



T 510.836.4200
F 510.836.4205

1939 Harrison Street, Ste. 150
Oakland, CA 94612

www.lozeaudrury.com
michael@lozeaudrury.com

October 11, 2023

VIA EMAIL AND CERTIFIED MAIL

The Honorable Debra Haaland
Secretary of the Interior
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240
exsec@ios.doi.gov

Gary Frazer
Assistant Director for Ecological Services
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, D.C. 20240
gary_frazer@fws.gov

Martha Williams
Director
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240
martha_williams@fws.gov

Caitlin Snyder, Chief, Branch of
Domestic Listing, U.S. Fish and Wildlife
Service, MS: ES, 5275 Leesburg Pike,
Falls Church, VA 22041-3803
caitlin_snyder@fws.gov

Re: Notice of San Francisco Baykeeper's Intent to Sue the Department of the Interior and United States Fish & Wildlife Service for Violation of the Endangered Species Act § 1533(b)(6)(A); Failure to Make a Timely Final Determination on the Proposed Listing Rule for the Longfin Smelt.

Dear Secretary Haaland, Director Williams, Assistant Director Frazer, and Chief Snyder:

I am writing on behalf of San Francisco Baykeeper in regard to the Secretary's and U.S. Fish and Wildlife Service's (collectively "Service") most recent proposed rule to list the San Francisco Bay-Delta Distinct Population Segment of the Longfin Smelt (*Spirinchus thaleichthys*) ("Longfin Smelt DPS") as an endangered species ("2022 Proposed Rule"). 87 Fed. Reg. 60,957 (October 7, 2022). This letter serves as a sixty-day notice from San Francisco Baykeeper ("Baykeeper") of its intent to sue the Service for its failure to publish a final listing determination and critical habitat designation, or otherwise make a final determination on the pending proposed listing for the Longfin Smelt DPS, as required by statute. 16 U.S.C. § 1533(b)(6)(A). To the extent notice is required by the federal endangered species act ("ESA"), 16 U.S.C. § 1540(g)(2)(C), this notice satisfies those requirements.

Baykeeper is a non-profit 501(c)(3) environmental organization, organized under the laws of California with its office at 1736 Franklin Street, Suite 800, Oakland, California 94612. Baykeeper has approximately 5,000 members and supporters, including many who live and/or recreate in and on San Francisco Bay and the Sacramento-San Joaquin River Delta. Baykeeper's mission is to defend the San Francisco Bay, including the Delta, from the biggest threats and hold polluters and government agencies accountable to create healthier communities and help wildlife thrive. Dr. Jonathan Rosenfield is the Science Director for Baykeeper and a leading expert on Longfin Smelt ecology and

behavior. Dr. Rosenfield has published peer-reviewed scientific studies of Longfin Smelt in San Francisco Bay and assisted in preparing the 2007 petition to list the Longfin Smelt. He has continued to conduct scientific research on the San Francisco Bay population of Longfin Smelt and review and comment on management activities and threats relating to this population's survival.

I. The San Francisco Bay-Delta Distinct Population Segment of Longfin Smelt is on the Brink of Extirpation.

The Longfin Smelt is an anadromous fish found in bay, estuary, and nearshore coastal environments of the Pacific Coast, from San Francisco Bay north to Cook Inlet, in south-central Alaska. The San Francisco Bay Estuary ("Estuary") supports the largest Longfin Smelt population in California, which the US Fish and Wildlife Service has determined is a distinct population segment ("DPS"). Longfin Smelt were once one of the most abundant resident fishes in the Estuary and were fished commercially. In recent years, Longfin Smelt numbers have plummeted to record lows in the Estuary, and it is thought to be extirpated or nearing extirpation in other California estuaries.

Catastrophic declines in the Longfin Smelt DPS have been caused by poor management of the Estuary by Federal and State water regulators and water diverters, which have allowed and carried out excessive water diversions and drastically reduced freshwater flow into San Francisco Bay. During the 1987-1992 drought, which coincided with a period of relatively high volume diversions and water exports from the estuary and its watershed, Longfin Smelt abundance declined dramatically, reaching historically low levels in the early 1990s. The population partially recovered during the mid-late 1990s, when hydrological conditions improved, but the population decline resumed when dry conditions and increased water diversions prevailed during the early part of this century. The Estuary's Longfin Smelt population reached a record low in 2015. Longfin Smelt abundance in 2022 (the most recent year of sampling) was <0.5% of the levels detected when sampling began in 1967. Protections available under the federal ESA are necessary to prevent the extirpation of the Longfin Smelt DPS.

II. Listing of Longfin Smelt DPS is long overdue as a result of repeated delays by the Service

At every stage of the federal ESA listing process, litigation has been necessary to compel the Service to meet its obligations to protect the Longfin Smelt DPS. In November 1992, Baykeeper and seven other organizations filed the original petition requesting the Service to list the Longfin Smelt. On June 24, 1993, the Service published its 90-day finding that the petition presented substantial information indicating that the requested action may be warranted and triggering a formal status review for the Longfin Smelt. 58 Fed. Reg. 36184 (July 6, 1993). The Service subsequently concluded that the San Francisco Estuary population of the Longfin Smelt was not a DPS and this original petition was ultimately denied.

