: Donald Ratcliff, Field Supervisor, U.S. Fish and Wildlife Service, San Francisco Bay-Delta Fish and Wildlife Office, 650 Capitol Mall Suite 8–300, Sacramento, CA 95814; telephone 916–930–5603. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States. Please see Docket No. FWS–R8–ES–2024–0131 on *https://www.regulations.gov* for a document that summarizes this proposed rule.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a determination that a species is endangered or threatened requires that we must designate the species' critical habitat to the maximum extent prudent and determinable. We published a final rule in the *Federal Register* listing the San Francisco Bay-Delta distinct population segment (DPS) of the longfin smelt (*Spirinchus thaleichthys*) (Bay-Delta longfin smelt) as an endangered species on July 30, 2024 (89 FR 61029). We are now proposing to designate its critical habitat. Making a critical habitat designation can be completed only by issuing a rule through the Administrative Procedure Act rulemaking process (5 U.S.C. 551 et seq.).

What this document does. We propose to designate critical habitat for the San Francisco Bay-Delta DPS of the longfin smelt (*Spirinchus thaleichthys*).

The basis for our action. Section 4(a)(3) of the Act requires that the Secretary of the Interior (Secretary), to the maximum extent prudent and determinable, designate

critical habitat for listed species. Section 3(5)(A) of the Act defines critical habitat as (i) the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. Section 4(b)(2) of the Act states that the Secretary must make the designation 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 impacts of specifying any particular area as critical habitat.

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other governmental agencies, Native American Tribes, the scientific community, industry, or any other interested parties concerning this proposed rule. We particularly seek comments concerning:

(1) Specific information on:

(a) Biological or ecological requirements of the Bay-Delta longfin smelt, including habitat requirements for feeding, breeding, rearing, and sheltering;

(b) The amount and distribution of the Bay-Delta longfin smelt's habitat;

(c) Any additional areas occurring within the range of the species in the San Francisco Bay estuary (e.g., Petaluma River, South San Francisco Bay) and ocean areas outside the Golden Gate, that should be included in the designation because the areas (i) were occupied at the time of listing and contain the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection, or (ii) were unoccupied at the time of listing and are essential for the conservation of the species;

(d) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change.

(2) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(3) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the related benefits of including or excluding specific areas.

(4) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts and any additional information regarding probable economic impacts that we should consider.

(5) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that

area under section 4(b)(2) of the Act. If you think we should exclude any areas, please provide information supporting a benefit of exclusion.

(6) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Please note that submissions merely stating support for, or opposition to, the action under consideration without providing supporting information, although noted, do not provide substantial information necessary to support a determination. Section 4(b)(2) of the Act directs that the Secretary shall designate critical habitat on the basis of the best scientific data available.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit information via *https://www.regulations.gov*, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *https://www.regulations.gov*.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *https://www.regulations.gov*.

Our final designation may differ from this proposal because we will consider all comments we receive during the comment period as well as any information that may become available after this proposal. Based on the new information we receive (and, if relevant, any comments on that new information), our final critical habitat designation may not include all areas proposed, may include some additional areas that meet the definition of critical habitat, or may exclude some areas if we find the benefits of exclusion outweigh the benefits of inclusion and exclusion will not result in the extinction of the species. In our final rule, we will clearly explain our rationale and the basis for our final decision, including why we made changes, if any, that differ from this proposal.

Public Hearing

Section 4(b)(5) of the Act provides for a public hearing on this proposal, if requested. Requests must be received by the date specified in **DATES**. Such requests must be sent to the address shown in **FOR FURTHER INFORMATION CONTACT**. We will schedule a public hearing on this proposal, if requested, and announce the date, time, and place of the hearing, as well as how to obtain reasonable accommodations, in the *Federal Register* and local newspapers at least 15 days before the hearing. We may hold the public hearing in person or virtually via webinar. We will announce any public hearing on our website, in addition to the *Federal Register*. The use of virtual public hearings is consistent with our regulations at 50 CFR 424.16(c)(3).

Previous Federal Actions

On October 7, 2022, we published in the *Federal Register* a proposed rule to list the Bay-Delta longfin smelt as endangered (87 FR 60957). On February 27, 2023, we reopened the comment period on the proposed rule for 30 days and announced an online public hearing, which took place March 14, 2023 (88 FR 12304). Our final rule determining endangered species status for the Bay-Delta longfin smelt was published in the *Federal Register* on July 30, 2024 (89 FR 61029). In our 2022 proposed listing rule, we stated that the designation of critical habitat was not determinable due to the lack of incremental economic impact information. We have since obtained the necessary economic information and are now proposing critical habitat. Please see the 2022 proposed listing rule and 2024 final listing rule (citations above in this paragraph) for additional information on previous Federal actions.

Peer Review

A species status assessment (SSA) team prepared an SSA report for the Bay-Delta longfin smelt (Service 2024, entire). The SSA team was composed of Service biologists, in consultation with other species experts including those from the California Department of Fish and Wildlife (CDFW). The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the Bay-Delta longfin smelt, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species.

In accordance with our joint policy on peer review published in the *Federal*

Register on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review in listing and recovery actions under the Act, we solicited independent scientific review of the information contained in the draft SSA report (Service 2021, entire). We sent the draft SSA report to five independent peer reviewers and received three responses. Results of this structured peer review process can be found at *https://www.regulations.gov*. A summary of the peer review comments and our response to those comments can be found in the final listing rule (see 89 FR 61029; July 30, 2024, Peer Review section). Prior to preparing the proposed and final listing rules, we incorporated the results of these reviews as well as comments and information received from public comment, as appropriate, into the current (2024) SSA report. The information within the 2024 SSA report forms the foundation for this proposed critical habitat rule.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as an area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that each Federal action agency ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation also does not allow the government or public to

access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Rather, designation requires that, where a landowner requests Federal agency funding or authorization for an action that may affect an area designated as critical habitat, the Federal agency consult with the Service under section 7(a)(2) of the Act. If the action may affect the listed species itself (such as for occupied critical habitat), the Federal agency would have already been required to consult with the Service even absent the designation because of the requirement to ensure that the action is not likely to jeopardize the continued existence of the species. Even if the Service were to conclude after consultation that the proposed activity is likely to result in destruction or adverse modification of the critical habitat, the Federal action agency and the landowner are not required to abandon the proposed activity, or to restore or recover the species; instead, they must implement "reasonable and prudent alternatives" to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat).

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the *Federal Register* on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information compiled in the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species; the recovery plan for the species; articles in peer-reviewed journals; conservation plans developed by States and counties; scientific status surveys and studies; biological assessments; other unpublished materials; or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act; (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species; and (3) the prohibitions found in section 9 of the Act. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of the species. Similarly, critical habitat designations made on the basis of the best scientific data available at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available at the time of those planning efforts calls for a different outcome.

Physical or Biological Features Essential to the Conservation of the Species

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas we will designate as critical habitat from within the geographical area occupied by the species at the time of listing, we consider the

physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define "physical or biological features essential to the conservation of the species" as the features that occur in specific areas and that are essential to support the life-history needs of the species, including, but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features essential to the conservation of the species might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or absence of a particular level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic essential to support the life history of the species.

In considering whether features are essential to the conservation of the species, we may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to, space for individual and

population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

Bay-Delta Longfin Smelt Description, Distribution, and Habitat Requirements

Below is a summary of the description, distribution, and habitat requirements of the Bay-Delta longfin smelt. For a more thorough discussion of this information as well as information on the species' ecology, life history, and habitat needs, please see the SSA report (Service 2024, chapter 2, pp. 9–27).

