

for a species' listing determination under section 4(a) of the Act (16 U.S.C. 1531 *et seq.*), which are:

- (a) The present or threatened destruction, modification, or curtailment of the species' habitat or range;
  - (b) Overutilization for commercial, recreational, scientific, or educational purposes;
  - (c) Disease or predation;
  - (d) Inadequacy of existing regulatory mechanisms; and
  - (e) Other natural or manmade factors affecting its continued existence.
- (3) Information on management programs for the conservation of the Bonneville cutthroat trout.

Please note that comments merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, because section 4(b)(1)(A) of the Act directs that determinations as to whether any species is a threatened or endangered species must be made "solely on the basis of the best scientific and commercial data available." At the conclusion of the status review, we will issue a new 12-month finding on the petition, as provided in section 4(b)(3)(B) of the Act.

You may submit your comments and materials concerning this finding by one of the methods listed in the **ADDRESSES** section. We will not accept comments you send by e-mail or fax.

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that we will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. While you can ask us in your comment to withhold your personal identifying information from public review, 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 this finding, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service's Utah Field Office, 2369 West Orton Circle, Suite 50, West Valley City, Utah 84119, telephone (801) 975-3330.

#### Background

Section 1533(b)(3)(A) and (B) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the Lists of Threatened and Endangered Wildlife and Plants, to the maximum

extent practicable, within 90 days after receiving the petition, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. In addition, that within 12 months after receiving a petition that is found to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make a finding on whether the petitioned action is: (a) not warranted, (b) warranted, or (c) warranted but precluded by other pending proposals. Such 12-month findings are to be published promptly in the **Federal Register**. This notice is to initiate a 12-month finding.

On October 9, 2001, we announced our 12-month finding (66 FR 51362) in which we found that, after reviewing the best available scientific and commercial information, listing the Bonneville cutthroat trout was not warranted. We were sued by the Center for Biological Diversity on February 17, 2005 on the merits of the 12-month finding. On March 7, 2007, the District Court of Colorado dismissed the lawsuit after determining that Plaintiffs failed to demonstrate the not warranted finding was arbitrary, capricious, or contrary to law. Plaintiffs appealed to the 10th Circuit Court of Appeals. However, due to subsequent development of a formal opinion (Department of the Interior, March 16, 2007) regarding the legal interpretation of the term "significant portion of the range" of a species, we withdrew our finding (Stansell Memorandum, August 24, 2007). The lawsuit was subsequently dismissed and the case was closed on May 14, 2007. The new status review will include an analysis of whether any significant portion of the range of the Bonneville cutthroat trout warrants listing as threatened or endangered under the Act.

At this time, we are soliciting new information on the status and potential threats to the Bonneville cutthroat trout. Information submitted in response to our 2001 12-month finding will be considered and need not be resubmitted. We will base our 12-month finding on a review of the best scientific and commercial information available, including all information received as a result of this notice. For more information on the biology, habitat, and range of the Bonneville cutthroat trout, please refer to our previous 12-month finding published in the **Federal Register** on October 9, 2001 (66 FR 51362).

We request any new information concerning the status of the Bonneville cutthroat trout. If you submit

information, support it with documentation such as maps, bibliographic references, methods used to gather and analyze the data, or copies of any pertinent publications, reports, or letters by knowledgeable sources. We specifically request information regarding data from any systematic surveys, as well as any studies or analysis of data regarding population size or trends; biology or ecology of the species; effects of current land management on population distribution and abundance; current condition of habitat; and conservation measures that have been implemented to benefit the species. Additionally, we specifically request information on the current distribution of populations, and threats to the subspecies in relation to the five listing factors (as defined in section 4(a)(1) of the Act).

#### Author

The primary authors of this document are staff of U.S. Fish and Wildlife Service, Utah Field Office—Ecological Services.

#### Authority

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

Dated: February 1, 2008.

#### H. Dale Hall,

Director, Fish and Wildlife Service.

