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## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

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

**[Docket Nos. FWS-R4-ES-2012-0076 and FWS-R4-ES-2013-0029; 4500030113]**

**RIN 1018-AY08; 1018-AZ51**

**Endangered and Threatened Wildlife and Plants; Endangered Species Status for Cape Sable Thoroughwort, Florida Semaphore Cactus, and Aboriginal Prickly-Apple, and Designation of Critical Habitat for Cape Sable Thoroughwort**

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

**ACTION:** Proposed rule; reopening of comment period; availability of draft economic analysis.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on the October 11, 2012, proposed rule to list *Chromolaena frustrata* (Cape Sable thoroughwort), *Consolea corallicola* (Florida semaphore cactus), and *Harrisia aboriginum* (aboriginal prickly-apple) as endangered species under the Endangered Species Act of 1973, as amended (Act), and to designate critical habitat for *Chromolaena frustrata* under the Act. We also announce the availability of a draft economic analysis (DEA) of the proposed designation of critical habitat for *Chromolaena frustrata* 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. Any comments that we receive after the closing date may not be considered in the final decisions on these actions.

**ADDRESSES:**

*Document availability:* You may obtain copies of the October 11, 2012, proposed

rule on the internet at <http://www.regulations.gov> at Docket No. FWS-R4-ES-2012-0076 or by mail from the South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain a copy of the draft economic analysis at Docket No. FWS-R4-ES-2013-0029.

*Written Comments:* You may submit written comments by one of the following methods:

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

<http://www.regulations.gov>. Submit comments on the listing proposal to Docket No. FWS-R4-ES-2012-0076, and submit comments on the critical habitat proposal and the associated draft economic analysis to Docket No. FWS-R4-ES-2013-0029. See **SUPPLEMENTARY INFORMATION** for an explanation of the two dockets.

(2) *By hard copy:* Submit comment on the listing proposal by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R4-ES-2012-0076; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203. Submit comment on the critical habitat proposal and draft economic analysis by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS-R4-ES-2013-0029; 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:** Larry Williams, Field Supervisor, U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960; by telephone 772-562-3909; or by facsimile 772-562-4288. 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 are reopening the comment period for our proposed listing determination for *Chromolaena frustrata*, *Consolea corallicola*, and *Harrisia aboriginum* and our proposed critical habitat designation for *Chromolaena frustrata* that was published in the **Federal Register** on October 11, 2012 (77 FR 61836). We are also specifically seeking comments on the draft economic analysis, which is now available, for the critical habitat designation. We will consider information and recommendations from all interested parties. See **ADDRESSES** for information on where to send your comments.

We are also notifying the public that we will publish two separate rules, one for

the final listing determination for *Chromolaena frustrata*, *Consolea corallicola*, and *Harrisia aboriginum* and another for the final critical habitat determination for *Chromolaena frustrata*. The final listing rule will publish under the existing docket number, FWS–R4–ES–2012–0076, and the final critical habitat designation will publish under docket number FWS–R4–ES–2013–0029.

We request that you provide comments that are specifically on our listing determination under the existing docket number FWS–R4–ES–2012–0076. We are particularly interested in comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threats (or lack thereof) to these species and regulations that may be addressing those threats.

(2) Additional information concerning the historical and current status, range, distribution, and population size of these species, including the locations of any additional populations of these species.

(3) Any information on the biological or ecological requirements of these species and ongoing conservation measures for these species and their habitats.

(4) Current or planned activities in the areas occupied by these species and possible impacts of these activities on these species.

We request that you provide comments that are specifically on the critical habitat determination and draft economic analysis under docket number FWS–R4–ES–2013–0029. We are particularly interested in comments concerning:

(5) 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.

(6) Specific information on:

(a) The amount and distribution of *Chromolaena frustrata* 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; and

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

(7) Land use designations and current or planned activities in the subject areas occupied by *Chromolaena frustrata* or proposed to be designated as critical habitat, and possible impacts of these activities on these species and proposed critical habitat.

(8) Information on the projected and reasonably likely impacts of climate change on *Chromolaena frustrata* and proposed critical habitat.

(9) Any probable 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.

(10) 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.

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

(12) 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.

(13) 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.

If you submitted comments or information on the proposed rule (77 FR 61836) during the initial comment period from October 11, 2012, to December 10, 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 determinations. Our final determinations will take into consideration all written comments and any additional information we receive during both comment periods.