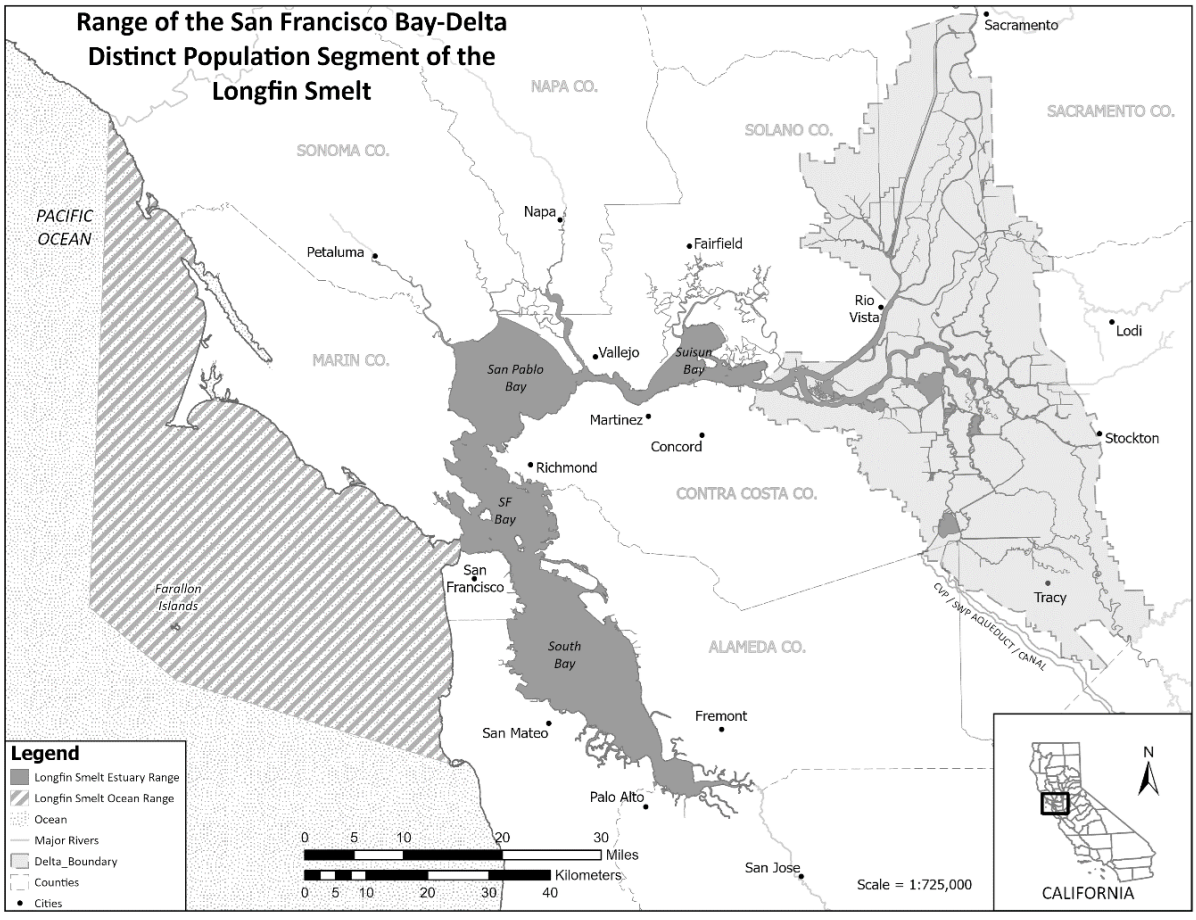


Figure 1. Range of the San Francisco Bay-Delta longfin smelt distinct population segment

The longfin smelt is a small fish 9 to 11 centimeters (cm) (3.5 to 4.3 inches (in)) in length with a relatively short lifespan of approximately 2 to 3 years. The longfin smelt, as a species, occurs in bays and estuaries from northern California north along the coast through Alaska. The Bay-Delta DPS of the longfin smelt occupies the entire San Francisco Bay estuary and areas of the Pacific Ocean outside the Golden Gate (see figure 1 above) depending on time of year and lifestage. The Bay-Delta longfin smelt does not occur outside of the San Francisco Bay estuary or the near ocean areas in large numbers, and there does not appear to be substitutable habitat outside of currently occupied areas (e.g., salinity, water temperature); therefore, we have determined that proposing critical habitat in unoccupied areas is unnecessary, as these areas likely would not represent suitable habitat nor contribute to conservation of the Bay-Delta longfin smelt.

The tidally influenced San Francisco Bay estuary includes the central and south San Francisco Bay, San Pablo Bay, and Suisun Bay (and their tributaries), the Sacramento and San Joaquin River Delta (Delta), and near-shore ocean waters outside the Golden Gate from the Marin headlands to the mouth of Tomales Bay into the Gulf of the Farallones (CDFW 2009, pp. 6–9). The San Francisco Bay estuary is a complex and dynamic system exhibiting a wide range of salinities, temperatures, and habitats. Tidal movement and freshwater inputs from the Sacramento River and San Joaquin River as well as local tributaries are two major drivers of estuary conditions. Incoming high-salinity tides and freshwater flows combine in creating a longitudinal and vertical salinity gradient. Water temperature is also influenced by tidal and freshwater inflow as well as wind, precipitation, and air temperatures. This salinity gradient and water temperature

variability exert a strong physical and biological influence in the estuary and dictates habitat use by different life stages of Bay-Delta longfin smelt.

The Bay-Delta longfin smelt is a facultatively anadromous species, meaning some older juveniles and adults may migrate to the ocean to seek cooler water temperatures, but adults return to less saline water for spawning activities to meet egg laying, hatching, larval development, and juvenile growth requirements.

Water Temperature Conditions: Bay-Delta longfin smelt most frequently occur in cold- and cool-water habitats within the San Francisco Bay estuary (Jeffries et al. 2016, p. 1712; Yanagitsuru et al. 2021, fig. 1, p. 5). Adults are thought to be limited by water temperature of approximately >22 degrees Celsius (°C) (>72 degrees Fahrenheit (°F)) during the summer and are likely to spend the majority of this time in cooler water habitats of the San Francisco Bay and near-shore ocean areas. In general, fish over a year in age inhabit lower temperature water than fish below a year in age, although both age classes inhabit water temperature between 16–18 °C (61–64 °F) in the summer and fall (Baxter 1999, fig. 8, p. 191). In the fall and early winter as water temperatures in the estuary decline, Bay-Delta longfin smelt return upstream to the estuary to seek appropriate spawning areas where water conditions are favorable for egg survival. These conditions vary by location depending on delta outflow, freshwater flow from tributaries, water salinity conditions, and other environmental conditions. See Spawning Conditions below for information on egg and larvae water temperature conditions.

Water Turbidity Conditions: Turbidity, or the amount of suspended particles in the water, is an important habitat characteristic for the Bay-Delta longfin smelt. Turbidity in aquatic environments is similar to fog in terrestrial environments in that the greater the

distance an object is from an individual the more obscure it becomes (Utne-Palm 2002, p. 115; Pangle et al. 2012, pp. 10–11). Turbid waters assist fish such as the Bay-Delta longfin smelt by making it less visible to predators and making its prey (which are relatively translucent) more visible against the backdrop of the particles in the water (Utne-Palm 2002, pp. 122–123). In laboratory studies, Bay-Delta longfin smelt larvae had higher survival rates in more turbid water measured at 40 NTU (nephelometric turbidity units) and grew larger at 20 NTU and 40 NTU as opposed to 10 NTU (Yanagitsuru 2020, entire).

Water Salinity Conditions: Although spawning behavior of longfin smelt has not been observed in the San Francisco Bay estuary, it is believed that spawning behavior is similar to that of the Lake Washington population in Washington State, where adults make overnight runs into tributaries of the lake then return to the lake before dawn (Dryfoos 1965, p. 61; Moulton 1974, pp. 49–50). For the Bay-Delta longfin smelt this would entail adult longfin smelt making short runs upstream into fresh-water areas of the Delta, tributaries, or into areas of the San Francisco Bay (Suisun Bay, San Pablo Bay, or South Bay) that have low-salinity water and appropriate water temperature conditions (CDFW 2009, pp. 11–12; Rosenfield 2010, p. 8). One laboratory study has identified a salinity tolerance below 32 parts per thousand (ppt) with larvae surviving the longest and having the largest growth at lower salinity levels between 5 and 10 ppt (Yanagitsuru et al. 2022, p. 6). Another study identified that Bay-Delta longfin smelt can successfully spawn and rear in a range of low salinity (0.4−5 ppt), with fertilization being greatest at lower salinity levels (Rahman et al. 2023, pp. 7–8). Field studies have identified salinity levels

between 2–4 ppt as having the greatest density of larvae (4–9 millimeter (mm) (0.16–0.35 in) in length) (Grimaldo et al. 2017, p. 8).

Spawning Conditions: Bay-Delta longfin smelt spawn only once in their lifetime but may have multiple spawning events during that single period depending on habitat conditions. Spawning, reproduction, and rearing occurs in low-salinity to freshwater habitats beginning in late fall/early winter and extends into the spring as water temperature and low-salinity conditions allow. The freshwater flow into the estuary as well as other environmental conditions and geomorphology greatly influence the habitat conditions, spawning success, and food availability for the Bay-Delta longfin smelt.