In 2007, The Bay Institute (for which Dr. Rosenfield was consulting at the time), Center for Biological Diversity ("CBD"), and Natural Resources Defense Council again

petitioned the Service to list the Longfin Smelt DPS as endangered under the federal ESA. Initially, the Service responded by denying federal protection to the Estuary's population while promising to look at the status of the species as a whole. In 2009, The Bay Institute and CBD sued the Service for its denial, and in 2011, the Service announced it would rethink its decision. In 2012, the Service determined that the Estuary population was a DPS and that it *warranted* protection, but listing was precluded because the listing of other species was a higher a priority. 77 Fed. Reg. 19756 (Apr. 2, 2012). Thus, the Service added the Longfin Smelt DPS to the "candidate" list.

From 2012 to 2022, the Longfin Smelt DPS remained on the candidate list. The Service took no further action to reconsider or move the listing forward despite the Longfin Smelt DPS's inclusion in National Listing Workplans as a species targeted for completion. Instead, the Service repeatedly found, in every year, that the Longfin Smelt DPS was warranted for protection under the ESA, but that such protection was precluded by other pending listing determinations and that the Service was making expeditious progress to add or remove other species from the lists.

On April 8, 2021, Baykeeper filed a lawsuit to compel the Service to publish a finding and proposed rule regarding listing of the Longfin Smelt DPS. In a parallel case, CBD reached a settlement with the Service to do just that. *Center For Biological Diversity v. United States Fish & Wildlife Service, et al.*, Case No. 1:21-cv-00884-EGS (D.D.C. 2021). On October 7, 2022, the Service published its 2022 Proposed Rule, which proposed to list the Longfin Smelt DPS as an endangered species. 87 Fed. Reg. 60,957 (October 7, 2022).

Because the Service's initial determination was to list the Longfin Smelt DPS as an endangered species, 16 U.S.C. § 1533(b)(6)(A) requires that:

Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register--

- (i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either--
 - (I) a final regulation to implement such determination,
 - (II) a final regulation to implement such revision or a finding that such revision should not be made,
 - (III) notice that such one-year period is being extended under subparagraph (B)(i), or
 - (IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based....

See Ctr. for Biological Diversity v. Kempthorne, No. C 08-1339 CW, 2008 WL 1902703, at *2 (N.D. Cal. Apr. 28, 2008), citing 16 U.S.C. § 1533(b)(6) ("After publication of a notice and proposed rule in the *Federal Register*, the Secretary of the Interior must act on the rule within one year of the date of its publication by promulgating a final rule, withdrawing the proposed rule, or extending the one-year time period for not more than six months").

“This is a mandatory, nondiscretionary duty which may be enforced by citizen suit.” *Envtl. Def. Ctr. v. Babbitt*, 73 F.3d 867, 871 (9th Cir.1995). Any extension pursuant to Section 1533(b)(6)(A)(i)(III) is limited to six months and only when the Secretary can find that “there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination....” 16 U.S.C. § 1533(b)(6)(A)(i)(III), 1533(b)(6)(A)(iii).

In addition to the one-year deadline to make a final determination on a proposed listing rule, the Act also sets a deadline for designating critical habitat:

A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened...

16 U.S.C. § 1533(b)(6)(C). This concurrent one-year deadline to designate critical habitat can be extended for no more than one additional year if the Secretary has evidence to:

deem[] that--

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

16 U.S.C. § 1533(b)(6)(C).

The deadline to make a final determination on the October 7, 2022 proposed listing rule for the Longfin Smelt DPS was October 7, 2023. That deadline has now passed.

Based on the many years of data gathered during the Service’s unwarranted delay of the listing process for the Longfin Smelt DPS, Baykeeper is informed and believes that there is no “substantial disagreement regarding the sufficiency or accuracy of the available data relevant” to the proposed listing determination. Accordingly, any decision to further delay the final determination for six months would not be warranted. 16 U.S.C. § 1533(b)(6)(A)(i)(III). Baykeeper hereby notifies the Service that it intends to challenge any such unwarranted determination.

Based on the continuing high risk of extirpation of the Longfin Smelt DPS, Baykeeper also is informed and believes that there would be no evidentiary basis for the Service to reverse its proposed rule (and more than a decade of determinations that the Longfin Smelt DPS is warranted for listing) by making a determination not to list the Longfin Smelt DPS. Accordingly, Baykeeper hereby notifies the Service that it intends to challenge any determination not to proceed with the listing.

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Lastly, also as a result of the many years of delay by the Service in proceeding with the rulemaking for the Longfin Smelt DPS and the many years of data regarding the habitat needs of the species, Baykeeper is informed and believes that the Service could not justify a finding that critical habitat for the Longfin Smelt DPS is not determinable. Both the immediate listing of the Longfin Smelt DPS and the designation of its critical habitat are essential steps to thwart the continued downward spiral of its population towards extirpation and to put the Longfin Smelt on a path to recovery.

III. Conclusion.

If the Secretary does not make a final determination for the Longfin Smelt DPS within the next 60 days, Baykeeper intends to file suit. Please contact me if you have any questions regarding the issues raised in this notice or would otherwise like to discuss this matter.

Sincerely,



Michael R. Lozeau
Lozeau Drury LLP
on behalf of San Francisco Baykeeper