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## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Part 17**

**[Docket No. FWS–R2–ES–2012–0082]**

**[4500030114]**

**RIN 1018–AY20**

### **Endangered and Threatened Wildlife and Plants; Proposed Revision of Critical Habitat for the Comal Springs Dryopid Beetle, Comal Springs Riffle Beetle, and Peck’s Cave Amphipod**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening

of the public comment period on the October 19, 2012, proposed revision of critical habitat for the Comal Springs dryopid beetle (*Stygoparnus comalensis*), Comal Springs riffle beetle (*Heterelmis comalensis*), and Peck's cave amphipod (*Stygobromus pecki*) under the Endangered Species Act of 1973, as amended. We also announce the availability of a draft economic analysis of the proposed designation of critical habitat for the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod 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 draft economic analysis (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:** The comment period for the proposed rule published October October 19, 2012, at 77 FR 77 FR 64272, is reopened. *Written Comments:* 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.

*Public Information Meeting:* We will hold a public information meeting on Friday, May

17, 2013, from 5:30 pm to 6:30 pm (see **ADDRESSES** section, below).

*Public Hearing:* We will hold a public hearing on Friday, May 17, 2013 from 7:00pm to 8:30 pm (see **ADDRESSES** section, below).

**ADDRESSES:**

*Document Availability:* You may obtain copies of the proposed rule and DEA on the internet at <http://www.regulations.gov> at Docket No. FWS–R2–ES–2012–0082 or by mail from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

*Written Comments:* You may submit written comments by one of the following methods, or at the public information meeting or public hearing:

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. Search for Docket No. FWS–R2–ES–2012–0082, which is the docket number for this rulemaking , and follow the directions for submitting a comment.

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R2–ES–2012–0082; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM;

Arlington, VA 22203.

*Public information Meeting and Public Hearing:* The public informational session and hearing will be held at **San Marcos Activity Center, 501 E. Hopkins, San Marcos, TX 78666**. People needing reasonable accommodation in order to attend and participate in the public hearing should contact Adam Zerrenner, Field Supervisor, Austin Ecological Services Field Office, as soon as possible (see **FOR FURTHER INFORMATION CONTACT**).

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:** Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Suite 200, Austin, TX 78758; by telephone at 512-490-0057, extension 248; or by facsimile at 512-490-0974. Persons who use a telecommunications device for the deaf (TDD) may 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 revision of critical habitat for Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod that published in the **Federal Register** on October 19, 2012 (77 FR 64272), 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 Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), including whether there are threats to the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod 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 these species and their habitat;
  - (b) What areas, that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of these species, should be included 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 for the conservation of the species and why.
- (3) Any data documenting the extent of subsurface areas used by any of the species for breeding, feeding, or sheltering.
- (4) Land use designations and current or planned activities in the subject areas and the possible impacts of these designations or activities on both species and their proposed critical habitat.
- (5) Information on the projected and reasonably likely impacts of climate change on these species and proposed critical habitat.
- (6) Any foreseeable economic, national security, or other relevant impacts of

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.

(7) 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, in particular for those areas that may benefit from the proposed Edwards Aquifer Recovery Implementation Program Habitat Conservation Plan (HCP). Copies of the draft HCP are available from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

(8) 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.

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

(10) 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 (77 FR 64272) during the initial comment period from October 19, 2012, to December 18, 2012, 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.

You may submit your comments and materials concerning the proposed rule or DEA by one of the methods listed in the **ADDRESSES** section. Verbal testimony may also be presented during the public hearing (see **DATES** and **ADDRESSES** sections). 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–R2–ES–2012–0082, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule and the DEA on the Internet at <http://www.regulations.gov> at Docket Number FWS–R2–ES–2012–0082, or by mail from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

*Public Information Meeting and Public Hearing*

We are holding a public information meeting and a public hearing on the date listed in the **DATES** section at the address listed in the **ADDRESSES** section (above). We are holding the public hearing to provide interested parties an opportunity to present verbal testimony (formal, oral comments) or written comments regarding the proposed revision of critical habitat for the Comal Springs invertebrates, and the associated DEA. A formal public hearing is not, however, an opportunity for dialogue with the Service; it is only a forum for accepting formal verbal testimony. In contrast to the hearing, the public information meeting will allow the public the opportunity to interact with Service

staff, who will be available to provide information and address questions on the proposed rule and its associated DEA. We cannot accept verbal testimony at the public information meeting; verbal testimony can only be accepted at the public hearing. Anyone wishing to make an oral statement at the public hearing for the record is encouraged to provide a written copy of their statement to us at the hearing. At the public hearing, formal verbal testimony will be transcribed by a certified court reporter and will be fully considered in the preparation of our final determination. In the event there is a large attendance, the time allotted for oral statements may be limited. Speakers can sign up at the hearing if they desire to make an oral statement. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us.