Observations of yolk-sac staged larvae suggest spawning habitat extends from the tidal reaches of the Sacramento and San Joaquin Rivers to Suisun Bay and Suisun Marsh as well as tributaries to San Pablo Bay, and in the sloughs of Coyote Creek in the South Bay, although recruitment success in San Pablo Bay tributaries and the South Bay was confirmed only during wet years (Wang 1986, pp. 113–121; Meng and Matern 2001, p. 755; Grimaldo et al. 2017, p. 6; Lewis et al. 2019, p. 31; Lewis et al. 2020, p. 1). Spawning substrate is composed of sandy or gravel substrates, rocks, or aquatic plants (Wang 1986, p. 113; Moyle 2002, p. 236; CDFW 2009, pp. 12, 16). Laboratory studies have identified that Bay-Delta longfin smelt release more eggs onto sand (approximately 94 percent) as opposed to gravel (approximately 6 percent) (CDFW 2009, p. 11). In one study, high river flows during egg incubation were associated with poor recruitment, whereas increased river flows later in the season—during the hatching period—were associated with greater recruitment (Chigbu 2000, pp. 549–554).

Spawning activity for Bay-Delta longfin smelt can begin as early as November and extends until late June, although spawning more typically occurs from December through April based on ripe females and when the presence of yolk-sac larvae have been observed in the environment (Radtke 1966, p. 116; Hieb and Baxter 1993, p. 110; Moyle 2002, p. 236; CDFW 2009, p. 10). Water temperature plays an important role in triggering spawning activity. Although spawning can start once water temperatures drop below 16 °C (60.8 °F) (CDFW 2009, p. 11), other information suggests lower water temperatures may be more ideal (Baxter 2016, entire; Tempel and Burns 2021, slide 12). Lab studies have identified a minimum spawning temperature of 5.6 °C (41 °F) (Wang 1986, pp. 6–9) and reduced size of larvae and decrease in reproduction success near or above 15 °C (59 °F) (Yanagitsuru et al. 2021, Figure 1 and 3a, pp. 5 and 7). Within the San Francisco Bay estuary, spawning occurs when water temperature drops below ~14 °C (57.2 °F) and becomes consistent when water temperatures remain 13 °C or lower (55.4 °F) (CDFW 2009, p. 11; Baxter 2016, entire; Grimaldo et al. 2017, p. 8).

Larval Habitat Use: The majority of larvae are affiliated with the estuary's major low salinity zone (LSZ) generated by the mixing of freshwater outflow from the Delta with the brackish waters of the estuary (Service 2024, section 2.3, p. 11, and p. 20). However, larvae can also be found in tributaries when flows from those tributaries are high enough and temperatures low enough to support egg survival and hatching (Lewis et al. 2019, p. 3). The spatial distribution of these larvae reflects the year-to-year variation in the geographic location of the LSZ (Dege and Brown 2004, fig. 3, p. 57; Grimaldo et al. 2020, fig. 6, p. 10).

Juvenile and Adult Habitat Use: Aggregated survey data have shown that juveniles (>20 mm in length) have been detected at one time or another throughout the estuary and into some tributaries to the Delta above tidal influence and have been collected most frequently from deeper water habitats as opposed to shoals or shoreline areas (Rosenfield and Baxter 2007, p. 1586; Merz et al. 2013, fig. 2, p. 132). Regardless of where spawning takes place and embryos develop, the spatial distribution of juveniles and adults shows a distinct seaward migration as water temperatures warm in the late spring and early summer in the Delta and upstream portions of the San Francisco Bay estuary (Rosenfield and Baxter 2007, p. 1590). However, in any given month, survey data indicate that some fraction of the Bay-Delta longfin smelt population remains in the San Francisco Bay with an unknown fraction moving out to the ocean off the coast of San Francisco (Rosenfield and Baxter 2007, p. 1590; Merz et al. 2013, p. 142; Garwood 2017, pp. 98–104).

Food Resources: Larval Bay-Delta longfin smelt select strongly for the calanoid copepod *Eurytemora affinis* as prey; all other prey types combined account for only about 10 percent of their diet (Barros et al. 2022, fig. 6a and 6c, p. 10). When longfin smelt reach about 25 mm (1 in) in length, their diet switches and is nearly all mysids (small shrimp-like crustaceans) (Barros et al. 2022, fig. 6b, p. 10). This finding of a highly specified diet applies to fresh- and brackish-water habitats throughout the estuary (Barros et al. 2022, fig. 2. p. 2). Bay-Delta longfin smelt larvae and small juveniles appear to focus on only two prey taxa. Larvae less than about 25 mm (1 in) in length appear to primarily feed on the copepod *Eurytemora affinis*. The same is true for larvae and small juveniles larger than 25 mm in length, which appear to prey most often on mysids. Bay-

Delta longfin smelt adults that return to Suisun Marsh also show a strong dietary preference for mysids while relying on other copepods and amphipods when mysids are less abundant (CDFW unpub. Diet Study Data; Feyrer et al. 2003, p. 281; Burdi 2022, entire).

Summary of Essential Physical or Biological Features

The ecological conditions within the water areas of the San Francisco Bay estuary are complex and dynamic and exhibit a wide range of salinities, temperatures, and habitats as the result of tidal movement of ocean water, freshwater inputs from the Sacramento and San Joaquin Rivers and local tributaries, wind conditions, and air temperature. We derive the specific physical or biological features essential to the conservation of the Bay-Delta longfin smelt from studies of the species' habitat, ecology, and life history as described above. We focused our designation on areas that contained the appropriate physical or biological features needed by the species for successful spawning and rearing and that provide larvae sufficient food resources to grow and mature as described in our conservation strategy for determining critical habitat for the Bay-Delta longfin smelt (see **Criteria Used to Identify Critical Habitat** below). Although areas outside the designation, such as the Pacific Ocean or areas within the Sacramento-San Joaquin Delta, are used by the species and are important in providing appropriate life history conditions for adults and may provide for limited reproduction in years with extreme freshwater inflow, the majority of appropriate spawning conditions, spawning, and larval development occurs within the area we have identified as critical habitat. Additional information can be found in the SSA report (Service 2024, entire; available on *https://www.regulations.gov* under Docket No. FWS–R8–ES–2022–0082).

The physical or biological features (PBFs) essential to the conservation of the Bay-Delta longfin smelt are comprised of water temperature, salinity, turbidity, food resources, substrate, and hydrologic conditions capable of supporting Bay-Delta longfin smelt spawning and rearing as well as larval and juvenile development. Within the San Francisco Bay estuary, different areas of the critical habitat unit provide all of the physical or biological features essential to the conservation of Bay-Delta longfin smelt, but not all of the features occur in all portions of the unit at all times. During various times of the year, different areas of the estuary provide the following essential physical or biological features:

PBF 1, Water temperature requirements: Water temperature ranges to support reproduction, growth, and survival of the Bay-Delta longfin smelt at different life stages to include:

(A) Estuary water temperatures below 13 °Celsius (°C) (55.4 °Fahrenheit (°F)) from December through May to initiate and support successful spawning;

(B) Estuary water temperatures less than 15 °C (59.0 °F) from December through May for egg development, hatching success, and early larval development;

(C) Estuary water temperatures less than 20 °C (60.0 °F) from February through June for larvae 40 days post hatch and older to support growth and avoid physiological stress; and

(D) Estuary and nearshore ocean water temperatures less than 22 °C (71.6 °F) year-round for juveniles and adults to support growth and avoid physiological stress.

PBF 2, Water salinity requirements: Suitable salinity concentrations to support successful reproduction, growth, and recruitment; such ranges include:

(A) Salinity conditions between 2–4 parts per thousand (ppt) from December through May to support average larval salinity requirements; and

(B) Salinity conditions between 0.4–10 ppt from December through May to support diversity of egg and early larval rearing conditions.

PBF 3, Water turbidity requirements: Turbidity greater than 20 nephelometric turbidity units to optimize feeding and predator avoidance.

PBF 4, Food resource requirements: Food resources in abundances that support growth and recruitment of all life stages; these food resources include, but are not limited to:

(A) The copepod *Eurytemora affinis*, the primary prey item supporting larvae less than 25 mm (approximately 1 inch length);

(B) Mysids including *Neomysis mercedis* and *Hyperacanthomysis longirostris*, and other amphipods, the primary prey items supporting juveniles and larvae greater than 25 mm in length (approximately 1 inch length); and

(C) Prey of various zooplankton species such as those identified in paragraphs (A) and (B) of this entry for juveniles and adults.

PBF 5, Substrate requirements: Substrate composed mostly of sandy habitat, although portions may include gravel substrates, rocks, or aquatic plants that provide suitable habitat for spawning, protection, cover, and development of eggs and larvae.

PBF 6, Hydrologic requirements: Contemporaneous with the appropriate seasonal needs by life stage of the species, inflow into the estuary of appropriate freshwater to provide the appropriate water salinity, temperature, and turbidity conditions as well as food resources set forth in PBFs 1–4 above.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of the Bay-Delta longfin smelt may require special management considerations or protections to address: (1) habitat alteration within and adjacent to water areas; (2) changes to hydrology associated with reduced and altered freshwater flows and resulting increases in saline habitat conditions; (3) increased water temperatures associated with altered flow regimes or climate change conditions; (4) reduced food resource availability due to inappropriate water conditions or introduction of nonnative species; and (5) introduction of pollutants and other sources of contaminants that may degrade water quality conditions or impact food resources.