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[FWS-R2-ES-2008-0018; 92210-1117-0000-B4]

RIN 1018-AV25

#### Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Devils River Minnow (*Dionda diaboli*)

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

**ACTION:** Proposed rule; reopening of comment period, notice of availability of draft economic analysis, amended required determinations, and notice of public hearing.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed designation of critical habitat for the Devils River minnow (*Dionda diaboli*) under the Endangered Species

Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA) of the proposed critical habitat designation and an amended required determinations section of the proposal. We are also providing notice of a public hearing on the proposal. The DEA estimates baseline costs associated with conservation activities for the Devils River minnow to be approximately \$507,000 in undiscounted dollars over a 20-year period in areas we proposed as critical habitat. Incremental impacts are estimated to be \$57,100 (undiscounted dollars) over a 20-year period. 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 on this rulemaking do not need to be resubmitted, as they will be incorporated into the public record and fully considered when preparing our final determination.

**DATES:** We will accept comments received or postmarked on or before March 10, 2008. We will hold one public hearing on the proposed critical habitat designation and the DEA on February 27, 2008. See Public Hearing section under **SUPPLEMENTARY INFORMATION** for details.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: RIN 1018-AV25; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. 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 Solicited section below for more information).

*Public Hearing:* We will hold a public hearing and information session at the following location: Del Rio, TX: Kennedy Room, Del Rio Civic Center, 1915 Veterans Boulevard.

**FOR FURTHER INFORMATION CONTACT:** Adam Zerrenner, Field Supervisor, U.S. Fish and Wildlife Service, Austin Ecological Services Field Office, 10711 Burnet Road, Austin, TX 78758; telephone 512/490-0057, extension 248; facsimile 512/490-0974. If you use a telecommunications device for the deaf

(TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### **SUPPLEMENTARY INFORMATION:**

##### **Public Hearing**

We will hold a public hearing on the proposed critical habitat designation and the DEA on February 27, 2008 in Del Rio, Texas. An information session will be held from 6 p.m. to 7 p.m. and will precede the hearing. The public hearing will run from 7 p.m. to 8 p.m. See the Public Hearing section under **ADDRESSES** for the specific location of the public hearing.

Persons needing reasonable accommodations to attend and participate in the public hearing should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible. To allow sufficient time to process requests, please call no later than one week before the hearing date. Information regarding the proposal is available in alternative formats upon request.

##### **Public Comments**

We will accept written comments and information during this reopened comment period, as well as oral or written comments at the scheduled public hearing on our proposed critical habitat designation for the Devils River minnow (*Dionda diaboli*) published in the **Federal Register** on July 31, 2007 (72 FR 41679), the 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 habitat should or should not be designated as critical habitat under section 4 of the Act, specifically the benefits of excluding or the benefits of including any particular area as critical habitat.

(2) Specific information on:

- The amount and distribution of Devils River minnow habitat,
- What areas occupied at the time of listing that contain features essential for the conservation of the species we should include in the designation and why, and
- What areas not occupied at the time of listing are essential to the conservation of the species and why.

(3) Information on the status of the Devils River minnow in Sycamore Creek and Las Moras Creek watersheds and information that indicates whether or not these areas should be considered essential to the conservation of the species and why.

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

(5) Information on whether the DEA identifies all State and local costs and benefits attributable to the proposed critical habitat designation, and information on any costs or benefits that we have overlooked.

(6) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes likely if we designate critical habitat.

(7) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities and information about the benefits of including or excluding any areas that exhibit those impacts.

(8) 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.

If you submitted comments or information during the initial comment period from July 31, 2007, to October 1, 2007, on the proposed rule (72 FR 41679), they need not be resubmitted. They will be fully considered in the preparation of our final determination. Our final determination concerning critical habitat for the Devils River minnow will take into consideration all written comments we receive, oral or written comments we receive at the public hearing, 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 or are appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning our proposed rule, the associated DEA of the proposed designation, and the amended required determinations section by one of the methods listed in the **ADDRESSES** section. We will not accept anonymous comments; your comment must include your first and last name, city, State, country, and postal (zip) code. Finally, we will not consider hand-delivered comments or mailed comments that are not received or postmarked, respectively, by the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>

[www.regulations.gov](http://www.regulations.gov). If you provide personal identifying information in addition to the required items specified in the previous paragraph, such as your street address, phone number, or e-mail address, 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 this notice, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

You may obtain copies of the original proposed rule and the DEA by mail from the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**) or by visiting our Web site at <http://www.fws.gov/southwest/es/austintexas/>.

