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## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

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

**[Docket No. FWS–R4–ES–2011–0074]**

**[4500030114]**

**RIN 1018–AX76**

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Cumberland Darter, Rush Darter, Yellowcheek Darter, Chucky Madtom, and Laurel Dace**

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

**ACTION:** Proposed rule; reopening of comment period and announcement of public hearing.

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

public comment period on our October 12, 2011, proposed designation of critical habitat for the Cumberland darter (*Etheostoma susanae*), rush darter (*Etheostoma phytophilum*), yellowcheek darter (*Etheostoma moorei*), chunky madtom (*Noturus crypticus*), and laurel dace (*Chrosomus saylori*) 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 five fishes 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 revised 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. We will also hold a public hearing (see **DATES** and **ADDRESSES**).

**DATES:** *Comment submission:* We will consider all 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**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

*Public hearing:* We will hold a public hearing from 7:00 p.m. to 9:00 p.m., on June 7, 2012, in Clinton, Arkansas.

**ADDRESSES:** *Document availability:* You may obtain copies of the proposed rule and the draft economic analysis on the Internet at <http://www.regulations.gov> at Docket Number FWS–R4–ES–2011–0074, or by mail from the Tennessee 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–2011–0074, 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–2011–0074; 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).

*Public hearing:* The public hearing will be held at the Clinton High School Auditorium, 115 Joe Bowling Road, Clinton, Arkansas 72031. People needing

reasonable accommodations in order to attend and participate in the public hearing should contact Jim Boggs, Arkansas Ecological Services Field Office, at 501-513-4470 no later than 1 week before the hearing date (see **DATES**) to allow sufficient time to accommodate requests.

**FOR FURTHER INFORMATION CONTACT:** Mary Jennings, Field Supervisor, U.S. Fish and Wildlife Service, Tennessee Ecological Services Field Office, 446 Neal Street, Cookeville, TN 38501; by telephone 931-525-4973; or by facsimile 931-528-7075. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:**

**Changes From the Proposed Rule**

We are making the following changes to the proposed rule of October 12, 2011 (76 FR 63360). A change in mapping methodology resulted in a revision to the total number of river kilometers (km) for the proposed designation of yellowcheek darter critical habitat. The beginning and ending points of critical habitat, as well as the unit descriptions (as described in the proposed critical habitat rule) will remain the same. The change in mapping results from an oversight in methods used for estimating the unit lengths in the other units proposed for designation as critical habitat. This methodology uses a better technique for following the curve and meander of the river channel and

results in an additional 6.6 river kilometers (rkm) (4.1 river miles (rm)) for the yellowcheek darter. In addition, a revision to the ownership of one property resulted in a change of the total number of river kilometers (miles) in private ownership, from 148 rkm (92 rm) to 162.7 rkm (101.1 rm), as well as a corresponding downward revision to other ownership types.

The following table shows the revised totals. The data in this table replaces the data provided in table 3 of the proposed rule at 76 FR 63385 (October 12, 2011).

Unit	Location	Occupied	Private Ownership km (mi)	State, County, City Ownership km (mi)	Total Length km (mi)
1	Middle Fork Little Red River	Yes	73.2 (45.5)	0	73.2 (45.5)
2	South Fork Little Red River	Yes	33.3 (20.7)	0.5 (0.3)	33.8 (21.0)
3	Archey Fork Little Red River	Yes	28.2 (17.5)	0.3 (0.2)	28.5 (17.7)
4	Devil's Fork Little Red River	Yes	28.0 (17.4)	0	28.0 (17.4)
	Total		162.7 (101.1)	0.8 (0.5)	163.5 (101.6)

### Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of critical habitat for the Cumberland darter (*Etheostoma susanae*), rush darter (*Etheostoma phytophilum*), yellowcheek darter (*Etheostoma moorei*), chunky madtom (*Noturus crypticus*), and laurel dace (*Chrosomus*

*saylori*) that was published in the **Federal Register** on October 12, 2011 (76 FR 63360), our draft economic analysis (DEA) of the proposed designation, and the amended required determinations provided in this document. Verbal testimony or written comments may also be presented during the public hearing. 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 amount and distribution of each species’ habitat;

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

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

(3) Land use designations and current or planned activities in the subject areas

and their possible impacts on proposed critical habitat.