Special management considerations or protection that could address these threats include, but are not limited to: (1) implement best management practices to reduce impacts associated with habitat alteration such as bank hardening, levee maintenance, and channel dredging or reduction of sand sources; (2) consider water management to mimic functional flow regimes (timing, intensity, and duration of flows), especially during periods of low flow or drought conditions; (3) consider water management to maintain appropriate water temperature conditions for all life stages of the Bay-Delta longfin smelt; (4) implement monitoring and other actions to prevent or limit introduction of nonnative species into the estuary that may reduce or alter food resources for the Bay-

Delta longfin smelt; and (5) monitor and manage water quality to assist in reducing the amount of pollutants entering the estuary.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the Bay-Delta longfin smelt because we have not identified any unoccupied areas that meet the definition of critical habitat. The range of the Bay-Delta longfin smelt is only a portion of the range occupied by the species. The Bay-Delta longfin smelt as a DPS currently occupies the full extent of its identified range within the San Francisco Bay estuary and ocean areas outside the Golden Gate to the Farallon Islands depending on the time of year, life stage, and environmental conditions (see figure 1 in *Bay-Delta Longfin Smelt Description, Distribution, and Habitat Requirements* above).

The sources of data used to determine and delineate the critical habitat for the Bay-Delta longfin smelt included: (1) the SSA report and references therein pertaining to the habitat needs of the DPS (Service 2024, entire); (2) Bay-Delta longfin smelt spawning and rearing habitat utilized during the winter/spring, fresher water phase of the life cycle

as determined by study of the LSZ based on published data; (3) U.S. Geological Survey (USGS) National Hydrography Dataset (NHD) for California for the San Francisco Bay estuary and associated river systems and shorelines; (4) USGS digital ortho-photo quarter-quadrangles base layer map using Universal Transverse Mercator (UTM) Zone 10N coordinates, which was used to delineate the critical habitat unit; and (5) Environmental Systems Research Institute's (ESRI's) Aeronautical Reconnaissance Coverage Geographical Information System (ArcGIS) online basemap aerial imagery, which was used to cross-check the base layer map. Land ownership or management information was obtained from digitized surface land management data managed by the Bureau of Land Management.

In order to determine the specific areas within the geographical area occupied by the species at the time of listing on which are found those PBFs essential to the conservation of the species and delineating the critical habitat unit boundaries, we developed a conservation strategy. Below we summarize our strategy and criteria for this designation. Please see the full description of our strategy for additional information (Service 2023a, entire).

The goal of our conservation strategy for this critical habitat designation is to identify the specific areas within the Bay-Delta longfin smelt's range that provide essential physical or biological features; without these areas, range-wide resiliency, redundancy, and representation could not be achieved. The strategy focuses on the fundamental parameters of the species' biology and ecology based on well-accepted conservation-biology and ecological principles for conserving species and their habitats, such as those described by Carroll et al. (1996, pp. 1–12); Meffe and Carroll (1997, pp.

347–383); Shaffer and Stein (2000, pp. 301–321); Natural Resources Conservation Service (NRCS) 2004 (entire); Tear et al. (2005, pp. 835–849); Groom et al. (2006, entire); and Wolf et al. (2015, pp. 200–207).

In developing our conservation strategy, we focused on increasing the resiliency of Bay-Delta longfin smelt by improving the DPS's abundance. To this end, our conservation strategy and rule set for determining critical habitat for the Bay-Delta longfin smelt looked at conserving and maintaining those areas withing the San Francisco Bay estuary that provide sufficient amount of high-quality spawning and rearing habitat with appropriate physical and hydrological characteristics to provide for recruitment over the long term. We considered the habitat and conditions necessary for successful recruitment of individuals to the different life stages of the species. The Bay-Delta longfin smelt relies on the San Francisco Bay estuary and the unique suite of environmental conditions it provides for spawning, larval rearing, juvenile growth, and maturation.

Salinity and water temperature are two primary factors that determine the distribution of the Bay-Delta longfin smelt in the estuary and are especially important for spawning and rearing life stages. Both salinity and water temperature conditions are influenced by freshwater input, primarily from the San Joaquin and Sacramento Rivers. The species uses most of the estuary during its life cycle, focusing spawning and larval rearing in the more landward LSZ, and juvenile growth and maturation at greater salinities typical of the more seaward areas of the estuary. The location and extent of the LSZ and suitable spawning and rearing habitat varies annually depending on the magnitude, timing, and duration of freshwater inputs into the estuary. Numerous studies

have shown a positive and persistent correlation between longfin smelt juvenile abundance indices and freshwater flow (Stevens and Miller 1983, pp. 431–432; Jassby et al. 1995, p. 285; Sommer et al. 2007, p. 274; Thomson et al. 2010, pp. 1439–1440; Kimmerer 2002, p. 47; Rosenfield and Baxter 2007, p. 1585; Kimmerer et al. 2009, p. 381; Mac Nally et al. 2010, p. 1422; Maunder et al. 2015, p. 108; Nobriga and Rosenfield 2016, p. 53; Kimmerer and Gross 2022, p. 2734).

While the overall pattern relating freshwater flows to abundance indices for the Bay-Delta longfin smelt is widely accepted, the mechanisms driving this correlation are not fully quantified or resolved. Potential mechanisms have been identified and include how freshwater may affect spawning locations, the duration of the spawning season, the transport of eggs and larvae downstream to favorable rearing habitats, the location of the LSZ and larval and young juvenile retention, entrainment of larvae and juveniles, prey availability for larvae and juveniles, prey delivery, and turbidity of the LSZ (for further information see SSA section 3.1.1.). These mechanisms likely act in concert and influence recruitment in a manner determined by prevailing freshwater conditions. Our critical habitat designation was informed by the relationship between these mechanisms and freshwater inputs into the estuary.

With this information, we have determined that the specific areas occupied by the species that provide spawning and rearing habitat that is utilized by the Bay-Delta longfin smelt during the fresher-water phase of the life cycle in the winter/spring period are the focus of our critical habitat designation. Without appropriate areas for spawning and rearing of offspring, the Bay-Delta longfin smelt would not be able to sustain populations in the wild. Therefore, we initially follow the PBFs to predict distribution, using salinity

at these key life stages, as the primary predictive factor. These areas were determined by using the best available scientific information on the approximation of the LSZ of the San Francisco Bay-Delta, using the 95 percent occurrence interval (actual observed values) of X2 values between January through May for water years stretching the last nine decades (Hutton et al. 2017a, entire; Hutton et al. 2017b, entire). X2 is defined as the location (in kilometers) along a linear axis stretching from the Golden Gate Bridge eastwards into the Sacramento/San Joaquin River Delta where salinity measures two practical salinity units. This representation is a static estimate of a very dynamic phenomenon, as outflow and tidal dynamics influence this metric such that the actual position of X2 fluctuates in space and time. We also included areas within the Napa River that contain those low salinity habitat areas that were contiguous with the data on LSZ for the San Francisco Bay-Delta. Additional information on our conservation strategy can be found in our PBF and conservation strategy document (Service 2023a, entire)

The area identified as critical habitat is occupied during the spawning and rearing life stage (~January through May) and contains those physical or biological features essential to the conservation of the Bay-Delta longfin smelt reflecting the habitat characteristics required by pre-spawning adults, eggs, larvae, and early juveniles of the Bay-Delta longfin smelt for survival and successful reproduction. The Bay-Delta longfin smelt does not occur outside of the San Francisco Bay estuary or the near ocean, and there does not appear to be substitutable habitat outside of currently occupied areas (e.g., salinity, water temperature); therefore, we have determined that proposing critical habitat in unoccupied areas is unnecessary, as these areas likely would not represent suitable habitat nor contribute to conservation of the Bay-Delta longfin smelt.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the Bay-Delta longfin smelt. Because the designation focuses on water areas, very little if any developed areas such as buildings or other structures are included in the designation. However, any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule are excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We propose to designate as critical habitat areas that we have determined are occupied at the time of listing (i.e., currently occupied) and contain one or more of the physical or biological features that are essential to support life-history processes of the Bay-Delta longfin smelt.

The proposal includes one unit for designation based on one or more of the physical or biological features being present to support the Bay-Delta longfin smelt's life-history processes. This unit contains all of the identified physical or biological features and supports the Bay-Delta longfin smelt's particular use of that habitat.

