



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2011–0050]

[4500030114]

RIN 1018–AW92

Endangered and Threatened Wildlife and Plants; Endangered Status for the Alabama Pearlshell, Round Ebonyshell, Southern Sandshell, Southern Kidneyshell, and Choctaw Bean, and Threatened Status for the Tapered Pigtoe, Narrow Pigtoe, and Fuzzy Pigtoe; with Critical Habitat

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 the October 4, 2011, rule proposing endangered status for the

Alabama pearlshell (*Margaritifera marrianae*), round ebonyshell (*Fusconaia rotulata*), southern sandshell (*Hamiota australis*), southern kidneyshell (*Ptychobranthus jonesi*), and Choctaw bean (*Villosa choctawensis*), and threatened status for the tapered pigtoe (*Fusconaia burkei*), narrow pigtoe (*Fusconaia escambia*), and fuzzy pigtoe (*Pleurobema strodeanum*), and designation of their critical habitat, under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for these eight species and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule, the associated DEA, and the amended required determinations section. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final rule.

DATES: We will consider comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION].

Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, 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 and draft economic

analysis on the Internet at <http://www.regulations.gov> at Docket Number FWS–R4–ES–2011–0050, or by mail from the Panama City Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

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–2011–0050, which is the docket number for this rulemaking.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2011–0050; 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: Don Imm, Field Supervisor, U.S. Fish and Wildlife Service, Panama City Ecological Services Field Office, 1601 Balboa Avenue, Panama City, FL 32405; telephone 850–769–0552; facsimile 850–763–2177. If

you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of critical habitat for these eight mussels that was published in the **Federal Register** on October 4, 2011(76 FR 61482), our DEA of the proposed designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. 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 (16 U.S.C. 1531 *et seq.*), 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 distribution of the eight mussels;

(b) The amount and distribution of habitat for these eight mussels; and

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

(d) What areas not occupied at the time of listing are essential to the conservation of these 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) The projected and reasonably likely impacts of climate change on these eight mussels and on the critical habitat we are proposing.

(6) 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.

(7) Information on the extent to which the description of economic impacts in the DEA is complete and accurate.

(8) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

If you submitted comments or information on the proposed rule (76 FR 61482) during the initial comment period from October 4, 2011, to December 5, 2011, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning designation of critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed rule or DEA by one of the methods listed in the **ADDRESSES** section. We request that you

send comments only by the methods described in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. 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 and DEA, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS–R4–ES–2011–0050, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Panama City Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section, above). You may obtain copies of the proposed rule and the DEA on the Internet at <http://www.regulations.gov> at Docket Number FWS–R4–ES–2011–0050, or by mail from the Panama City Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section, above).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the Alabama pearlshell, round ebonyshell, southern sandshell, southern kidneyshell, Choctaw bean, tapered pigtoe, narrow pigtoe, and fuzzy pigtoe in this document. For more information on previous Federal actions concerning these eight species, or their biology and habitat needs, refer to the proposed listing and designation of critical habitat published in the **Federal Register** on October 4, 2011 (76 FR 61482). This document is available online at <http://www.regulations.gov> (at Docket Number FWS-R4-ES-2011-0050) or from the Panama City Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section, above).

Previous Federal Actions

On October 4, 2011, we published a proposed rule to list and designate critical habitat for these species (76 FR 61482). We proposed to designate approximately 2,406 kilometers (km) (1,495 miles (mi)) of stream and river channels within Bay, Escambia, Holmes, Jackson, Okaloosa, Santa Rosa, Walton, and Washington Counties, Florida; and Barbour, Bullock, Butler, Coffee, Conecuh, Covington, Crenshaw, Dale, Escambia, Geneva, Henry, Houston, Monroe, and Pike Counties, Alabama. We will submit for publication in the **Federal Register** a final critical habitat designation for these eight species on or before October 4, 2012.

Critical Habitat

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

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

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat. 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 as critical habitat, provided such exclusion will not result in the extinction of these species.

When considering the benefits of inclusion for an area, we consider the additional

regulatory benefits that area would receive from the protection from adverse modification or destruction as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies), the educational benefits of mapping areas containing essential features that aid in the recovery of the listed species, and any benefits that may result from designation due to State or Federal laws that may apply to critical habitat.

When considering the benefits of exclusion, we consider, among other things, the economic impacts of designation; whether exclusion of a specific area is likely to result in conservation; the continuation, strengthening, or encouragement of partnerships; or implementation of a management plan. In the case of these eight mussels, the benefits of critical habitat include public awareness of the presence of these species and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for these species due to protection from adverse modification or destruction of critical habitat. In practice, situations with a Federal nexus exist primarily on Federal lands or for projects undertaken by Federal agencies.

We have not proposed to exclude any areas from critical habitat. However, the final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation.

Accordingly, we have prepared a draft economic analysis concerning the proposed

critical habitat designation (DEA), which is available for review and comment (see **ADDRESSES** section, above).