Persons with disabilities needing reasonable accommodations to participate in the public information meeting or public hearing should contact Adam Zerrenner, Field Supervisor, Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Reasonable accommodation requests should be received at least 3 business days prior to the public information meeting or public hearing to help ensure availability; at least 2 weeks' prior notice is requested for American Sign Language needs.

## **Background**

It is our intent to discuss only those topics directly relevant to the designation of revised critical habitat for the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod in this document. For more information on previous Federal actions concerning the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod, refer to the proposed revision of critical habitat published in the **Federal Register** on October 19, 2012 (77 FR 64272), which is available online at <http://www.regulations.gov> (at Docket Number FWS-R2-ES-2012-0082) or from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### *Previous Federal Actions*

The final rule to list Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod as endangered species was published in the **Federal Register** on December 18, 1997 (62 FR 66295). Critical habitat was not designated at the time of listing due to the determination by the Service that designation for the three invertebrate species was not prudent because it would not provide benefits to the species beyond listing and the subsequent evaluation of activities required under section 7 of the Act. The lack of designated critical habitat for these species was subsequently challenged by the Center for Biological Diversity in the U.S. District Court for the District of Columbia.

As part of a stipulated settlement agreement between the plaintiff and the Service, the Service subsequently proposed critical habitat on July 17, 2006 (71 FR 40588), and designated critical habitat for the species on July 17, 2007 (72 FR 39248).

On January 14, 2009, the Center for Biological Diversity, Citizens Alliance for Smart Expansion, and Aquifer Guardians in Urban Areas (*CBD, et al. v. Kempthorne*, No. 1:09-cv-00031-LY (W.D. Tex.)) filed suit in Federal Court (Western District of Texas) alleging that the Service failed to use the best available science in the critical habitat designation. On December 18, 2009, the parties filed a settlement agreement where we agreed to submit a revised proposed critical habitat determination for publication in the **Federal Register** by October 17, 2012, and a final revised determination by October 13, 2013.

On October 19, 2012, we published a proposed rule to revise critical habitat for the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod (77 FR 64272). We proposed to designate approximately 39.4 acres (ac) (15.56 hectares (ha)) of surface area and 139 ac (56 ha) of subsurface area in two units (Comal and Fern Bank Springs Units) located in Comal and Hays Counties, Texas, as critical habitat for Comal Springs dryopid beetle; approximately 54 ac (22 ha) of surface area in two units (Comal and San Marcos Springs Unit) located in Comal and Hays Counties, Texas, as critical habitat for the Comal Springs riffle beetle; and approximately 38.4 ac (15.16 ha)

of surface area and 138 ac (56 ha) of subsurface area in two units (Comal and Hueco Springs Units) located in Comal and Hayes County, Texas, as critical habitat for Peck's cave amphipod. In total, approximately 169 ac (68 ha) are proposed as revised critical habitat for all three species in Hays and Comal Counties, Texas.

That proposal had a 60-day comment period, ending December 18, 2012. In accordance with the December 18, 2009, settlement agreement, we will submit for publication in the **Federal Register** a final revised critical habitat designation for Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod on or before October 13, 2013.

#### *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 the 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, 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 the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod, the benefits of critical habitat include public awareness of the presence of either species and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod 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, in the proposed rule we explained that we are considering the exclusion of the lands covered by the Edwards Aquifer Recovery Implementation Program HCP that provide for the conservation of the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod (77 FR 64272, October 19, 2012). The final decision on whether to exclude any area will be based on the best scientific data available at the time of the final designation, including information obtained during the comment periods and information about the economic impact of designation. Accordingly, we have prepared a DEA concerning the proposed revised critical habitat designation, which is available for review and comment (see **ADDRESSES**).

*Draft Economic Analysis*

The purpose of the DEA is to identify and analyze the potential economic impacts associated with the proposed revision of critical habitat designation for the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections otherwise afforded to the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs 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 these species.

The "without critical habitat" scenario represents the baseline for the analysis, and considers the protections already afforded the species regardless of critical habitat designation. The baseline for this analysis is the state of regulation, absent designation of critical habitat, that provides protection to the species under the Act, as well as under other Federal, State, and local laws and conservation plans. The baseline includes

sections 7, 9, and 10 of the Act to the extent that they are expected to apply absent the designation of critical habitat for the species. The analysis qualitatively describes how baseline conservation for the Comal Springs invertebrates is currently implemented across the proposed revised designation in order to provide context for the incremental analysis (Chapters 2 of the DEA).

