



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2013–0015]

[4500030113]

RIN 1018–AZ47

**Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat
for *Leavenworthia exigua* var. *laciniata***

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 May 24, 2013, proposed designation of critical

habitat for *Leavenworthia exigua* var. *laciniata* (Kentucky glade cress) 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 and an amended required determinations section of the proposal. For this action, our DEA consists of an incremental effects memorandum considering the probable incremental economic impacts that may result from the proposed designation of critical habitat and a screening analysis of the probable effects of the designation of critical habitat for the Kentucky glade cress. 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 our determination on this rulemaking action.

DATES: The comment period for the proposed rule published May 24, 2013, at 78 FR 31479, is reopened. We will consider comments received or postmarked on or before [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION]. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES:

Document availability: You may obtain copies of the proposed rule and the DEA on the Internet at <http://www.regulations.gov> at Docket Number FWS–R4–ES–2013–0015, or by mail from the Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

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 critical habitat proposal and associated DEA by searching for Docket No. FWS–R4–ES–2013–0015, which is the docket number for this rulemaking.
- (2) *By hard copy:* Submit comments on the critical habitat proposal and DEA by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2013–0015; 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: Lee Andrews, Field Supervisor, U.S.

Fish and Wildlife Service, Kentucky Ecological Services Field Office, J.C. Watts Federal Building, 330 W. Broadway Rm. 265, Frankfort, KY 40601; by telephone 502-695-0468; or by facsimile 502-695-1024. 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 designation of critical habitat for *L. exigua* var. *laciniata* that was published in the **Federal Register** on May 24, 2013 (78 FR 31479), our DEA of the proposed designation, and the amended required determinations provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat is not prudent.

(2) Specific information on:

(a) The distribution of the *L. exigua* var. *laciniata*;

(b) The amount and distribution of *L. exigua* var. *laciniata* habitat; (c) 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

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

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

(4) Information on the projected and reasonably likely impacts of climate change on *L. exigua* var. *laciniata* and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, we seek information on the benefits of including or excluding areas that exhibit these impacts.

(6) Information on the extent to which the description of economic impacts in the DEA is a reasonable estimate of the likely economic impacts.

(7) 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.

(8) Whether any 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.

(9) 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.

If you submitted comments or information on the proposed rule (78 FR 31479) during the initial comment period from May 24, 2013, to July 23, 2013, please do not resubmit them. We will incorporate them into the public record as part of this comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final

determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the proposed critical habitat 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 critical habitat rule and DEA, will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS-R4-ES-2013-0015, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Kentucky 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 No. FWS–R4–ES–2013–0015, or by mail from the Kentucky 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 *L. exigua* var. *laciniata* in this document. For more information on *L. exigua* var. *laciniata* or its habitat, refer to the proposed listing rule published in the **Federal Register** on May 24, 2013 (78 FR 31498), which is available online at <http://www.regulations.gov> (at Docket Number FWS-R4-ES-2013-0069) or from the Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

On May 24, 2013, we published a proposed rule to designate critical habitat for the species (78 FR 31479). We proposed to designate approximately 2,053 acres (ac) (830 hectares (ha)) in six units located in Bullitt and Jefferson Counties, Kentucky, as critical habitat. That proposal had a 60-day comment period, ending July 23, 2013. For more information on previous Federal actions concerning *L. exigua* var. *laciniata*, refer to the proposed designation of critical habitat published in the **Federal Register** on May 24, 2013 (78 FR 31479).

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 of an area we consider, among other factors, the additional regulatory benefits that an area would receive through the analysis under section 7 of the Act addressing the destruction or adverse modification of critical habitat as a result of actions with a Federal nexus (activities conducted, funded, permitted, or authorized by Federal agencies); the educational benefits of identifying areas containing essential features that aid in the recovery of the listed species; and any ancillary benefits triggered by existing local, State, or Federal laws as a result of the critical habitat designation.

When considering the benefits of excluding a particular area, we consider, among other things, whether exclusion of a specific area is likely to incentivize or result in the conservation of the species and its habitat; the continuation, strengthening, or encouragement of partnerships; or implementation of a conservation or management plan for the species and its habitat. In the case of *L. exigua* var. *laciniata*, the benefits of critical habitat include public awareness of the presence of *L. exigua* var. *laciniata* and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for *L. exigua* var. *laciniata* 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. To consider information related to economic impact, we have prepared a draft economic analysis (DEA) concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**).

Consideration of Economic Impact

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species. The probable economic impact of a 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, which includes the existing regulatory and socio-

economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the impacts of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat 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 the species. The incremental conservation efforts and associated impacts would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct an optional section 4(b)(2) exclusion analysis.

For this particular designation, we developed an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from the proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Kentucky glade cress (IEc 2013, entire). The purpose of the screening analysis is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening

analysis considers baseline costs (i.e., absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether units are unoccupied by the species and may require additional management or conservation efforts as a result of the critical habitat designation and may incur incremental economic impacts. This screening analysis, combined with the information contained in our IEM, is what we consider our DEA of the proposed critical habitat designation for the Kentucky glade cress and is summarized in the narrative below.