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

(5) The projected and reasonably likely impacts of climate change 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 63360) during the initial comment period from October 12, 2011, to December 12, 2011, please do not resubmit them. We have incorporated them into the public record as part of the original comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods, including public testimony from the public hearing mentioned above. 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 **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the 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–2011–0074, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Tennessee Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

## **Background**

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the Cumberland darter, rush darter, yellowcheek darter, chunky madtom, and laurel dace in this document. For more information on previous Federal actions concerning the five fishes, refer to the proposed designation of critical habitat published in the **Federal Register** on October 12, 2011 (76 FR 63360). For more information on the five fishes or their habitats, refer to the final listing rule published in the **Federal Register** on August 9, 2011 (FR 48722), which is available online at <http://www.regulations.gov> (at Docket Number FWS–R4–ES–2011–0027) or from the Tennessee Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

### *Previous Federal Actions*

On October 12, 2011, we published a proposed rule to designate critical habitat for these five fishes (76 FR 63360). We proposed to designate approximately 85 river kilometers (rkm) (53 river miles (rmi)) of critical habitat for the Cumberland darter in

McCreary and Whitley Counties, Kentucky, and Campbell and Scott Counties, Tennessee; 42 rkm (27 rmi) and 19 hectares (ha) (22 acres (ac)) of critical habitat for the rush darter in Etowah, Jefferson, and Winston Counties, Alabama; 157 rkm (98 rmi) of critical habitat for the yellowcheek darter in Cleburne, Searcy, Stone, and Van Buren Counties, Arkansas; 32 rkm (20 rmi) of critical habitat for the chunky madtom in Greene County, Tennessee; and 42 rkm (26 rmi) of critical habitat for the laurel dace in Bledsoe, Rhea, and Sequatchie Counties, Tennessee. That proposal had a 60-day comment period, ending December 12, 2011. We will submit for publication in the **Federal Register** a final critical habitat designation for these five fishes on or before October 12, 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 these five fishes, the benefits of critical habitat include public

awareness of the presence of the fishes and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the five fishes 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, our DEA concerning the proposed critical habitat designation 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 the Cumberland darter, rush darter, yellowcheek darter, chucky madtom, and laurel dace. 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 five fishes (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 methodology 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 the five fishes 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 the five fishes conservation efforts associated with the following categories of activity: (1) coal mining; (2) oil and natural gas development; (3) agriculture, ranching, and silviculture; (4) recreational uses; (5) dredging, channelization, impoundments, dams, and diversions; (6) transportation; and (7) residential and commercial development.

The DEA concluded that the types of conservation efforts requested by the

Service during section 7 consultation regarding the five fishes were not expected to change due to critical habitat designations. The Service believes that results of consultation under the adverse modification and jeopardy standards are likely to be similar because (1) the primary constituent elements that define critical habitat are also essential for the survival of the five fishes, (2) the five fishes are limited or severely limited in the respective ranges, and (3) numbers of individuals in the surviving populations are small or very small. In addition, although two of the proposed critical habitat units for the Cumberland darter are unoccupied, incremental impacts of the critical habitat designations will be limited for the following reasons: (1) Both units are currently occupied by the federally threatened blackside dace, *Chrosomus cumberlandensis*; (2) both units are situated at least partially within the Daniel Boone National Forest, which is managed according to a land and resource management plan that includes specific measures to protect sensitive species; and (3) both units are located within the same hydrologic unit as other occupied critical habitat units.

The DEA concludes that incremental impacts of critical habitat designation are limited to additional administrative costs of consultations and that indirect incremental impacts are unlikely to result from the designation of critical habitat for the five fishes. The present value of the total direct (administrative) incremental cost of critical habitat designation is \$644,000 over the next 20 years assuming a seven percent discount rate, or \$56,800 on an annualized basis. Water quality management activities are likely to be subject to the greatest incremental impacts at \$273,000 over the next 20 years, followed

by transportation at \$161,000; coal mining at \$79,000; oil and natural gas development at \$73,700; agriculture, ranching, and silviculture at \$36,100; dredging, channelization, impoundments, dams, and diversions at \$10,700; and recreation at \$10,000.

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 12, 2011, proposed rule (76 FR 63360), 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), E.O. 13211 (Energy, Supply, Distribution, and 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

rule.

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 the five fishes would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as coal mining; oil and natural gas development; dredging, channelization, impoundments, dams, and diversions; and transportation. In order to determine whether it is appropriate for our

agency to certify that this 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 the five fishes 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 the species. If we finalize this 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 five fishes. We anticipate that ten small entities could be affected by coal mining in a single year at a cost of \$875 each, representing less than three percent of annual revenues. Two small entities could be affected by oil and natural gas development within a single year at a cost of \$875 each, representing less than three percent of annual revenues. One small entity could be affected by dredging, channelization, impoundments, dams, and diversions within a single year, at a cost of \$2,630, representing less than one percent of annual revenues. One small entity could be affected by transportation within a single year, at a cost of \$1,750, representing less than

one percent of annual revenues. Please refer to the DEA of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

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. We have identified 14 small entities that may be impacted by the proposed critical habitat designation. 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 Tennessee Ecological Services Field Office (see ADDRESSES section).

**Authority**

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

Date: May 17, 2012

Rachel Jacobson

Acting Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55

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