



ASSOCIATION OF ARKANSAS COUNTIES
1415 West Third Street
Little Rock, Arkansas 72201
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AAC Position

Endangered Species Act Listings & Designation of Critical Habitat

It is the position of the Association of Arkansas Counties as regards all current and future listings, along with the designation of critical habitat, under the federal Endangered Species Act (ESA) to work closely with public and private entities to insure:

1. Only those species that are truly threatened or endangered are, in fact, listed, and
2. Any designation of critical habitat is limited to the minimum land area, supported by good science, necessary for the protection and welfare of the species, and
3. Both science and the overall economic impact of any listing and designation of critical habitat are taken into account before such listings and designation so as to minimize the impact of such on citizens and private enterprise—also known as the tax base for county government, and
4. The impact of listings and designation of critical habitat under the ESA do not act as a barrier to county government in supplying those fundamental services required by the Arkansas Constitution and state law.



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BACKGROUND INFORMATION ON THE NEOSHO MUCKET AND RABBITS FOOT MUSSELS

HISTORY OF THE LISTING

On July 11, 2011 a stipulated settlement agreement was reached between the Center for Biological Diversity (CBD), The U.S. Fish and Wildlife Service (Service) and the U.S. Department of Interior (Interior) to set a schedule for the potential listing of 374 (46 in Arkansas) fresh water aquatic species in 12 South and Southeastern States. The agreement set out a schedule for all 374 species starting in 2011 and going through 2018. The agreement referred to as multi district litigation was signed on September 9, 2011 by a U.S. District Court Judge for the District of Columbia. It is worth noting that none of the States affected by the listing were made aware of the settlement until it was announced.

STATUS OF LISTINGS IN ARKANSAS

The listing for the Neosho Mucket and Rabbits Foot Muscles has had a drawn out history. However for purposes of the current situation the status as of now is what should be focused on. On June 27, 2013 Mr. Dan Ashe the Director of the U.S. Fish and Wildlife Service notified in writing Senator Mark Pryor that his request for an extension of time for the public comment period on the proposed Critical Habitat and the economic impact was being granted. The extension was for 60 days. The actual notice of the extension was not published in the Federal Register until August 28th. All written comments must be in the hands of the Service by midnight October 28th. The comments are on the proposed Critical Habitat and the Economic Analysis for the Proposed Critical Habitat.

BACKGROUND ON CRITICAL HABITAT AND ECONOMIC ANALYSIS FOR THE NEOSHO MUCKET AND RABBITS FOOT MUSSELS

It is not required that Proposed Critical Habitat be finalized prior to the actual listing of a species. In the case of the Mussels discussed here they were ordered by the Court and the listing took effect on September 17th. If the Service proposes Critical Habitat it must be accompanied by an economic analysis of impact the proposed Critical Habitat. Critical Habitat, if proposed, is the area which the Service believes is essential to the conservation of the species and may require special management consideration or protection. Once Critical Habitat has been finalized it is against Federal Law to "Take" a species. The definition of "Take" means to "harass, harm, hunt shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct." The term "harm" which includes the detrimental modification of a species habitat is in this situation in of particular significance. In a Supreme Court decision habitat destruction has been defined as any activity which "actually kills or injures the endangered or threatened species constitutes a violation of the ESA.

Unfortunately the Economic Analysis covers only the direct and indirect cost of agencies consulting with each other if a federal permit is needed for a project in a Critical Habitat Unit (CHU)".

ARKANSAS PROPOSED CRITICAL HABITAT

In Arkansas should all the proposed Critical Habitat for both mussels be adopted it would be 48 percent of the total proposed Critical Habitat in all of the states. The streams included in the Critical Habitat Units (CHU's) in Arkansas directly impact 27 counties and if fully adopted will cover 42 percent of geographical area of Arkansas. This is due to the extensive impact of the Rabbits Foot Mussel which covers CHU's in 26 counties. The primary reason for the extensive impact is the conclusion by the Service to extend the definition of Critical Habitat to state; "Therefore where one occurrence record was known from a river reach, we consider the entire river reach between the uppermost and lowermost locations as occupied habitat except lakes and reservoirs." Given the definition of "Harm" and the requirement that both Mussels must have an abundance of clear, cool water the proposed Critical Habitat Units present a real challenge

ARKANSAS PROPOSED ECONOMIC ANALYSIS

As stated above the Service uses a method of economic analysis that only estimates the limited cost those governmental agencies will bear if these CH designations cause some additional work (consultation) for the Service/Corp of Engineers/ U.S. Forest Service and other federal agencies. The total estimated economic impact using this "incremental" analysis approach is 4.4 million over a 20 year period or \$290,000 per year. This impact is for the entire designation in all states. It does nothing to take into account the delay or elimination of projects or activities that may harm Critical Habitat and the impact on local economies. It is an economic approach that totally ignores human cost

