

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AV51

[FWS-R4-ES-2008-0058; 92210-1117-0000-FY08-B4]

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Alabama Sturgeon (*Scaphirhynchus suttkusi*)**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Revised proposed rule; reopening of comment period, notice of availability of draft economic analysis, announcement of public hearing, and amended required determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period and the scheduling of a public hearing on the proposed revised designation of critical habitat for the Alabama sturgeon (*Scaphirhynchus suttkusi*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability for public comment of a draft economic analysis (DEA) and an amended required determinations section of the proposal. We also seek comment on our proposal to change the first primary constituent element (PCE) from its original description because we have determined that the original wording failed to indicate that the flow needs of the species are relative to the season of the year. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the revised proposed rule, the associated DEA, and the amended required determinations section. If you submitted comments previously, you do not need to resubmit them because we have already incorporated them into the public record and will fully consider them in preparation of the final rule.

DATES: *Written Comments:* We will consider comments received on or before January 29, 2009.

Public Hearings: We announce a public hearing to be held on January 28, 2009, at the Nettles Auditorium at Alabama Southern Community College, 2800 South Alabama Avenue, Monroeville, AL 36460. The hearing is open to all who wish to provide formal, oral comments regarding the proposed revised critical habitat and will be held from 7 p.m. to 9 p.m., central time, with an open house from 5:30 p.m. to 6:30 p.m., central time.

ADDRESSES: 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: FWS-R4-ES-2008-0058; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.
- *Public Hearing:* A public hearing will be held (see **DATES**) at the Nettles Auditorium at Alabama Southern Community College, 2800 South Alabama Avenue, Monroeville, AL 36460.

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" section below for more information).

FOR FURTHER INFORMATION CONTACT: Jeff Powell, Aquatic Species Biologist, U.S. Fish and Wildlife Service, Alabama Field Office, 1208 Main Street, Daphne, AL 36526; telephone: 251-441-5858; facsimile: 251-441-6222. If you use a telecommunications device for the deaf (TDD), 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 the Alabama sturgeon that was published in the **Federal Register** on May 27, 2008 (73 FR 30361), our draft economic analysis 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 we should or should not designate habitat as critical habitat under section 4 of the Act (16 U.S.C. 1531 *et seq.*).

(2) Specific information on:

- (a) The distribution of the Alabama sturgeon;
- (b) The amount and distribution of Alabama sturgeon habitat; and
- (c) Which habitat contains the features essential for 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 impacts that

may result from the proposed designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(5) Whether we can improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments;

(6) Whether the benefits of excluding any particular area from critical habitat outweigh the benefits of including that area as critical habitat under section 4(b)(2) of the Act, after considering the potential impacts and benefits of the proposed critical habitat designation.

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

(8) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(9) Information on flow requirements (magnitude, seasonality, duration, and frequency) of the sturgeon.

You may submit your comments and materials concerning the proposed rule or DEA by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed 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 Web site. 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. We will post hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule and draft economic analysis, 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, Alabama 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 Number FWS-R4-ES-2008-0058, or by mail from the Alabama Field Office (see **FOR FURTHER INFORMATION CONTACT** section).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat. For more information on previous Federal actions concerning the Alabama sturgeon, refer to the proposed designation of critical habitat published in the **Federal Register** on May 27, 2008 (73 FR 30361). That proposal had a 60-day comment period, ending July 28, 2008.

For more information on the threatened Alabama sturgeon or its habitat, refer to the proposed and final listing rules published in the **Federal Register** on March 26, 1999 (64 FR 14676), and on May 5, 2000 (65 FR 26438), or from the Alabama Field Office (see **FOR FURTHER INFORMATION CONTACT**).

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 critical habitat rule is made final, section 7 of the Act will prohibit destruction or adverse modification of Alabama sturgeon 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.

Public Hearing

Section 4(b)(5)(E) of the Act requires us to hold a public hearing if any person requests it within 45 days of the publication of a proposed rule. In response to requests from the public, the Service will conduct a public hearing for this proposed revision to critical habitat on the dates and times and at the addresses identified in the **DATES** and **ADDRESSES** sections above.

People wishing to make an oral statement for the record are encouraged to provide a written copy of their statement and present it to us at the hearing. In the event there is a large attendance, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us. If you have any questions concerning the public

hearing, please contact the Alabama Field Office (see **FOR FURTHER INFORMATION CONTACT**).

People needing reasonable accommodations in order to attend and participate in the public hearings should contact Jeff Powell, Alabama Ecological Services Office, at (251) 441-5858, as soon as possible. In order to allow sufficient time to process requests, please call no later than one week before the hearing date. Information regarding this notice is available in alternative formats upon request.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise 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. We have prepared a DEA of our May 27, 2008 (73 FR 30361), proposed rule to designate critical habitat for the Alabama sturgeon.

