

Dated: April 26, 2006.

**Matt Hogan,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

RIN 1018-AU32

#### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Rota Bridled White-eye (*Zosterops rotensis*)

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

**ACTION:** Proposed rule; reopening of comment period and notice of 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 proposed designation of critical habitat for the Rota bridled white-eye (*Zosterops rotensis*) and the availability of the draft economic analysis. The draft economic analysis estimates the potential total costs for this critical habitat designation to range from \$806,000 to \$4,465,000, at present value over a 20-year period, or \$76,000 to \$421,000 per year, assuming a 7 percent discount rate. We are reopening the comment period to allow peer reviewers and all interested parties the opportunity to comment simultaneously on the proposed rule and the associated draft economic analysis. Comments previously submitted need not be resubmitted as they will be incorporated into the public record as part of this comment period and will be fully considered in preparation of the final rule.

**DATES:** We will accept public comments until June 5, 2006.

**ADDRESSES:** You may submit your comments and information by any one of several methods:

(1) You may submit written comments and information by mail to the Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Blvd., P.O. Box 50088, Honolulu, HI 96850-0001.

(2) You may hand-deliver written comments to our Pacific Islands Fish and Wildlife Office at the address given above.

(3) You may fax your comments to 808-792-9581.

(4) You may send comments by electronic mail (e-mail) to [RBWE\\_CritHab@fws.gov](mailto:RBWE_CritHab@fws.gov). For directions on how to submit e-mail comments, see the Public Comments Solicited section.

(5) You may submit comments via the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

**FOR FURTHER INFORMATION CONTACT:**

Patrick Leonard, Field Supervisor, Pacific Islands Fish and Wildlife Office, at the above address (telephone: 808-792-9400; facsimile: 808-792-9581).

**SUPPLEMENTARY INFORMATION:**

**Public Comments Solicited**

We will accept written comments and information during this reopened comment period. We solicit comments on the original proposed critical habitat designation, published in the **Federal Register** on September 14, 2005 (70 FR 54335), and on our draft economic analysis of the proposed designation. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons any habitat should or should not be determined to be critical habitat as provided by section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation will outweigh any threats to the species due to designation;

(2) Specific information on the amount and distribution of Rota bridled white-eye habitat, and what features 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 potential impacts resulting from the proposed designation and, in particular, any impacts on small entities;

(5) 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;

(6) The extent to which the description in the draft economic analysis of economic impacts to public land management, agricultural homestead development, and private development and tourism activities is complete and accurate; and

(7) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in section 1.2.3.3

of the draft economic analysis, 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 the Island-wide Habitat Conservation Plan (HCP) or the Rota Bridled White-eye HCP should be considered for inclusion or exclusion from the final critical habitat designation.

If you wish to submit comments electronically, please submit them in an ASCII format and avoid the use of special characters and any form of encryption. Please include "Attn: RIN 1018-AU32" in the subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your message, contact us directly by calling our Pacific Islands Fish and Wildlife Office at 808-792-9400. Please note that the e-mail address [RBWE\\_CritHab@fws.gov](mailto:RBWE_CritHab@fws.gov) will be closed at the termination of the public comment period. If our e-mail connection is not functioning, please submit comments by one of the alternate methods listed in the **ADDRESSES** section.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home addresses, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name or address or both, you must state this prominently at the beginning of your comment, but you should be aware that the Service may be required to disclose your name and address pursuant to the Freedom of Information Act. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Comments and materials received, as well as supporting documentation used in preparation of the proposal to designate critical habitat, will be available for inspection, by appointment, during normal business hours at the Pacific Islands Fish and Wildlife Office (see **ADDRESSES** section). Copies of the proposed critical habitat rule for the Rota bridled white-eye and the draft economic analysis are available

on the Internet at <http://www.fws.gov/pacificislands> or by request to the Field Supervisor (see **FOR FURTHER INFORMATION CONTACT** section).

### Background

We published the final rule to list the Rota bridled white-eye as endangered in the **Federal Register** on January 22, 2004 (69 FR 3022). At the time of listing, we concluded that designating critical habitat for the Rota bridled white-eye was prudent and that we would publish a proposed rule in accordance with other priority listing actions when funding became available. On May 20, 2004, a lawsuit was filed against the Department of the Interior (DOI) and the Service by the Center for Biological Diversity challenging our failure to propose critical habitat for the Rota bridled white-eye. On September 14, 2004, a stipulated settlement agreement was filed in the U.S. District Court for Hawaii (*Center for Biological Diversity v. Norton*, Case No. C-04-00326 SPK LEK) stating that the Service will submit for publication in the **Federal Register** a proposed critical habitat designation for the Rota bridled white-eye no later than September 7, 2005, and a final critical habitat designation no later than September 7, 2006. On September 14, 2005, we published a proposed rule to designate approximately 3,958 acres (1,602 hectares) in one unit as critical habitat for the Rota bridled white-eye on the island of Rota, Commonwealth of the Northern Mariana Islands (CNMI) (70 FR 54335). The public comment period was open for 60 days until November 14, 2005.