The proposed critical habitat designation is defined by the map, as modified by any accompanying regulatory text, presented at the end of this document under **Proposed Regulation Promulgation**. We include more detailed information on the boundaries of

the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which the map is based available to the public on *https://www.regulations.gov* at Docket No. FWS-R8-ES-2024-0131 and on our internet site at *https://www.fws.gov/office/san-francisco-bay-delta-fish-and-wildlife/*, and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**).

Proposed Critical Habitat Designation

We are proposing to designate one unit of approximately 91,630 ac (37,082 ha) as critical habitat for the Bay-Delta longfin smelt, identified as the San Francisco Bay-Delta Unit (see table below). The critical habitat area we describe below constitutes our current best assessment of areas that meet the definition of critical habitat for the Bay-Delta longfin smelt.

TABLE 1—PROPOSED CRITICAL HABITAT UNIT FOR THE BAY-DELTA LONGFIN SMELT
[Area estimates reflect all water and land within the critical habitat unit boundary]

Critical habitat unit	Land ownership by type	Size of unit in acres/hectares		Occupied?
San Francisco Bay-Delta	Federal	20	8	Yes
	State	257	104	
	Local government	7	3	
	Non-profit/nongovernmental organization	49	20	
	Undetermined Shoreline	913	370	
	Undetermined waters	90,384	36,578	
	Total	91,630	37,082	

Note: Area sizes may not sum due to rounding.

We present a brief description of the unit, and reasons why it meets the definition of critical habitat for the Bay-Delta longfin smelt, below.

San Francisco Bay-Delta Unit

The San Francisco Bay-Delta Unit consists of 91,630 ac (37,082 ha) in total and is made up of 1,246 ac (504 ha) of shoreline area and 90,384 ac (36,578 ha) of stream and estuary water area within the San Francisco Bay estuary within Contra Costa, Napa, Sacramento, Solano, and Sonoma Counties, California. The unit extends from the numerous tributaries flowing into the Suisun Bay near the confluence of the Sacramento and San Joaquin Rivers at Sherman Island downstream approximately 7 to 10 miles (mi) (10 to 16 kilometers (km)) into San Pablo Bay near Point Pinole (Contra Costa County) and Midshipman Point at Tubbs Island (Sonoma County).

Ownership of shoreline areas within the proposed designation includes the U.S. Fish and Wildlife Service (20 ac (8 ha)), California Department of Fish and Wildlife (181 ac (73 ha)), California State Parks (3 ac (1.1 ha)), California Department of Water Resources (45 ac (18 ha)), California State Lands Commission (29 ac (12 ha)), local government (7 ac (3 ha)), and nonprofit and nongovernmental organizations (49 ac (20 ha)). Additionally, the proposed designation includes water areas of the San Francisco Bay estuary totaling approximately 90,384 ac (36,578 ha) of undetermined ownership. We have exempted Department of Defense (DoD) areas owned, managed, and controlled by the U.S. Army Military Ocean Terminal Concord (MOTCO) totaling approximately 753 ac (304 ha) under section 4(a)(3)(B)(i) of the Act (see **Exemptions** *Application of Section 4(a)(3) of the Act*, below).

The unit was occupied by the species at the time of listing and is still occupied. Seasonally, this unit contains all the identified PBFs essential to the conservation of the Bay-Delta longfin smelt. Particularly, those PBFs reflecting the habitat characteristics required by pre-spawning adults, eggs, larvae, and early juveniles for survival and successful reproduction are geographically associated with this area. The identified specific critical habitat areas may require special management considerations or protection to address activities that impact the PBFs identified for the Bay-Delta longfin smelt and may include those activities associated with habitat alteration (such as dredging, shoreline protection activities, or levee maintenance); changes to hydrology associated with reduced and altered freshwater flows and its resulting potential increases in saline habitat conditions; increased water temperatures; reduced food resource availability; and activities that introduce or increase pollutants and other contaminants into the estuary.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species

proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species (50 CFR 402.02).

Compliance with the requirements of section 7(a)(2) is documented through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define "reasonable and prudent alternatives" (at 50 CFR 402.02) as alternative actions identified during formal consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Service Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 set forth requirements for Federal agencies to reinitiate consultation. Reinitiation of consultation is required and shall be requested by the Federal agency, where discretionary Federal involvement or control over the action has been retained or is authorized by law and: (1) if the amount or extent of taking specified in the incidental take statement is exceeded; (2) if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or (4) if a new species is listed or critical habitat designated that may be affected by the identified action. As provided in 50 CFR 402.16, the requirement to reinitiate consultations for new species listings or critical habitat designation does not apply to certain agency actions (e.g., land management plans issued by the Bureau of Land Management in certain circumstances).

Destruction or Adverse Modification of Critical Habitat

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical

habitat for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires that our *Federal Register* documents "shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such [critical] habitat, or may be affected by such designation." Activities that may be affected by designation of critical habitat for the Bay-Delta longfin smelt include those that may affect the physical or biological features of the Bay-Delta longfin smelt's critical habitat. See the sections above on **Physical or Biological Features Essential to the Conservation of the Species** and **Special Management Considerations or Protection** for additional information.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that the Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.

We consult with the military on the development and implementation of INRMPs for installations with listed species. We analyzed INRMPs developed by military installations located within the range of the proposed critical habitat designation for the Bay-Delta longfin smelt to determine if they meet the criteria for exemption from critical habitat under section 4(a)(3) of the Act. The following areas are Department of Defense (DoD) lands with completed, Service-approved INRMPs within the areas preliminarily identified as meeting the definition of critical habitat.

Approved INRMPs

U.S. Army Military Ocean Terminal Concord (MOTCO), Contra Costa and Solano Counties, California, 753 ac (304 ha)

Within the areas preliminarily identified as meeting the definition of critical habitat for the Bay-Delta longfin smelt, we identified a portion of shoreline (50 ac (20 ha)) and water area (703 ac (284 ha)) (753 ac (304 ha) total) of the San Francisco Bay estuary owned, controlled, and managed by the U.S. Army Military Surface Deployment and Distribution Command's 834th Transportation Battalion, which manages and operates the U.S. Army Military Ocean Terminal Concord (MOTCO). MOTCO is the primary munitions trans-shipment facility for the DoD on the West Coast of the United States.

The U.S. Army received full management authority for MOTCO on October 1, 2008, as a result of the 2005 Base Realignment and Closure process. Prior to this, MOTCO was a tenant command to Naval Weapon Station Seal Beach Detachment (NWSSBD) Concord, operating under the U.S. Navy. Military lands on MOTCO include a total of 6,641 ac (2,688 ha) of uplands, shoreline, and island areas adjacent to or within Suisun Bay in Contra Costa and Solano Counties, California. Other military lands formerly belonging to the NWSSBD have been declared surplus and have been operationally closed and transferred to the City of Concord.

In August 2023, staff at MOTCO in coordination with the Service and U.S. Department of Commerce National Oceanic and Atmospheric Administration–Fisheries, West Coast Region (NOAA) finalized and signed the Final MOTCO Integrated Natural Resources Management Plan (INRMP) (U.S. Army Corps of Engineers 2023, entire).

The INRMP provides the staff of MOTCO with an adaptive plan for managing natural resources to support and be consistent with the military mission while protecting and enhancing those natural resources for multiple use and ecological integrity. The INRMP is designed to meet statutory requirements of the Sikes Act as amended as well as manage and implement measures concerning conservation, protection, and management of fish and wildlife resources. The total area owned by the DoD at MOTCO includes inland areas (115 ac (47 ha)) and tidal areas (6,242 ac (2,526 ha)). The tidal area comprises a mainland operational portion and island areas that include approximately 5 miles (8 kilometers) of mainland shoreline; three ocean terminal piers and facilities for reception, staging, and loading of ammunition; railroad infrastructure; and the Los Medanos Hills. Approximately 703 ac (284 ha) of water area of the San Francisco Bay estuary are restricted use areas controlled by MOTCO that are used for docking and loading of vessels for military purposes. The offshore islands consist of approximately 2,045 ac (828 ha). The offshore islands and most of the marshlands within the tidal area at MOTCO are part of a wetland preserve area, established through a memorandum of understanding between the U.S. Navy and the Service (U.S. Navy and U.S. Fish and Wildlife Service 1984, entire). The islands are undeveloped, except for natural gas wells operated on the southern shore of Ryer Island operated by Chevron U.S.A. Inc. (California Department of Conservation 1982, pp. 1–11, 250). The mainland operational area is composed of old and new buildings, roads, and other developed infrastructure and landscaping.

The overall goal of the MOTCO INRMP is to integrate natural resources stewardship and compliance responsibilities with operational requirements to sustain the

military mission at MOTCO as well as develop, initiate, and maintain programs for the conservation, utilization, and rehabilitation of natural resources at MOTCO. The following measures, objectives, and management strategies that have been identified and implemented to further the goal include:

• Ensure compliance with applicable Federal laws and regulations as they pertain to natural resources.