Draft Economic Analysis

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for these eight mussels. The DEA separates conservation measures into two distinct categories according to “without critical habitat” and “with critical habitat” scenarios. The “without critical habitat” scenario represents the baseline for the analysis, considering protections otherwise afforded to the eight mussels (e.g., under the Federal listing and other Federal, State, and local regulations). The “with critical habitat” scenario describes the incremental impacts specifically due to designation of critical habitat for these species. In other words, these incremental conservation measures and associated economic impacts would not occur but for the designation. Conservation measures implemented under the baseline (without critical habitat) scenario are described qualitatively within the DEA, but economic impacts associated with these measures are not quantified. Economic impacts are only quantified for conservation measures implemented specifically due to the designation of critical habitat (i.e., incremental impacts). For a further description of the methods of the analysis, see Chapter 2, “Framework for the Analysis,” of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts

of the proposed critical habitat designation for these eight mussels over the next 20 years, which was determined to be the appropriate period for analysis because limited planning information is available for most activities to forecast activity levels for projects beyond a 20-year timeframe. It identifies potential incremental costs as a result of the proposed critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing. The DEA quantifies economic impacts of mussel conservation efforts associated with the following categories of activity: (1) Impoundments, dams, and diversions; (2) dredging, channelization, and in-stream mining; (3) transportation and utilities; (4) residential and commercial development; (5) timber management, agriculture, and grazing; and (6) oil wells/drilling.

Based on discussions with State and local regulatory authorities, including Alabama Department of Environmental Management, Florida Department of Environmental Protection, and Northwest Florida Water Management District, land and water management practices are not expected to change due to the designation of critical habitat.

The present value of the total incremental cost of critical habitat designation is estimated at \$1.41 million over 20 years assuming a 7 percent discount rate, or \$125,000 on an annualized basis. Transportation and utility activities are likely to be subject to the greatest incremental impacts at \$1.02 million over 20 years, followed by development at \$62,300; timber management, agriculture, and grazing activities at \$56,600; and

impoundments, dams, and diversions at \$13,100 (present values over 20 years assuming a 7 percent discount rate). No incremental impacts to dredging, channelization, and in-stream mining are anticipated because these activities are not expected to occur within proposed critical habitat boundaries. No incremental impacts to oil wells or drilling operations are anticipated because there is no Federal nexus for these activities that would require section 7 consultation. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

As we stated earlier, we are soliciting data and comments from the public on the DEA, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, 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 these species.

Required Determinations – Amended

In our October 4, 2011, proposed rule (76 FR 61482), we indicated that we would defer our determination of compliance with several statutes and executive orders until the information concerning potential economic impacts of the designation and potential

effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), , the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951). However, based on the DEA data, we are amending our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), E.O. 13211 (Energy, Supply, Distribution, or Use), and the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*).

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; 5 U.S.C. 801 *et seq.*), 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. Based on our DEA of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rule making.

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 if 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.

To determine if the proposed designation of critical habitat for these species would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as residential or commercial development entities. In order to determine whether it is appropriate for our agency to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies. In areas where these eight mussels are present, Federal agencies already are required to consult with us under section 7 of the Act on activities they fund, permit, or implement that may affect these species. If we finalize the proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the eight mussels. This analysis estimates that six small

governments (counties) may be affected by the rule. The affected counties represent 9 percent of small counties in Alabama and Florida. We anticipate approximately three to four counties could be affected each year, with an impact of approximately \$875 per county. Assuming annual county tax revenues of at least \$1 million, per county impacts represent approximately 0.02 percent of annual revenues. Approximately 20 small development-related entities are likely to incur administrative costs associated with section 7 consultations. Assuming that all of these entities are small, they represent approximately 0.04, or less than one, percent of all small developers and homebuilders in the affected counties. Annualized impacts per entity are approximately \$48, which represents less than one percent of annual, per entity revenues. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts to small businesses.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Information for this analysis was gathered from the Small Business Administration, stakeholders, and the Service. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed 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.

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

As outlined in the DEA and in the amended RFA determination above, we do not believe that this rule will significantly or uniquely affect small governments. It will not produce a Federal mandate of \$100 million or greater in any year, and therefore is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on state or local governments. By definition, Federal agencies are not considered small entities, although the activities they fund or permit may be proposed or carried out by small entities. After careful review of the DEA we have determined that a Small Government Agency Plan is not required.

Energy, Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The Office of Management and Budget provides guidance for implementing this executive order, and outlines the situations that are considered to have a “significant energy effect” when compared with the regulatory action under consideration. As outlined in the DEA, we do not anticipate impacts to oil wells and drilling activities in the study area (critical habitat reaches and associated watersheds). Thus, we do not anticipate a “significant energy effect” from this rulemaking.

Authors

The primary authors of this notice are the staff members of the Panama City Ecological Services Field Office.

Authority

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

Date: March 16, 2012

/s/ Rachel Jacobson

Acting Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55-P

[FR Doc. 2012-7200 Filed 03/26/2012 at 8:45 am; Publication Date: 03/27/2012]