The “with critical habitat” scenario describes and monetizes the incremental impacts specifically due to designation of revised critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for these species. In other words, the incremental costs are those attributable solely to the designation of revised critical habitat, above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat when evaluating the benefits of excluding particular areas under section 4(b)(2) of the Act. The analysis looks at baseline impacts incurred from the listing of the species and forecasts both baseline and incremental impacts likely to occur if we finalize the proposed revised critical habitat designation. For a further description of the methodology of the analysis, see Appendix B “Framework for Analysis,” of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed revised critical habitat designation for the Comal Springs dryopid beetle,

Comal Springs riffle beetle, and Peck's cave amphipod 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 revised critical habitat designation; these are those costs attributed to critical habitat over and above those baseline costs attributed to listing.

In the DEA, we concentrated on the activities of primary concern with respect to potential adverse modification of critical habitat. The key concerns are the potential for activities to result in changes to existing water flow regimes; the introduction or augmentation of nonnative species; and physical, biological, or chemical changes to current habitat conditions. Within these activity categories, we focus our analysis on those projects and activities that are considered reasonably likely to occur within the proposed revised critical habitat area. This includes projects or activities that are currently planned or proposed, or that permitting agencies or land managers indicate are likely to occur.

When a species is federally listed as an endangered or threatened species, it receives protection under the Act. For example, under section 7 of the Act, Federal agencies must consult with the Service to ensure that actions they fund, authorize, or

carry out do not jeopardize the continued existence of the species. Economic impacts of conservation measures undertaken to avoid jeopardy to the species are considered baseline impacts in our analysis, as they are not generated by the critical habitat designation. In other words, baseline conservation measures and associated economic impacts are not affected by decisions related to critical habitat designation for these species. Other baseline protections accorded listed species under the Act and other Federal and State regulations and programs are described in Chapter 2 of the DEA.

The only Federal regulatory effect of the designation of critical habitat is the prohibition on Federal agencies taking actions that are likely to adversely modify critical habitat. They are not required to avoid or minimize effects unless the effects rise to the level of destruction or adverse modification as those terms are used in section 7 of the Act. Even then, the Service must recommend reasonable and prudent alternatives that can be implemented consistent with the intended purpose of the action, that are within the scope of the Federal agency's legal authority and jurisdiction, and that are economically and technologically feasible. Thus, while the Service may recommend conservation measures, unless the action is likely to destroy or adversely modify critical habitat, implementation of recommended measures is voluntary and Federal agencies and applicants have discretion in how they carry out their section 7 mandates.

Thus, the direct, incremental impacts of critical habitat designation stem from the

consideration of the potential for destruction or adverse modification of critical habitat during section 7 consultations. The two categories of direct, incremental impacts of critical habitat designation are: (1) The administrative costs of conducting section 7 consultation; and (2) implementation of any conservation efforts requested by the Service through section 7 consultation, or required by section 7 to prevent the destruction or adverse modification of critical habitat.

The DEA describes the types of project modifications currently recommended by the Service to avoid jeopardy to the Comal Springs invertebrates in proposed critical habitat (“baseline” project modifications). These baseline project modifications would be recommended in occupied habitat areas regardless of whether critical habitat is designated for these species. Although the standards for jeopardy and adverse modification of critical habitat are not the same, because the degradation or loss of habitat is a key threat to the Comal Springs invertebrates, our jeopardy analyses for these species would already consider the potential for project modifications to avoid the destruction of habitat; therefore recommendations to avoid jeopardy would also likely avoid adverse modification or destruction of critical habitat for these species.

The designation of critical habitat may, under certain circumstances, affect actions that do not have a Federal nexus and thus are not subject to the provisions of section 7 under the Act. Indirect impacts are those unintended changes in economic behavior that

may occur outside of the Act that may occur through other Federal, State, or local actions, and that are caused by the designation of critical habitat. Appendix A of the DEA discusses the common types of indirect impacts that may be associated with the designation of critical habitat, such as time delays, regulatory uncertainty, and negative perceptions related to critical habitat designation on private property. These types of impacts are not always considered incremental. In the case that these types of conservation efforts and economic effects are expected to occur regardless of critical habitat designation, they are appropriately considered baseline impacts in this analysis.