NEXT STEPS

There is an effort underway to constructively and with good science make a serious effort to demonstrate that the proposed CH is over blown and the economic analysis is dramatically under estimated. The effort is well underway and is important to the economic well-being of the affected Arkansas Counties and the businesses and citizens that reside in those counties. It would be a pleasure to discuss the effort that is underway and if you are interested in understanding how you can help



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Response Reply To:
FWS/R4/ES/054775

JUN 27 2013

The Honorable Mark Pryor
United States Senate
Washington, D.C. 20510

Dear Senator Pryor:

Thank you for your letter dated June 7, 2013, requesting a 30-day extension of the public comment period for the U.S. Fish and Wildlife Service's (Service) proposed designation of aquatic critical habitat for the Neosho mucket and rabbitsfoot mussels.

Later this summer, the Service will reopen the comment period on the proposed critical habitat rule. This will provide the public with an opportunity to review and comment on the draft environmental assessment and draft economic analysis and to offer additional comments on the proposed critical habitat designation. The public comment period will be open for 60 days.

The Service believes the greatest conservation benefits for any species and its habitat are best realized by working collaboratively with all of our partners. We believe providing this additional time will lead to greater understanding of what the designation of critical habitat does and does not mean to those who enjoy and/or depend upon healthy aquatic natural resources. It is our hope that through the coming weeks we can advance our conservation and recovery goals.

Thank you for your interest in the conservation of threatened and endangered species and your willingness to participate in the rulemaking process. If you have any questions or need additional information, please contact me personally, or have your staff contact Ms. Cynthia K. Dohner, the Service's Southeastern Regional Director, at (404) 679-4000.

Sincerely,


DIRECTOR

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS-R4-ES-2013-0007; 4500030113]

RIN 1018-AZ30

Endangered and Threatened Wildlife and Plants; Designating Critical Habitat for the Neosho Mucket and Rabbitsfoot

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the public comment period on our October 16, 2012, proposed designation of critical habitat for the Neosho mucket (*Lampsilis rafinesqueana*) and rabbitsfoot (*Quadrula cylindrica cylindrica*) mussels under the Endangered Species Act of 1973, as amended (Act). In response to requests we received, we are reopening the comment period to allow all interested parties an opportunity to comment on the proposed designation of critical habitat, draft environmental assessment, and draft economic analysis. Comments previously submitted need not be resubmitted, as they will be fully considered in our determinations on this rulemaking action.

DATES: For the proposed rule published October 16, 2012 (77 FR 63440), we will consider all comments received or postmarked on or before October 28, 2013. 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.

ADDRESSES: *Document availability:* You may obtain copies of the proposed rule on the Internet at <http://www.regulations.gov> at Docket No. FWS-R4-ES-2012-0031, or by mail from the Arkansas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain a copy of the draft economic analysis and the draft environmental assessment at Docket No. FWS-R4-ES-2013-0007.

Comment submission: You may submit written comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Search for Docket No. FWS-R4-ES-2013-0007.

(2) *By hard copy:* Submit comments by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R4-ES-2013-0007; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Boggs, Field Supervisor, U.S. Fish and Wildlife Service, Arkansas Ecological Services Field Office, 110 South Amity Road, Suite 300, Conway, AR 72032; by telephone 501-513-4475; or by facsimile 501-513-4480. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

On October 16, 2012, the Service published a proposed rule in the Federal Register (77 FR 63440) to list the Neosho mucket (*Lampsilis rafinesqueana*) as an endangered species and the rabbitsfoot (*Quadrula cylindrica cylindrica*) as a threatened species under the Act and to designate critical habitat for these two mussels. We proposed to designate approximately 779.1 river kilometers (rkm) (484.1 river miles (rmi)) of critical habitat for the Neosho mucket in the Cottonwood, Elk, Fall, Illinois, Neosho, Shoal, Spring, North Fork Spring, and Verdigris Rivers in Arkansas, Kansas, Missouri, and Oklahoma. The proposed critical habitat for the Neosho mucket is located in:

- Benton and Washington Counties, Arkansas;
- Allen, Chase, Cherokee, Coffey, Elk, Greenwood, Labette, Montgomery, Neosho, Wilson, and Woodson Counties, Kansas;
- Jasper, Lawrence, McDonald, and Newton Counties, Missouri; and
- Adair, Cherokee, and Delaware Counties, Oklahoma.