## Background

It is our intent to discuss only those topics directly relevant to designation of critical habitat in this notice. For more information on Devils River minnow, refer to the final listing rule published in the **Federal Register** on October 20, 1999 (64 FR 56596), the original proposed critical habitat designation published on July 31, 2007 (72 FR 41679), or the 2005 Devils River Minnow Recovery Plan. All of these documents and others are available online at [http://ecos.fws.gov/tess\\_public/](http://ecos.fws.gov/tess_public/).

The Devils River minnow was listed as threatened on October 20, 1999 (64 FR 56596). Critical habitat was not designated for this species at the time of listing (64 FR 56606). On October 5, 2005, the Forest Guardians, Center for Biological Diversity, and Save Our Springs Alliance filed suit against the Service for failure to designate critical habitat for this species (*Forest Guardians v. Hall*, 2005). On June 28, 2006, a settlement was reached that requires the Service to re-evaluate our original determination. The settlement stipulated that, if prudent, a proposed rule would be submitted to the **Federal Register** for publication on or before July 31, 2007, and a final rule by July 31, 2008.

On July 31, 2007, we published a proposed rule (72 FR 41679) to designate critical habitat for Devils River minnow. We proposed three units as critical habitat, including approximately 73.5 total stream kilometers (km) (45.7 stream miles (mi)).

The proposed critical habitat is located along three Texas streams, two in Val Verde County (Devils River and San Felipe Creek) and one in Kinney County (Pinto Creek). Further, in the proposed rule, we identified two additional areas, Sycamore Creek and Las Moras Creek, which we are considering including in the final critical habitat designation. We requested public comment and information on whether these areas are essential to the conservation of the species.

Section 3 of the Act defines critical habitat as the specific areas within the geographic 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 geographic 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 areas designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

## Application of Section 4(b)(2) of the Act

Under section 4(b)(2), we may exclude an area from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including that particular area as critical habitat, unless failure to designate that specific area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

In the July 31, 2007, critical habitat proposed rule (72 FR 41679), we address a number of general issues that are relevant to exclusions under section 4(b)(2) of the Act. In addition, we have prepared a DEA analyzing the potential impacts of the proposed critical habitat designation, which is available for public review and comment. Based on public comment on this document and the proposed designation, additional areas may be excluded from final critical habitat by the Secretary under the provisions of section 4(b)(2) of the Act. This is provided for in the Act and in our implementing regulations at 50 CFR 424.19.

## Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate critical habitat based upon the best scientific and commercial 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. In compliance with section 4(b)(2) of the Act, we have prepared a DEA of the proposed critical habitat designation based on our July 31, 2007, proposed rule (72 FR 41679) to designate critical habitat for the Devils River minnow. In the July 31, 2007, critical habitat proposal, we discussed the uncertainty regarding the inclusion of two areas currently unoccupied by the species. Sycamore Creek and Las Moras Creek were historically occupied by Devils River minnow, but the species has not been collected in either location since 1989 and 1955, respectively. We requested public input during the initial comment period for information to assist our determination to include or not include these areas in the critical habitat designation. We received multiple comments from peer reviewers and the public encouraging inclusion of these areas to further the conservation of the species. In response to these comments, the DEA further evaluates the potential economic costs of designating these two additional areas.

The intent of the DEA is to quantify the economic impacts of all potential conservation efforts for the Devils River minnow; some of these costs are coextensive with listing and recovery and will likely be incurred regardless of whether we designate critical habitat. The DEA also identifies the incremental costs associated specifically with the designation of critical habitat for the species. Incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the Devils River minnow. The DEA describes and quantifies the potential economic impacts associated with the proposed critical habitat designation for the Devils River minnow in relation to the threats identified by the Service. That is, analyzed impacts are due to conservation measures for the Devils River minnow that address one or more of the threats to the species identified by the Service. Based on the proposed rule, the DEA analyzed potential costs of measures taken to address threats related to poor water quality caused by pollution, groundwater and surface water extraction, nonnative species, and stream channel alteration.