• Maintain and enhance biodiversity within the constraints of the military mission.

• Implement adaptive management strategies using flexible and responsive management techniques based upon scientific data gathered from monitoring programs, literature, and resource experts.

• Conserve the quality of habitat for Federal and State-listed endangered and threatened species.

• Maintain sufficient natural resources support personnel to implement, oversee, and monitor the management strategies of the INRMP.

• Provide for an institutional memory and Geographic Information System (GIS) based data inventory that may be used as a framework for future resources personnel to make installation management decisions.

• Maintain the distributions of sensitive plant and animal species and native plant communities, as well as their relationships to tidal hydrology and landscape features, until they become progressively better understood.

• Maintain or enhance levels of biodiversity and habitat quality on the installation.

• Maintain or enhance tidally influenced marsh habitats capable of supporting viable populations of the federally listed salt marsh harvest mouse (*Reithrodontomys*

raviventris), California Ridgway's rail (*Rallus obsoletus obsoletus*), and State listed California black rail (*Laterallus jamaicensis coturniculus*).

• Maintain landscape-scale native habitat diversity and species richness.

• Monitor, control, and eventually eliminate the spread of nonnative invasive aquatic and marsh species, such as Brazilian waterweed (*Egeria densa*) and perennial pepperweed (*Lepidium latifolium*), to enhance native aquatic and wetland communities.

• Adaptively manage approximately 3,227 ac (1,306 ha) of tidal wetlands at MOTCO using an improved understanding of the installation's tidal hydrology and its effects on native species diversity and habitat quality, as well as maintain and improve wetland functions and values.

• Continue management of the Wetland Preserve Area in collaboration with the Service and coordinate with other stakeholders on tidal wetland management issues.

• Ensure hydrologic regimes and erosion rates reflect natural conditions on-site.

MOTCO has shown a track record of implementing conservation actions related to their activities that protect and maintain habitat for sensitive species including reducing erosion and run-off into the estuary, protecting water quality, and managing, conserving, and protecting wetland and estuary habitat adjacent to the San Francisco Bay-Delta and areas occupied by the Bay-Delta longfin smelt. The conservation efforts identified in the INRMP and being implemented by MOTCO will provide a benefit to the Bay-Delta longfin smelt by reducing or eliminating negative water quality impacts from erosion, maintaining tidally influenced wetland habitat adjacent to the bay, providing better water conditions for the DPS's food resources, and adaptively managing tidal wetlands to maintain and improve wetland functions and values.

Based on the above considerations, and in accordance with section 4(a)(3)(B)(i) of the Act, we have determined that the identified lands are subject to the MOTCO INRMP and that conservation efforts identified in the INRMP will provide a benefit to the Bay-Delta longfin smelt. Therefore, lands within this installation are exempt from critical habitat designation under section 4(a)(3) of the Act. We are not including approximately 753 ac (304 ha) of shoreline and water habitat used by the Bay-Delta longfin smelt in this proposed critical habitat designation because of this exemption.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to 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 designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. Exclusion decisions are governed by the regulations at 50 CFR 424.19 and the Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (hereafter, the "2016 Policy"; 81 FR 7226, February 11, 2016), both of which were developed jointly with the National Marine Fisheries Service (NMFS). We also refer to a 2008 Department of the Interior Solicitor's opinion entitled "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (M-37016).

In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion

outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise discretion to exclude the area only if such exclusion would not result in the extinction of the species. In making the determination to exclude a particular area, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor. In our final rules, we explain any decision to exclude areas, as well as decisions not to exclude, to make clear the rational basis for our decision. We describe below the process that we use for taking into consideration each category of impacts and any initial analyses of the relevant impacts.

Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a proposed critical habitat designation is analyzed by comparing scenarios both "with critical habitat" and "without critical habitat."

The "without critical habitat" scenario represents the baseline for the analysis, which includes the existing regulatory and socio-economic burden imposed on

landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). Therefore, the baseline represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat incurred regardless of whether critical habitat is designated). The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary 4(b)(2) exclusion analysis.

Executive Orders (E.O.s) 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with these E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. To determine whether the designation of critical habitat may have an economic effect of $200 million or more in any given year (which would trigger section 3(f)(1) of E.O. 12866, as amended by E.O. 14094), we used a screening analysis to assess whether a designation of critical habitat for the Bay-Delta

longfin smelt is likely to exceed this threshold.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat (Service 2023b, entire). The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Bay-Delta longfin smelt (Industrial Economic Inc. (IEc) 2024, entire). We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out particular geographical areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes any probable incremental economic impacts where land and water use may already be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation.

The presence of the listed species in occupied areas of critical habitat means that any destruction or adverse modification of those areas is also likely to jeopardize the continued existence of the species. Therefore, designating occupied areas as critical habitat typically causes little if any incremental impacts above and beyond the impacts of listing the species. As a result, we generally focus the screening analysis on areas of

unoccupied critical habitat (unoccupied units or unoccupied areas within occupied units). Overall, the screening analysis assesses whether designation of critical habitat is likely to result in any additional management or conservation efforts that may incur incremental economic impacts. This screening analysis combined with the information contained in our IEM constitute what we consider to be our economic analysis of the proposed critical habitat designation for the Bay-Delta longfin smelt and is summarized in the narrative below.

As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Bay-Delta longfin smelt, first we identified, in the IEM dated December 29, 2023 (Service 2023b), probable incremental economic impacts associated with the following categories of activities: (1) dredging; (2) levee construction; (3) sand mining; (4) in-water construction; (5) aquatic weed control; (6) flood/sea level rise protection projects; (7) habitat restoration projects; and (8) scientific monitoring activities. Indirect upstream impacts associated with water management or water withdrawal activities associated with water infrastructure and agriculture or municipal water use may also occur but the impacts associated with these activities would be overshadowed by the effects of climate change and reduced precipitation and water flows into the estuary. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not

have any Federal involvement; under the Act, designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies.

In areas where the Bay-Delta longfin smelt is present, Federal agencies would be required to consult with the Service under section 7 of the Act on activities they authorize, fund, or carry out that may affect the species. If we finalize this critical habitat designation as proposed, Federal agencies would be required to consider the effects of their actions on the designated habitat, and if the Federal action may affect critical habitat, our consultations would include an evaluation of measures to avoid the destruction or adverse modification of critical habitat.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (i.e., difference between the jeopardy and adverse modification standards) for the Bay-Delta longfin smelt's critical habitat. Because the designation of critical habitat for Bay-Delta longfin smelt is being proposed nearly concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species, and (2) any actions that would likely adversely affect the essential physical or biological features of occupied critical habitat are also likely to adversely affect the Bay-Delta longfin smelt. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical

habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the Bay-Delta longfin smelt includes a single occupied unit, totaling approximately 91,630 ac (37,082 ha). The areas being considered are shoreline areas ((less than 1 percent of the proposed designation) that are Federal (2 percent), State (21 percent), local government (1 percent), private or other non-profit areas (4 percent), and other undetermined shoreline areas (73 percent)) and a water area of undetermined ownership (over 99 percent of the proposed designation) within the San Francisco Bay-Delta. In these areas, any actions that may affect the Bay-Delta longfin smelt or its habitat would also affect the proposed critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of Bay-Delta longfin smelt. The entities most likely to incur incremental costs are parties to section 7 consultations, including Federal action agencies (such as the Bureau of Reclamation, U.S. Army Corps of Engineers, Federal Highway Administration, U.S. Fish and Wildlife Service, and U.S. Department of Agriculture) and, in some cases, third parties, most frequently State agencies, local government entities, and private land-owners. While this additional analysis will require time and resources by both the Federal action agency and the Service, in most circumstances, these costs would be administrative in nature.

The total number of formal consultations expected to occur is between 7 and 13 consultations annually and the number of informal consultations is 7 to 15 annually (IEc

2024, Table 2, p. 12). The total incremental costs for each technical assistance interaction and informal, formal, and programmatic section 7 consultation conducted is estimated to total $440, $2,700, $5,700, and $11,000, respectively, across all Federal and third party participants. These estimates assume that consultations would occur even in the absence of critical habitat due to the presence of the listed Bay-Delta longfin smelt, and the amount of administrative effort to address critical habitat during this process is relatively minor.

Applying these incremental costs to the estimated future consultations forecast, we estimate the incremental annual administrative costs of consultations pursuant to the proposed critical habitat for the Bay-Delta longfin smelt is likely between $56,500 to $120,000 per year (2024 dollars), including approximately $38,000 to $76,000 for formal consultations, and $18,000 to $42,000 for informal consultations.