We proposed to designate 2,664 rkm (1,655 rmi) of critical habitat for the rabbitsfoot in the Neosho, Spring (Arkansas River system), Verdigris, Black, Buffalo, Little, Ouachita, Saline, Middle Fork Little Red, Spring (White River system), South Fork Spring, Strawberry, White, St. Francis, Big Sunflower, Big Black, Paint Rock, Duck, Tennessee, Red, Ohio, Allegheny,

Green, Tippecanoe, Walhonding, Middle Branch North Fork Vermilion, and North Fork Vermilion Rivers and Bear, French, Muddy, Little Darby and Fish Creeks in Alabama, Arkansas, Kansas, Kentucky, Illinois, Indiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania, and Tennessee. The proposed critical habitat for the rabbitsfoot is located in:

- Colbert, Jackson, Madison, and Marshall Counties, Alabama;
- Arkansas, Ashley, Bradley, Clark, Cleveland, Dallas, Drew, Fulton, Grant, Hot Spring, Independence, Izard, Jackson, Lawrence, Little River, Marion, Monroe, Montgomery, Newton, Ouachita, Randolph, Saline, Searcy, Sevier, Sharp, Van Buren, White, and Woodruff Counties, Arkansas;
- Allen and Cherokee Counties, Kansas;
- Ballard, Green, Hart, Livingston, Logan, Marshall, and McCracken Counties, Kentucky;
- Massac, Pulaski, and Vermilion Counties, Illinois;
- Carroll, Pulaski, Tippecanoe, and White Counties, Indiana;
- Hinds, Sunflower, Tishomingo, and Warren Counties, Mississippi;
- Jasper, Madison, and Wayne Counties, Missouri;
- Coshocton, Madison, Union, and Williams Counties, Ohio;
- McCurtain and Rogers Counties, Oklahoma;
- Crawford, Erie, Mercer, and Venango Counties, Pennsylvania; and
- Hardin, Hickman, Marshall, Maury, and Robertson Counties, Tennessee.

That proposal had a 60-day comment period, ending December 17, 2012.

On May 9, 2013, we announced the reopening of the comment period for the proposed listing of Neosho mucket and rabbitsfoot and the availability of our draft environmental assessment (DNEPA-EA) and draft economic analysis (DEA) of the proposed critical habitat (78 FR 27171). The comment period was reopened for 30 days, ending on June 10, 2013. We received two requests for the reopened comment period to be extended so that the public could have additional time to review the draft environmental assessment and draft economic analysis. The requests were from Senator Mark Pryor of Arkansas and the Kansas Farm Bureau. Therefore, with this notice we are reopening the comment period on the proposed designation of critical habitat and the draft EA and NEPA-EA for an additional 60 days.

Pursuant to a court-ordered deadline, we must make a final determination on whether to list Neosho mucket and

rabbitsfoot by September 30, 2013.

Although we published the proposal to list the species and the proposal to designate critical habitat on October 16, 2012, as one rule, we intend to publish the final rule listing the species and the final determination on critical habitat separately. Additionally, in order to allow additional opportunity for public comment on the critical habitat proposal, we plan to publish the final critical habitat determination later than the listing determination.

Additional information may be found in the October 16, 2012, proposed rule (77 FR 63440) and the May 9, 2013, reopening of the comment period and availability of the draft environmental assessment and draft economic analysis (78 FR 27171).

Public Comments

We are again seeking written comments and information during this reopened comment period on our proposed designation of critical habitat for Neosho mucket and rabbitsfoot that published in the *Federal Register* on October 16, 2012 (77 FR 63440), and on our draft environmental assessment and draft economic analysis of the proposed critical habitat designation and the amended required determinations that were made available for review on May 9, 2013 (78 FR 27171).

With regard to the proposed critical habitat determination, we are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act, including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation

such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The amount and distribution of the species’ habitat;

(b) What areas occupied by the species at the time of listing that contain features essential for the conservation of the species we should include in the designation and why;

(c) 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; and

(d) What areas not occupied at the time of listing are essential to the conservation of the species and why.

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

(4) Any foreseeable economic, national security, or other relevant impacts that may result from designating any area that may be included in the final designation. We are particularly interested in any impacts on small entities and the benefits of including or excluding areas from the proposed designation that are subject to these impacts.

(5) Whether our approach to designating critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you submitted comments or information on the proposed rule (77 FR 63440) during the initial comment period from October 16, 2012, to December 17, 2012, or the reopened comment period (78 FR 27171) from May 9, 2013, to June 10, 2013, please do not resubmit them. We have incorporated them into the public

record as part of the original comment period, and we will fully consider them in our final determinations.

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

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment 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.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS-R4-ES-2013-0007 for the proposed critical habitat designation, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arkansas Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: August 12, 2013.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013-20671 Filed 8-26-13; 8:45 am]

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