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. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly impacted entities, where practicable and reasonable. We assess to the extent practicable the probable impacts, if sufficient data are available, to both directly and indirectly

impacted entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation. In our IEM dated September 9, 2013, we identified probable incremental economic impacts associated with the following categories of activities: (1) Residential and commercial development; (2) transportation projects; (3) recreational activities; (4) agricultural activities; (5) utility projects; and (6) commercial timber harvest. We considered each industry or category individually. Additionally, we considered whether the 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 Kentucky glade cress is present, Federal agencies already are required to consult with the Service 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. Therefore, disproportionate impacts to any geographic area or sector are not likely as a result of this critical habitat designation.

In our IEM, we attempted to clarify the distinction between the effects that would result from the species being listed and those attributable to the critical habitat designation (i.e., difference between the jeopardy and adverse modification standards) for

the Kentucky glade cress critical habitat. Because the designation of critical habitat for the Kentucky glade cress was proposed concurrently with the listing, it has been our experience that it is more difficult to discern which conservation efforts are attributable to the species being listed and those which would result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical and biological features identified for critical habitat are the same features essential for the life requirements of the species, and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the Kentucky glade cress would also likely adversely affect the essential physical and biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species.

The proposed critical habitat designation for the Kentucky glade cress totals 2,053 ac (830 ha) in six units, consisting of 18 subunits, that are all occupied by the species. All of the units and subunits are privately owned except for unit 1, which is owned by the Louisville/Jefferson County Metropolitan Government, and subunit 4B, where the Kentucky State Nature Preserve Commission owns a 20-acre conservation easement (Fish and Wildlife Service 2013). Inclusive of all units, any actions that may affect the species or its habitat would also affect designated critical habitat, and it is unlikely that any additional conservation efforts would be recommended to address the adverse

modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the Kentucky glade cress. In general, because the glade cress is a narrow endemic species, the quality of its habitat is closely linked to the species' survival and conservation measures would be, in most cases, addressed through the consultation recommendations as necessary to avoid jeopardizing the continued existence of the Kentucky glade cress (Fish and Wildlife Service 2013). Therefore, in our DEA, we determined that in most circumstances, these costs of the proposed critical habitat designation would predominantly be administrative in nature and would not be significant.

Federal action agencies will most likely incur incremental costs associated with section 7 consultations. In the DEA, we determined that few activities will lead to section 7 consultation because this species is an upland plant with no occurrences on Federal lands. Future section 7 consultation is likely to be infrequent. Activities we expect to be subject to consultation may involve the development in the Louisville, Kentucky/Jefferson County metropolitan area, which is predicted to grow substantially through year 2050. Critical habitat may impact property values indirectly if developers assume the designation will limit the potential use of that land. However, the designation of critical habitat is not likely to result in an increase of consultations. Therefore, the incremental administrative burden resulting from the designation is unlikely to reach \$100 million in a given year based on the small number of anticipated consultations and

pre-consultation costs. The \$100 million threshold is established by Executive Order 12866, which directs agencies to assess the potential costs and benefits of regulatory actions and quantify those costs and benefits if that action may have an effect on the economy of \$100 million or more annually.

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 May 24, 2013, proposed rule (78 FR 31479), we indicated that we would defer our determination of compliance with several statutes and executive orders until we had evaluated the probable effects on landowners and stakeholders and the resulting probable economic impacts of the designation. Following our evaluation in the DEA of the probable incremental economic impacts resulting from the designation of critical habitat for the Kentucky glade cress, we have amended or affirmed our determinations below. Specifically, we affirm the information in our proposed rule concerning

Executive Orders (E.O.s) 12866 and 13563 (Regulatory Planning and Review), 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 our evaluation of the probable incremental economic impacts of the proposed designation of critical habitat for the Kentucky glade cress, we are amending our required determination concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and E.O. 12630 (Takings).

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.

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.

The Service’s current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly

regulated by the rulemaking itself, and, therefore, are not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried by the agency is not likely to adversely modify critical habitat. Therefore, under these circumstances only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Federal agencies are not small entities, and to this end, there is no requirement under RFA to evaluate the potential impacts to entities not directly regulated. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that, if promulgated, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. 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.

E.O. 12630 (Takings)

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Kentucky glade cress in a takings implications assessment. As discussed above, the designation of critical habitat affects only Federal actions. Although private parties that receive Federal funding, assistance, or require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. The DEA found that no significant economic impacts are likely to result from the designation of critical habitat for the Kentucky glade cress. Because the Act's critical habitat protection requirements apply only to Federal agency actions, few conflicts between critical habitat and private property rights should result from this designation. Based on information contained in the economic analysis assessment and described within this document, it is not likely that economic impacts to a property owner would be of a sufficient magnitude to support a takings action. Therefore, we conclude that this designation of critical habitat for the Kentucky glade cress does not pose significant takings implications for lands within or affected by the designation.

Authors

The primary authors of this notice are the staff members of the Kentucky Ecological Services Field Office, Southeast Region, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Authority

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

Date: December 20, 2013

Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

Billing Code 4310-55-P

[FR Doc. 2013-31575 Filed 01/06/2014 at 8:45 am; Publication Date: 01/07/2014]