We are soliciting data and comments from the public on the economic analysis discussed above. During the development of a final designation, we will consider the information presented in the economic analysis and any additional information on economic impacts we receive during the public comment period to determine whether any specific areas should be excluded from the final critical habitat designation under authority of section 4(b)(2), our implementing regulations at 50 CFR 424.19, and the 2016 Policy. We may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species. The benefits of designating areas as critical habitat include identifying and informing landowners and the public of which specific areas are important to a species' conservation and recovery. Critical

habitat designation also raises awareness of the habitat needs of imperiled species and focuses efforts of our conservation partners.

Consideration of National Security Impacts

Section 4(a)(3)(B)(i) of the Act may not cover all DoD lands or areas that pose potential national-security concerns (e.g., a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), then national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of "critical habitat." However, we must still consider impacts on national security, including homeland security, on those lands or areas not covered by section 4(a)(3)(B)(i) because section 4(b)(2) requires us to consider those impacts whenever it designates critical habitat. Accordingly, if DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, or we have otherwise identified national-security or homeland-security impacts from designating particular areas as critical habitat, we generally have reason to consider excluding those areas.

However, we cannot automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, we must conduct an exclusion analysis if the Federal requester provides information, including a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or

a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If we conduct an exclusion analysis because the agency provides a reasonably specific justification or because we decide to exercise the discretion to conduct an exclusion analysis, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

Under section 4(b)(2) of the Act, we also consider whether a national security or homeland security impact might exist on lands owned or managed by DoD or DHS. In preparing this proposal, we have determined that, other than the land exempted under section 4(a)(3)(B)(i) of the Act based upon the existence of an approved INRMP (see **Exemptions**, above), the lands and water area within the proposed designation of critical habitat for the Bay-Delta longfin smelt are not owned or managed by DoD or DHS.

Therefore, we anticipate no impact on national security or homeland security.

Consideration of Other Relevant Impacts

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security discussed above. To identify other relevant impacts that may affect the exclusion analysis, we consider a number of factors, including whether there are approved and permitted conservation agreements or plans covering the species in the area—such as safe harbor agreements (SHAs), candidate conservation agreements with assurances (CCAAs) or "conservation benefit agreement" or "conservation agreement" ("CBAs") (CBAs are a new type of agreement replacing SHAs and CCAAs in use after April 2024 (89 FR 26070; April 12, 2024)) or HCPs——or whether there are non-permitted conservation agreements and partnerships that may be impaired by designation of, or exclusion from, critical habitat. In addition, we look at whether Tribal conservation plans or partnerships, Tribal resources, or government-to-government relationships of the United States with Tribal entities may be affected by the designation. We also consider any State, local, social, or other impacts that might occur because of the designation.

Summary of Exclusions Considered Under 4(b)(2) of the Act

In preparing this proposal, we have determined that no HCPs or other management plans for the Bay-Delta longfin smelt currently exist, and the proposed designation does not include any Tribal lands or trust resources or any lands for which designation would have any economic or national security impacts. Therefore, we anticipate no impact on Tribal lands, partnerships, or HCPs from this proposed critical

habitat designation, and thus, as described above, we are not considering excluding any particular areas on the basis of the presence of conservation agreements or impacts to trust resources.

However, if through the public comment period we receive information that we determine indicates that there are potential economic, national security, or other relevant impacts from designating particular areas as critical habitat, then as part of developing the final designation of critical habitat, we will evaluate that information and may conduct a discretionary exclusion analysis to determine whether to exclude those areas under authority of section 4(b)(2) and our implementing regulations at 50 CFR 424.19. If we receive a request for exclusion of a particular area and after evaluation of supporting information we do not exclude, we will fully describe our decision in the final rule for this action.

Required Determinations

Clarity of the Rule

We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Regulatory Planning and Review (Executive Orders 12866, 13563 and 14094)

Executive Order 14094 amends and reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and are consistent with E.O. 12866, and E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Executive Order 12866, as reaffirmed by E.O. 13563 and amended and reaffirmed by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; title II of

Pub. L. 104–121, March 29, 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine whether potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's business operations.

Under the RFA, as amended, and as understood in light of court decisions (*see, e.g., American Trucking Ass'ns* v. *U.S. Envtl. Protection Agency*, 175 F.3d 1027, 1044 (D.C. Cir. 1999)), Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, only Federal action agencies would be directly regulated if we adopt the proposed critical habitat designation. The RFA does not require evaluation of the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities would be directly regulated by this rulemaking, the Service certifies that, if made final as proposed, the critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if made final, the critical habitat designation would not have a significant economic impact on a substantial

number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects "to the extent permitted by law" when undertaking actions identified as significant energy actions (66 FR 28355; May 22, 2001). E.O. 13211 defines a "significant energy action" as an action that (i) is a significant regulatory action under E.O. 12866 or any successor order; and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy. This proposed rule is a significant regulatory action under E.O. 12866, as amended by E.O. 14094 (88 FR 21879; April 11, 2023). In our economic analysis, we did not find that this proposed critical habitat designation would significantly affect energy supplies, distribution, or use. This is because the proposed critical habitat is limited to a portion of the water and shoreline area of the San Francisco Bay estuary which is not used for energy supply, distribution or use. Therefore, this action is not a significant energy action, and no statement of energy effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following finding:

(1) This proposed rule would not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or Tribal governments, or the private sector, and

includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or Tribal governments" with two exceptions. It excludes "a condition of Federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and Tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding," and the State, local, or Tribal governments "lack authority" to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions are not likely to destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or

authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this proposed rule would significantly or uniquely affect small governments because the majority of area associated with the proposal is water area of the San Francisco Bay estuary and not owned or managed by small governments. Small governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized activities must ensure that their actions will not be likely to result in destruction or adverse modification of the species' critical habitat. Therefore, a small government agency plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Bay-Delta longfin smelt in a takings implications assessment. The Act does not authorize the Services to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require

Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed for the proposed designation of critical habitat for the Bay-Delta longfin smelt, and it concludes that, if adopted, this designation of critical habitat does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the proposed rule does not have substantial direct effects either on the States, or on the relationship between the Federal government and the States, or on the distribution of powers and responsibilities among the various levels of government. The proposed designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary for the conservation of the species are specifically

identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist State and local governments in long-range planning because they no longer have to wait for case-by-case section 7 consultations to occur.

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) of the Act would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the proposed rule would not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, this proposed rule identifies the physical or biological features essential to the conservation of the species. The proposed areas of critical habitat are presented on maps, and the proposed rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of

1995 (44 U.S.C. 3501 et seq.) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

Regulations adopted pursuant to section 4(a) of the Act are exempt from the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the *Federal Register* on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951, May 4, 1994), E.O. 13175 (Consultation and Coordination with Indian Tribal Governments), the President's memorandum of November 30, 2022 (Uniform Standards for Tribal Consultation; 87 FR 74479, December 5, 2022), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes and Alaska Native Corporations (ANCs) on a government-to-government basis. In accordance with Secretary's Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that

Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We have determined that no Tribal lands fall within the boundaries of the proposed critical habitat for the Bay-Delta longfin smelt, so no Tribal lands would be affected by the proposed designation. Accordingly, we have concluded that this action does not have Tribal implications as specified in E.O. 13175 because it will not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

References Cited

A complete list of references cited in this rulemaking is available on the internet at *https://www.regulations.gov* and upon request from the San Francisco Bay-Delta Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this proposed rule are the staff members of the Fish and Wildlife Service's Species Status Assessment Team, which includes staff from the Region 8 Regional Office and the San Francisco Bay-Delta Fish and Wildlife Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Plants, Reporting and recordkeeping requirements, Transportation, Wildlife.

Signing Authority

Martha Williams, Director of the U.S. Fish and Wildlife Service, approved this action on December 11, 2024, for publication. On December 11, 2024, Martha Williams

authorized the undersigned to sign the document electronically and submit it to the Office of the Federal Register for publication as an official document of the U.S. Fish and Wildlife Service.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. In § 17.11, amend paragraph (h) in the List of Endangered and Threatened Wildlife under Fishes by revising the entry for "Smelt, longfin [San Francisco Bay-Delta DPS]" to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* * * * * * *				
FISHES				
* * * * * * *				
Smelt, longfin [San Francisco Bay-Delta DPS]	*Spirinchus thaleichthys*	U.S.A. (CA)	E	89 FR 61029, 07/30/2024; 50 CFR 17.95(e).[CH]
* * * * * * *				

3. Amend § 17.95(e) by adding an entry for "San Francisco Bay-Delta Distinct Population Segment of the Longfin Smelt (*Spirinchus thaleichthys*)" after the entry for "Delta Smelt (*Hypomesus transpacificus*)" to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes*.