Critical habitat receives protection from destruction or adverse modification through required consultation under section 7 of the Act with regard to actions carried out, funded, or authorized by a Federal agency. Section 4(b)(2) of the Act requires that the Secretary shall designate or revise critical habitat based upon the best scientific and commercial data available, and after taking into consideration the economic impact of specifying any particular area as critical habitat. We have prepared a draft economic analysis of the proposed critical habitat designation. The draft economic analysis is now available on the Internet and from our office (see Public Comments Solicited section).

The current draft economic analysis estimates the foreseeable economic impacts of the proposed critical habitat designation on government agencies and private businesses and individuals. The economic analysis identifies potential costs as a result of the proposed critical habitat designation, including those

costs coextensive with listing. The analysis measures (in the case of the Rota bridled white-eye) lost economic efficiency associated with public land management (including subsistence farming, public access improvements to historic sites, Endangered Species Act studies, proposed island-wide HCP), agricultural homestead development, and private development and tourism activities. When evaluating agricultural homestead development activities, three different alternatives were identified: (1) An island-wide HCP is developed, with development of agricultural homesteads; (2) an HCP is developed only for the area of agricultural homesteads in Rota bridled white-eye habitat; and (3) no HCP is developed, and development of agricultural homesteads in Rota bridled white-eye habitat is avoided.

Costs related to conservation activities for the proposed Rota bridled white-eye critical habitat pursuant to sections 4, 7, and 10 of the Act are estimated to be approximately \$806,000 to \$4,465,000 from 2006 to 2026. The CNMI government is anticipated to experience the high end estimate if, under the agricultural homestead development activities, the land is not developed because it is designated as critical habitat. Annualized impacts of costs attributable to the proposed critical habitat designation are projected to be approximately \$76,000 to \$421,000.

### Required Determinations—Amended

#### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. However, it is not anticipated to have an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) did not formally review the proposed rule.

Further, Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A-4, September 17, 2003). Pursuant to Circular A-4, once it has been determined that the Federal regulatory action is appropriate, and then the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement pursuant to the Act, we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. As such, we believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

#### *Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), 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 effect of the rule on small entities (that is, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analysis of the proposed designation so that we would have the factual basis for our determination.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as 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 Rota bridled white-eye would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (for example, agricultural homestead development). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded, permitted, or authorized by Federal agencies; non-Federal activities are not affected by the designation. If this proposed critical habitat designation is made final, Federal agencies must consult with us if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our draft economic analysis of the proposed critical habitat designation, we evaluated the potential economic effects on small entities resulting from the protection of the Rota bridled white-eye and its habitat related to the listing of the species and the proposed designation of its critical habitat. Two entities, the Rota municipal government and the CNMI government, were identified as entities that could be affected by the proposed rule. The Rota municipal government was identified as a small entity with 3,283 constituents. However, we estimated that the impacts of protecting the Rota bridled white-eye and its habitat are anticipated to be borne only by the CNMI government, which generally undertakes land management in the CNMI and includes both the Department of Land and Natural Resources and Mariana Public Land Authority. The CNMI government has 69,221 constituents and is not considered a small entity. Therefore, we do not believe that the designation of critical habitat for the Rota bridled white-eye will result in a disproportionate effect to small business entities. Please refer to our draft

economic analysis of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

#### *Executive Order 13211*

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The rule is considered a significant regulatory action under E.O. 12866 because it raises novel legal and policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant action, and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes the following findings:

(a) The rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5) through (7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support

Enforcement.) "Federal private sector mandate" includes a regulation that "would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program."

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) We do not believe that the proposed designation will significantly or uniquely affect small governments because it will not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The proposed designation of critical habitat imposes no obligations on State or local governments. As such, a Small Government Agency Plan is not required.

#### **Takings**

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing critical habitat for Rota bridled white-eye. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. In conclusion, the designation of critical habitat for Rota bridled white-eye does not pose significant takings implications.

**Author(s)**

The primary author of this notice is Fred Amidon of the U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office (see **ADDRESSES** section).

**Authority**

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

Dated: April 26, 2006.

**Matt Hogan,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

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