We do not anticipate recommending incremental conservation measures to avoid adverse modification of critical habitat over and above those recommended to avoid jeopardy of these species. Therefore, incremental impacts of critical habitat designation are expected to be limited to the costs of additional administrative effort in section 7 consultations to consider adverse modification, as described in Chapter 2 of the DEA. Although we recognize that the standards for jeopardy and adverse modification of critical habitat are not the same, with the latter focusing more closely on effects to conservation of the species, in this case and for the reasons described above, the designation of critical habitat in occupied areas would likely result only in incremental effects over and above the costs associated with consultation due to the presence of the species. A number of factors limit the extent to which the proposed critical habitat designation will result in incremental costs, including the fact that all the proposed

critical habitat is occupied by the species, the species' survival is so closely linked to the quality of their habitat, the species have limited ability to move beyond their immediate locations, few actions are carried out in the area that are subject to a Federal nexus, and a portion of the proposed habitat is currently managed for conservation.

Quantified incremental impacts are limited to the administrative costs of section 7 consultation. The Service anticipates two consultations with the Department of Defense operations, and six consultations with the Army Corps of Engineers pertaining to several construction-related activities in the Comal Springs Unit and San Marcos Springs Unit that may require a section 404 permit over the next 20 years. There are four existing HCPs that include these three Comal species and two pending HCPs that may include these three Comal species in which designation of critical habitat may trigger re-initiation of consultation on the issuance of incidental take permits for HCPs. Re-initiation of intraservice section 7 consultation for existing HCPs is not automatic and would likely only occur when an incidental take permit holder seeks amendment of the incidental take permit. We can foresee no likely Federal activities in the future that would result in section 7 consultations caused by the designation of critical habitat beyond those that would occur due to the listing of the species. We anticipate no new project proponents or additional activities that would require consultation due to critical habitat designation. The Comal Springs invertebrates have been listed since 1997. It is unlikely that any

additional entities will pursue HCPs as a result of this revised critical habitat designation.

The aquatic habitat, in which the three Comal Springs invertebrates are found, also encompasses habitat for other species listed as endangered or threatened under the Act. San Marcos Springs currently has critical habitat designated for the fountain darter (*Etheostoma fonticola*), San Marcos salamander (*Eurycea nana*), and Texas wild-rice (*Zizania texana*). Comal Springs has critical habitat designated for the fountain darter.

Some projects within the proposed revised critical habitat area for the Comal Springs invertebrate species have already incorporated conservation measures to avoid adversely affecting the critical habitat of the listed fountain darter, San Marcos salamander, and Texas wild-rice. The Comal Springs invertebrate species, therefore, may benefit from the conservation efforts already in place for the fountain darter, San Marcos salamander, and Texas wild-rice.

In addition, groundwater production from the Edwards Aquifer is regulated by the Edwards Aquifer Authority (EAA), a special groundwater district established by the State of Texas Edwards Aquifer Authority Act (hereafter, "EAA-Act"). Under the EAA-Act, EAA is responsible for groundwater management in a jurisdictional area that spans 8,800 square miles across eight counties, including portions of Comal and Hays Counties. The

EAA-Act also directs EAA to implement management practices that ensure the continuous minimum springflows of Comal Springs and San Marcos Springs to protect endangered and threatened species. The Service has developed minimum flow guidelines for the San Marcos salamander, Texas blind salamander, and Texas wild-rice, and fountain darter. These guidelines have been incorporated into the EAA's Demand Management/Critical Period Management Trigger Levels, which determine aquifer-wide pumping reductions necessary during periods of reduced springflow.

The total projected incremental costs of administrative efforts resulting from section 7 consultations is approximately \$14,000 for water use actions, over 20 years (\$1,200 on an annualized basis), assuming a 7 percent discount rate, and \$57,000 for other actions, over 20 years (\$5,000 on an annualized basis), assuming a 7 percent discount rate. The analysis estimates potential future administrative impacts based on the historical rate of consultation on co-occurring listed species in areas proposed as revised critical habitat as discussed Chapter 2 of the DEA.

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 this species.

### **Required Determinations—Amended**

In our October 19, 2012, proposed rule (77 FR 64272), 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 that data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Orders (E.O.) 12866 and 13563 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy Supply, Distribution, or Use), 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 determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *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 revised 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 rulemaking.