* * * * *

San Francisco Bay-Delta Distinct Population Segment of the Longfin Smelt (*Spirinchus thaleichthys*)

(1) Critical habitat consists of one unit located in the San Francisco Bay estuary in Contra Costa, Napa, Sacramento, Solano, and Sonoma Counties, California, and is depicted on the map in this entry. The San Francisco Bay estuary is a complex and dynamic system exhibiting a wide range of salinities, temperatures, and habitats as the result of tidal movement of ocean water and freshwater inputs from the Sacramento and San Joaquin Rivers and local tributaries. This unit provides the unique suite of environmental conditions needed for spawning, larval rearing, juvenile growth, and maturation of the San Francisco Bay-Delta distinct population segment of the longfin smelt (Bay-Delta longfin smelt).

(2) The essential physical or biological features for the Bay-Delta longfin smelt consist of water and shoreline areas with the appropriate water temperature, salinity, turbidity, food resources, substrate, and hydrologic conditions capable of supporting spawning, rearing, and larval and juvenile development. Within the San Francisco Bay estuary, different areas of the critical habitat unit provide all of the physical or biological

features essential to the conservation of Bay-Delta longfin smelt, but not all of the features occur in all portions of the unit at all times. During various times of the year, different areas of the estuary provide the following essential physical or biological features:

(i) *Water temperature requirements*: Water temperature ranges to support reproduction, growth, and survival of the Bay-Delta longfin smelt at different life stages to include:

(A) Estuary water temperatures below 13 °Celsius (°C) (55.4 °Fahrenheit (°F)) from December through May to initiate and support successful spawning;

(B) Estuary water temperatures less than 15 °C (59.0 °F) from December through May for egg development, hatching success, and early larval development;

(C) Estuary water temperatures less than 20 °C (60.0 °F) from February through June for larvae 40 days post hatch and older to support growth and avoid physiological stress; and

(D) Estuary and nearshore ocean water temperatures less than 22 °C (71.6 °F) year-round for juveniles and adults to support growth and avoid physiological stress.

(ii) *Water salinity requirements*: Suitable salinity concentrations to support successful reproduction, growth, and recruitment; such ranges include:

(A) Salinity conditions between 2–4 parts per thousand (ppt) from December through May to support average larval salinity requirements; and

(B) Salinity conditions between 0.4–10 ppt from December through May to support diversity of egg and early larval rearing conditions.

(iii) *Water turbidity requirements*: Turbidity greater than 20 nephelometric turbidity units to optimize feeding and predator avoidance.

(iv) *Food resource requirements*: Food resources in abundances that support growth and recruitment of all life stages; these food resources include, but are not limited to:

(A) The copepod *Eurytemora affinis*, the primary prey item supporting larvae less than 25 mm (approximately 1 inch length);

(B) Mysids including *Neomysis mercedis* and *Hyperacanthomysis longirostris*, and other amphipods, the primary prey items supporting juveniles and larvae greater than 25 mm in length (approximately 1 inch length); and

(C) Prey of various zooplankton species such as those identified in paragraphs (2)(iv)(A) and (B) of this entry for juveniles and adults.

(v) *Substrate requirements*: Substrate composed mostly of sandy habitat, although portions may include gravel substrates, rocks, or aquatic plants that provide suitable habitat for spawning, protection, cover, and development of eggs and larvae.

(vi) *Hydrologic requirements*: Contemporaneous with the appropriate seasonal needs by life stage of the species, inflow into the estuary of appropriate freshwater to provide the conditions set forth in paragraphs (2)(i) through (iv) of this entry.

(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the **[EFFECTIVE DATE OF THE FINAL RULE]**.

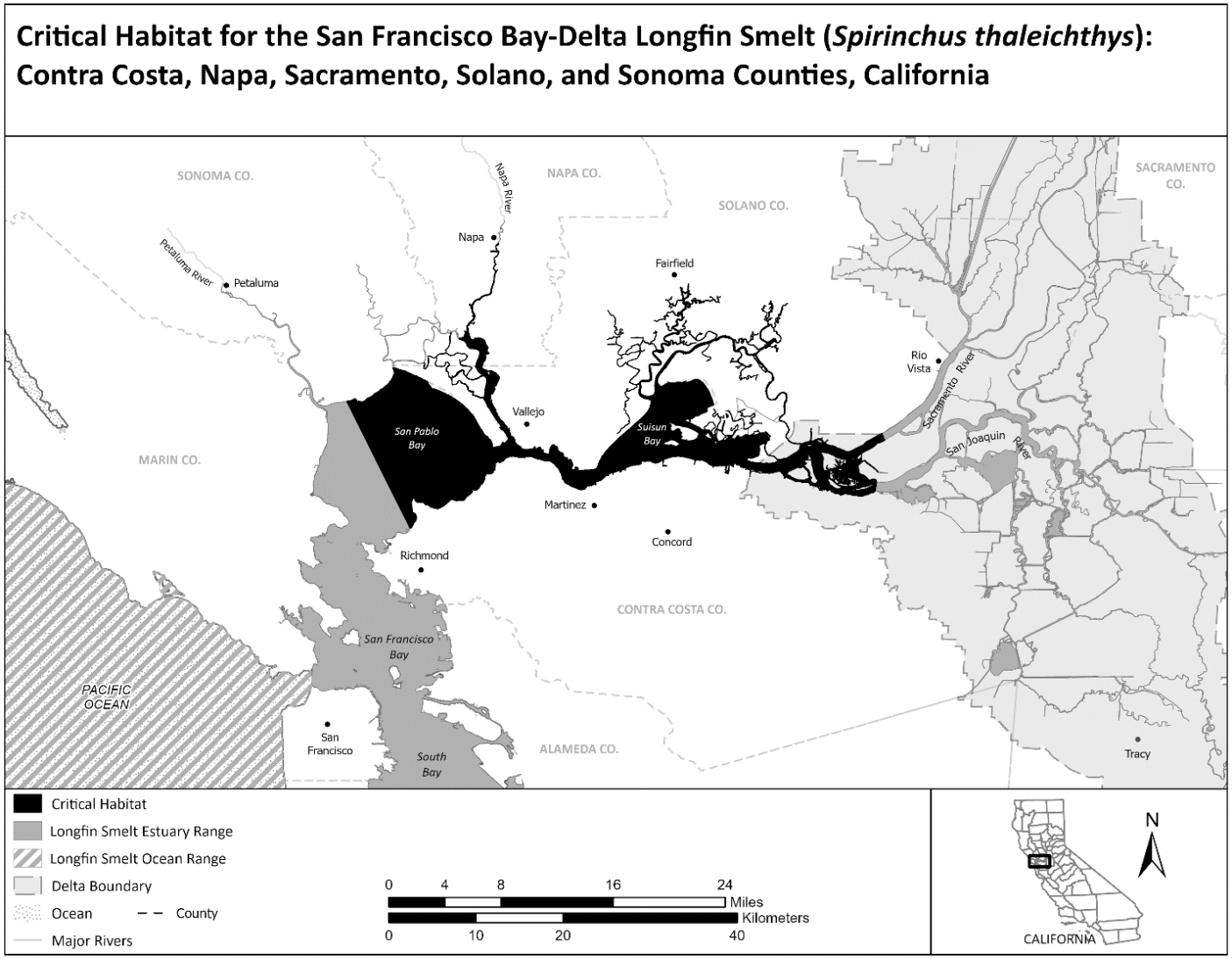
(4) Data layers defining the map unit were created on a base of U.S. Geological Survey digital ortho-photo quarter-quadrangles, and the critical habitat unit was then mapped using Universal Transverse Mercator (UTM) North American Datum of 1983 (NAD 83) Zone 10N projected coordinate system. The map in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates or plot points or both on which the map is based are available to the public at the Service's internet site at *https://www.fws.gov/office/san-francisco-bay-delta-fish-and-wildlife*, at *https://www.regulations.gov* at Docket No. FWS-R8-ES-2024-0131, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) San Francisco Bay-Delta Unit, Contra Costa, Napa, Sacramento, Solano, and Sonoma Counties, California.

(i) The San Francisco Bay-Delta Unit consists of a total of 91,603 ac (37,082 ha) of water and shoreline areas in a portion of the San Francisco Bay estuary bordering Contra Costa, Napa, Sacramento, Solano, and Sonoma Counties, California, and is composed of Federal (20 ac (8 ha)), State (257 ac (104 ha)), local government (7 ac (3 ha)), private, and nonprofit or nongovernmental organization lands (49 ac (20 ha)), and other water and shoreline area of undetermined ownership (91,297 ac (36,947 ha)).

(ii) Map of the San Francisco Bay-Delta Unit follows:

Figure 1 to San Francisco Bay-Delta longfin smelt (*Spirinchus thaleichthys*) paragraph (5)(ii)



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