The DEA estimates total pre-designation baseline impacts (8-year total from 1999 to 2007) for all 3 proposed units to be \$342,000 (undiscounted dollars), which is equivalent to a present value of \$380,000, assuming a 3 percent discount rate, and \$392,000, assuming a 7 percent discount rate. Post-designation baseline impacts (2008 to 2027) for all 3 proposed units are estimated to be \$507,000 (undiscounted dollars) over the next 20 years, which is equivalent to a present value of \$391,000, assuming a 3 percent discount rate, and \$290,000, assuming a 7 percent discount rate. The post-designation incremental impacts (2008 to 2027) for all 3 proposed units are estimated to be \$57,100 (undiscounted dollars), which is equivalent to a present value of \$42,600, assuming a 3 percent discount rate, and \$30,300, assuming a 7 percent discount rate.

Concerning the two additional areas we considered for inclusion in the designation of critical habitat (Sycamore Creek and Las Moras Creek), the DEA found no costs associated with Devils River minnow conservation or potential inclusion as critical habitat in either area. There were no conservation actions or projects involving consultation under section 7 of the Act related to the species in these areas, either baseline or future projects, with quantifiable costs. Therefore, the estimated economic costs reported above and elsewhere in this document refer to the total costs of the three units (Devils River, San Felipe Creek, and Pinto Creek) we actually proposed for designation.

The DEA considers the potential economic effects of all actions relating to the conservation of the Devils River minnow, including costs associated with sections 4, 7, and 10 of the Act, as well as costs attributable to the designation of critical habitat. The DEA further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for the species in areas containing features essential to the conservation of the species. The DEA considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the "opportunity costs" associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use).

The DEA also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat

conservation and the potential effects of conservation activities on small entities and the energy industry. The DEA measures lost economic efficiency associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector.

Finally, the DEA looks retrospectively at costs that have been incurred since we listed the Devils River minnow as threatened on October 20, 1999 (64 FR 56596), and considers those costs that may occur in the 20 years following the designation of critical habitat. Because the DEA considers the potential economic effects of all actions relating to the conservation of the Devils River minnow, including costs associated with sections 4, 7, and 10 of the Act and those attributable to the designation of critical habitat, the DEA may have overestimated the potential economic impacts of the critical habitat designation.

As stated earlier, we are soliciting data and comments from the public on this DEA, as well as on all aspects of the proposal. We may revise the proposal, or its supporting documents, to incorporate or address new information received during the 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 as critical habitat, provided such exclusion will not result in the extinction of the species.

#### Required Determinations—Amended

In our July 31, 2007, proposed rule (72 FR 41679), 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 was available in the DEA. We have now made use of the DEA data to make these determinations. In this document we affirm the information contained in the proposed rule concerning Executive Order (E.O.) 13132, E.O. 12988, the Paperwork Reduction Act, the National Environmental Policy Act, 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 information within the

DEA, we revise our required determinations concerning E.O. 12866, the Regulatory Flexibility Act, E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, and E.O. 12630 (Takings).

#### Regulatory Planning and Review

In accordance with E.O. 12866, we evaluate four parameters in determining whether a rule is significant. If any one of the following four parameters are met, the Office of Management and Budget (OMB) will designate that rule as significant under E.O. 12866:

(a) The rule would have an annual economic effect of \$100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(b) The rule would create inconsistencies with other Federal agencies' actions;

(c) The rule would materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients; or

(d) The rule would raise novel legal or policy issues.

If OMB requests to informally review a rule designating critical habitat for a species, we consider that rule to raise novel legal and policy issues. Because no other Federal agencies designate critical habitat, the designation of critical habitat will not create inconsistencies with other agencies' actions. We use the economic analysis of the critical habitat designation to evaluate the potential effects related to the other parameters of E.O. 12866 and to make a determination as to whether the regulation may be significant under parameter (a) or (c) listed above.