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 revised critical habitat for the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck’s cave amphipod would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as changes to existing flow regimes, introduction or augmentation of nonnative species, and physical, biological, or chemical changes to current habitat conditions. However, the SBREFA does not explicitly define “substantial number” or “significant economic impact.” Consequently, to assess whether a “substantial number” of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited

extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the number of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod are present, Federal agencies already are required to consult with us under section 7 of the Act on activities they authorize, fund, or carry out that may affect the species. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinitiate consultation for ongoing Federal activities (see *Application of the "Adverse Modification" Standard* section of the October 19, 2012, proposed rule (77 FR 64272)).

In the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of revised critical habitat for the Comal Springs dryopid beetle, Comal Springs riffle beetle, and Peck's cave amphipod. Quantified incremental impacts that may be borne by

small entities are limited to the administrative costs of section 7 consultation related to actions that alter water quality and quantity (Appendix B of the DEA).

We do not anticipate recommending incremental conservation measures to avoid adverse modification of critical habitat over and above those recommended to avoid jeopardy to the species, and as such, the economic analysis forecasts few incremental economic impacts as a result of the designation of revised critical habitat for these species. Those incremental impacts forecasted are solely related to administrative costs for adverse modification analyses in section 7 consultations. We forecast five formal section 7 consultations in the Comal Springs Unit and one formal section 7 consultation in the San Marcos Springs Unit relating to dam and retaining wall repair at Landa Lake and additional projects in the area surrounding Landa Lake that may require CWA 404 permits from the Corps in the future, as residential development is expanding in the area and funding for development and maintenance projects has increased relative to past years during the 20-year timeframe of the analysis. Due to uncertainty about when consultation will occur, the costs of these consultations are distributed evenly throughout the period of analysis. Because no projects, with or without a Federal nexus, are known, we do not attribute any costs to future actions in the Hueco Springs Unit in Comal County or the Fern Bank Springs Unit in Hays County. Re-initiation of section 7 consultation with the Service could potentially occur in 2013, for the Hays County-Regional Habitat Conservation Plan (RHCP), the Comal County RHCP, the South

Edwards Plateau HCP, and the Cibolo Canyon Property HCP, as each of these HCPs manage activity within the Edwards Aquifer and thus may choose to consider impacts to critical habitat for all listed species within their designated plan areas. The costs of any potential reinitiated intra-Service Section 7 consultations resulting from voluntary changes to incidental take permits associated with the aforementioned HCPs are assumed to be distributed equally across the four proposed revised critical habitat units.

The Department of Defense consultations are not expected to involve small entities. Reinitiated consultations related to incidental take permits are typically conducted by the Service alone, and thus may not require a third party. Although a third party such as the Edwards Aquifer Authority, Comal County, or Hays County could take part in potential reinitiated intra-Service Section 7 consultations resulting from voluntary changes to incidental take permits associated with the aforementioned HCPs, none of these entities are small entities. One consultation in San Marcos Springs is anticipated to involve the State of Texas as a third party. The State is not a small entity. Five miscellaneous consultations are anticipated in the Comal Springs Unit related to construction-related activities. The majority of these administrative costs are expected to be borne by Federal entities, but some costs would be borne by third parties participating in section 7 consultations. These entities may include the City of New Braunfels (population of 59,600), as well as developers. The City of New Braunfels is not considered a small government, as its population exceeds 50,000. It is possible that up to

five developers could be included as third parties in these consultations. The total costs of these five actions together are estimated to be \$1,900 to \$2,100 annually, including Federal costs.

The Service's current understanding of recent case law is that Federal agencies are only required to evaluate the potential impacts of rulemaking on those entities directly regulated by the rulemaking; therefore, they are not required to evaluate the potential impacts to those entities not directly regulated. The designation of critical habitat for an endangered or threatened species only has a regulatory effect where a Federal action agency is involved in a particular action that may affect the designated critical habitat. Under these circumstances, only the Federal action agency is directly regulated by the designation, and, therefore, consistent with the Service's current interpretation of RFA and recent case law, the Service may limit its evaluation of the potential impacts to those identified for Federal action agencies. Under this interpretation, there is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consequently, it is the current practice of the Service to assess to the extent practicable these potential impacts if sufficient data are available, whether or not this analysis is believed by the Service to be strictly required by the RFA. In other words, while the effects analysis required under the RFA is limited to

entities directly regulated by the rulemaking, the effects analysis under the Act, consistent with the E.O. regulatory analysis requirements, can take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable.

In summary, we have considered whether the proposed revised 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 revised 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.

### **Authors**

The primary authors of this notice are the staff members of the Austin Ecological Services Field Office, Southwest Region, U.S. Fish and Wildlife Service.

**Authority**

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

Date: April 17, 2013

Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

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