ornate shrew (Sorex ornatus sinuosus) and southwestern pond turtle (Clemmys marmorata pallida). Other vulnerable species include river otter (Lutra canadensis), beaver (Castor canadensis), nesting snowy egret (Egretta thula). nesting black-crowned night-heron (Nycticorax ncyticorax), ducklings of breeding ducks such as mallard (Anas platyrhynchos), gadwall (Anas strepera) and cinnamon teal (Anas cyanoptera), marsh wren (Cistothorus palustris), American bittern (Botaurus lentiginosus), Virginia rail (Rallus limicola), sora (Porzana carolina), and common moorhen (Gallinula chloropus).

EPA hopes that the measures taken to implement the Estuarine Habitat criteria will be sufficient to protect the fish and wildlife designated uses targeted by this narrative criterion. Nevertheless, in the event that continuing substantial adverse impacts on the brackish marsh habitat become evident before any possible revisions to the State's numeric criteria, this narrative criterion will provide a basis for State Board measures to address those adverse impacts.

## **D. Public Comments**

Public hearings on the Proposed Rule were held in Fresno, California on February 23, 1994; in Sacramento, California on February 24, 1994; in San Francisco, California on February 25, 1994; and in Los Angeles, California on February 28, 1994. Over 120 people spoke at these four hearings. The public comment period closed on March 11, 1994. EPA received over 225 written comments on the Proposed Rule.<sup>44</sup>

Responses to the public comments have been prepared and are a part of the administrative record to this rulemaking. The public may inspect this administrative record at the place and time described above.

## E. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action" because it raises novel policy issues arising out of the Federal coordination effort described above. This coordination effort, which calls for the integration of several Federal agencies and several different Federal statutes, is a unique and precedential approach to the implementation of Federal natural resources policy. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

The following is a summary of the regulatory impact assessment (RIA) that has been prepared in compliance with Executive Order 12866. The full RIA is part of the administrative record to this rule, and is available for public review as described above.

Executive Order 12866 requires Federal agencies to assess the costs and benefits of each significant regulatory action they promulgate. The RIA addresses two interrelated regulatory actions. The first is the promulgation by EPA of water quality criteria for the Bay/Delta estuary under the CWA. The second is the USFWS designation of critical habitat for the Delta smelt under the ESA.

## **Need for Regulation**

The Bay/Delta is the largest estuarine environment on the west coast of the Americas, encompassing 1,600 square miles and draining more than 40% of the water in California.

• The Bay/Delta estuary supports more than 120 species of fish and is a waterfowl migration and wintering area of international significance.

• The estuary supports 108 known species of fish, birds, mammals, reptiles, amphibians, invertebrates, and plants imperiled by habitat loss, including 25 species that are listed or are candidates for listing under the Endangered Species Act (ESA). • The estuary is composed of numerous habitats valued for their recreational, scientific, educational, aesthetic, and ecological aspects; designated uses defined by the California State Water Resources Control Board include estuarine habitat, coldwater and warmwater habitat, fish migration, fish spawning, ocean commercial and sport fishing, preservation of rare and endangered species, shellfish harvesting, and wildlife habitat.

• As a result of habitat change and other human-induced impacts, the estuary's ability to support a diverse ecosystem with large populations of important commercial, recreational, and heritage species has declined. The 1980's and 1990's brought the number of indigenous species to extremely low levels. Declines in aquatic resources have led to curtailed fishing seasons, petitions for listing species under the ESA, and general concern about the health of the estuarine ecosystem.

• The principal benefit expected to result from this rulemaking is an increase in ecosystem health. A healthy Bay/Delta ecosystem will maintain aquatic species in populations of sufficient sizes to sustain recreational and commercial fisheries, as well as the uniqueness and diversity still present in the estuary.

The Bay/Delta estuary is also the hub of California's two major water distribution systems, the SWP operated by California DWR and the CVP operated by the USBR. Most of the water stored and transported by the CVP is used for agriculture; the CVP also supplies municipal and industrial water to portions of the Central Valley and San Francisco Bay Area. SWP water is primarily used for municipal and industrial uses and the production of agricultural crops. Development and operation of the water projects have contributed to losses in biological productivity in the Bay/Delta estuary by substantially altering the flow and salinity conditions to which the indigenous organisms are adapted.

The Bay/Delta estuary is subject to the water quality control jurisdiction of the State Board and two regional boards. Pursuant to requirements of the CWA, the State Board in 1991 adopted and submitted to EPA the 1991 Bay/Delta Plan containing water quality standards for the Bay/Delta estuary. EPA, finding that the 1991 plan did not provide for adequate protection of the designated fish and wildlife uses of the Bay/Delta estuary, disapproved provisions of the plan. In response to State Board's failure to revise the disapproved criteria, EPA published the proposed rule for

<sup>&</sup>lt;sup>44</sup> The Bay Institute submitted identical comment letters generally supporting adoption of protective standards in the Bay/Delta from approximately 1,500 people. The total number of comments stated in the text counts these comments as a single comment.