Based on the economic analysis of the critical habitat designation, we have determined that the designation of critical habitat for Devils River minnow will not result in an annual effect on the economy of \$100 million or more or affect the economy in a material way. Based on previous critical habitat designations and the economic analysis, we believe this rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. OMB has requested to informally review this rule, and thus this action may raise novel legal or policy issues. In accordance with the provisions of E.O. 12866, this rule is considered significant.

Executive Order 12866 directs Federal agencies issuing 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, the agency will need to consider alternative regulatory approaches. Because the determination of critical habitat is a statutory requirement under the Act, we must evaluate alternative regulatory approaches, where feasible, when issuing 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 designating the area as critical habitat and that such exclusion would not result in the extinction of the species. 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 (RFA) (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) (5 U.S.C. 802(2)), 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 (*i.e.*, small businesses, small organizations, and small governmental 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. SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that 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 DEA 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 Devils River minnow critical habitat designation would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (e.g., residential and commercial development, agriculture, oil and gas production). We apply the "substantial number" test individually to each industry to determine if certification is appropriate. However, the SBREFA does not explicitly define "substantial number" or "significant economic impact." Consequently, to assess whether a "substantial number" of small entities is affected by this designation, this analysis considers the relative number of small entities likely to be impacted in an area. In some circumstances, especially with critical habitat designations of limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement.

Designation of critical habitat only affects activities conducted, funded, or permitted by Federal agencies. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. In areas where the 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 Devils River minnow. Federal agencies also must consult with us if their activities may affect critical habitat. Designation of critical habitat, therefore, could result in an additional economic impact on small entities due to the requirement to reinstate

consultation for ongoing Federal activities.

Appendix B of the DEA examined the potential for Devils River minnow conservation efforts to affect small entities. The analysis was based on the estimated impacts associated with the proposed critical habitat designation. Based on the analysis, the potential for economic impacts of the designation on small entities are expected to be borne primarily by the City of Del Rio and other miscellaneous small entities. The identities of these small entities are not known at this time but are expected to include local developers and private landowners that may represent third parties in section 7 consultations on the Devils River minnow in the future. The City of Del Rio and other miscellaneous small entities are expected to incur, at most, combined annualized administrative costs related to consultations for adverse modification of approximately \$3,000, assuming a 3 percent discount rate. This estimated \$3,000 in combined annual administrative costs is not expected to have a significant impact on small entities, including the City of Del Rio. In addition, because the annualized post-designation incremental impacts expected for the City of Del Rio and other miscellaneous small entities are relatively small, no future indirect impacts associated with post-designation incremental impacts are expected for the small businesses and entities included in this analysis.

In summary, we have considered whether this rule would result in a significant economic effect on a substantial number of small entities. Based on the above reasoning and currently available information, we certify that the designation of critical habitat for the Devils River minnow will not result in a significant economic impact on a substantial number of small business entities; therefore, a regulatory flexibility analysis is not required.

*Executive Order 13211—Energy Supply, Distribution, or Use*

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, or use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed designation of critical habitat for the Devils River minnow is not considered a significant regulatory action under E.O. 12866. OMB has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute "a significant adverse effect" when compared without the regulatory

action under consideration. The DEA's Appendix B finds that none of these criteria are relevant to this analysis. Thus, energy-related impacts associated with Devils River minnow conservation activities within proposed critical habitat are not expected. As such, the proposed designation of critical habitat is not expected to significantly affect energy supplies, distribution, or use and a Statement of Energy Effects is not 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) This 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)–(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 this rule 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. By definition, Federal agencies are not considered small entities, although the

activities they fund or permit may be proposed or carried out by small entities. As such, a Small Government Agency Plan is not required.

*Executive Order 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 proposing critical habitat for Devils River minnow. 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. We conclude that this designation of critical habitat for Devils River minnow does not pose significant takings implications.

**References Cited**

A complete list of all references cited in this rulemaking is available on the Internet at <http://www.regulations.gov> or by contacting the Field Supervisor, Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

**Author(s)**

The primary authors of this rulemaking are staff of the Austin Ecological Services Field Office, Austin, Texas.

**Authority**

16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

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**Lyle Laverty,**

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