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–2012–0076 (for the proposed listings), and at Docket No. FWS–R4–ES–2013–0029 (for the proposed critical habitat and draft economic analysis) or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule on the Internet at <http://www.regulations.gov> at Docket Number FWS–R4–ES–2012–0076 and the draft economic analysis at Docket No. FWS–R4–ES–2013–0029, or by mail from the South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT** section).

## **Background**

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for *Chromolaena frustrata* in this document. For more information on previous Federal actions concerning *C. frustrata*, the species, or its habitat, refer to the proposed listing rule and proposed designation of critical habitat published in the **Federal Register** on October 11, 2012 (77 FR 61836), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R4–ES–2012–0076) or from the South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

On October 11, 2012, we published a proposed rule to designate critical habitat for *Chromolaena frustrata* (77 FR 61836). We proposed to designate approximately 3,466 hectares (8,565 acres) in nine units located in Miami-Dade and Monroe Counties, Florida, as critical habitat. That proposal had a 60-day comment period, ending December 10, 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 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 *Chromolaena frustrata*, the benefits of critical habitat include public awareness of the presence of *C. frustrata* and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for *C. frustrata* 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 and commercial 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 DEA concerning the proposed 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 critical habitat designation for *Chromolaena frustrata*. 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 *Chromolaena frustrata* (e.g., under the Federal listing, if adopted, and under other Federal, State, and local regulations). The “with critical habitat” scenario describes the incremental impacts specifically due to designation of critical habitat for the 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 methodology of the analysis, see Chapter 2, “METHODOLOGY,” of the DEA.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for *Chromolaena frustrata* 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 attributable to listing.

The DEA provides estimated costs of the probable economic impacts of the proposed critical habitat designation of *Chromolaena frustrata* associated with the following categories of activity: commercial, residential and recreational development; Federal land management; and restoration and conservation.

The DEA estimates that approximately \$578,000 in direct incremental costs would result from the critical habitat designation over the next 20 years (at a 7 percent

discount rate). The DEA estimates 93 percent of the costs would be attributable to consultations regarding Federal land management and restoration and conservation activities, with the remaining 7 percent attributable to development in the area. Over half of the estimated incremental costs are expected to result from actions occurring with the Key Largo unit, in Monroe County, Florida.

Overall, 92 percent of the area proposed as critical habitat is located within Federal, State, or local conservation areas. The DEA estimates that the administrative cost of consultations for Federal land management to be \$61,474 for formal consultations and \$1,138 for informal consultations. It estimates that the incremental costs of the proposed critical habitat designation on Federal land management would be approximately \$299,000 over the next 20 years (7 percent discount rate). Over half of these costs are expected to occur within the Everglades National Park unit.

The DEA estimates the administrative cost of consultations for commercial, residential, and recreational development to be \$5,387 per formal consultation and \$2,412 per informal consultation. It is estimated that the incremental costs of the proposed critical habitat designation on commercial, residential, and recreational development would be approximately \$39,000 over the next 20 years (7 percent discount rate). The DEA provides an estimate that consultations in the Key Largo unit would account for 77 percent of these costs.

The DEA estimates the administrative cost of consultations for restoration and conservation to be \$22,437 for formal consultations and \$7,492 for informal consultations. It is estimated that the incremental costs of the proposed critical habitat designation on restoration and conservation projects to be approximately \$240,000 over the next 20 years (7 percent discount rate). The majority, 91 percent, of these costs are estimated to occur within the Key Largo unit. Given the presence of other listed species that may trigger consultation requirements related to restoration and conservation projects, these costs for *C. frustrata* are likely overestimates of the incremental cost of the proposed critical habitat designation on restoration and conservation projects.

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 11, 2012, proposed rule (77 FR 61836), 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 Orders (E.O.s) 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 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 critical habitat for *Chromolaena frustrata* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as commercial, residential, and recreational development; Federal land management; and restoration and conservation. 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 a listed species is 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 the 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 *Chromolaena frustrata*. Based upon the results of the DEA, we do

not anticipate significant adverse impacts to small entities as a result of the proposed critical habitat designation. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

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 potential impacts to entities not directly regulated, such as small businesses. However, Executive Orders 12866 and 13563 direct Federal agencies to assess the 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 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.

### **Authors**

The primary authors of this notice are the staff members of the South Florida Ecological Services Office, Region 4, 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: June 20, 2013

Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

~~**[Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Cape Sable Thoroughwort]**~~

Billing Code 4310-55-P

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