The intent of the DEA is to identify and analyze the potential economic impacts associated with the proposed critical habitat designation for the Alabama sturgeon. The DEA quantifies the economic impacts of all potential conservation efforts for the Alabama sturgeon; some of these costs will likely be incurred with or without critical habitat designated. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios both “with critical habitat” and “without critical habitat.” The “without critical habitat” scenario represents the baseline for the analysis, considering protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs 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 are those not expected to occur absent 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 may consider in the final designation of critical habitat. The analysis looks retrospectively at baseline impacts incurred since the species was listed, and forecasts both baseline and incremental impacts likely

to occur if we finalize the proposed critical habitat.

The DEA provides estimated costs of the foreseeable potential economic impacts of the proposed critical habitat designation for the sturgeon over the next 20 years. We determined 20 years is the appropriate period for analysis because limited planning information was available for most activities to forecast activity levels for projects beyond a 20-year timeframe. The DEA quantifies economic impacts of Alabama sturgeon conservation efforts associated with the following categories of activity: (1) Potential economic impacts on activities that depend on water management; (2) potential economic impacts on activities that affect water quality; (3) potential economic impacts on dredging activities; and (4) potential impacts on other activities.

The pre-designation (2000 to 2008) impacts associated with species conservation activities for the Alabama sturgeon in areas proposed as critical habitat are approximately \$332,000, applying a 3 percent discount rate, and \$367,000, applying a 7 percent discount rate. The potential post-designation (2009 to 2028) baseline impacts (those estimated to occur regardless of the critical habitat designation) associated with species conservation were estimated at \$1.33 million applying a 3 percent discount rate, or \$962,000 applying a 7 percent discount rate. Dredging accounted for 80.1 percent of the potential post-designation baseline impacts (discounted at 7 percent), followed by water management (8.3 percent), water quality (7.3 percent), and other activities (4.4 percent).

We expect incremental impacts attributed to the proposed critical habitat designation will be associated with water quality, water management, dredging, and other activities. The DEA estimates the post-designation incremental economic impacts for the next 20 years from \$93,800 applying a 3 percent discount rate, or \$71,200 applying a 7 percent discount rate. Water quality accounted for 32.9 percent (discounted at 7 percent) of potential incremental impacts, followed by water management (37.3 percent), other activities (19.7 percent), and dredging (10.2 percent).

Only the incremental costs that may result from the designation of critical habitat, over and above the costs associated with species protection under the Act more generally, may be considered in evaluating specific areas for potential economic exclusions from critical habitat; therefore, the methods for distinguishing these two categories of costs is important. In the absence of

critical habitat, Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered species or threatened species—costs associated with such actions are considered baseline costs. Once an area is designated as critical habitat, proposed actions that have a Federal nexus in this area also will require consultation and potential modification to ensure that the action does not result in the destruction or adverse modification of designated critical habitat—costs associated with these actions are considered incremental costs. Incremental consultation that takes place as a result of critical habitat designation may fall into one of three categories: (1) Additional effort to address adverse modification in a new consultation; (2) re-initiation of consultation to address effects to critical habitat; and (3) incremental consultation resulting entirely from critical habitat designation (*i.e.*, where a proposed action may affect unoccupied critical habitat). However, because no unoccupied habitat is being proposed for designation, no consultations in category 3 are projected.

As 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 exclusions will not result in the extinction of this species.

Revision to Proposed Critical Habitat Designation (73 FR 30361)

We are also proposing to change the first primary constituent element (PCE) from its original description because we have determined that the original wording failed to indicate that the water flow needs of the species are relative to the season of the year. For example, sturgeon likely need a higher flow in the spring to successfully spawn than the 4,640 cubic feet per second (cfs) flow indicated in the original PCE. Also, we have determined that it is more descriptive and helpful to potential action agencies to describe the habitat needs of the species in relation to flow seasonality and how seasonal flows allow for maintenance of all life stages. Lastly, we have determined that while we believe flows lower than 4,640 cfs

may involve adverse effects to the species (and therefore we will continue to recommend consultation), depending upon other factors, lower flows may not result in measurable adverse effects. Therefore, focusing on 4,640 cfs in the PCE fails to account for the complexity of variables that need to be analyzed to determine effects to the sturgeon.

Therefore, we have decided to revise the proposed PCE as stated below:

A flow regime (i.e., the magnitude, frequency, duration, seasonality of discharge over time) necessary to maintain all life stages of the species in the riverine environment, including migration, breeding site selection, resting, larval development, and protection of cool water refuges (i.e., tributaries).

Required Determinations—Amended

In our May 27, 2008, proposed rule (73 FR 30361), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have now made use of the DEA data in making these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, 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 DEA data, we revise our required determination concerning the Regulatory Flexibility Act.

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 (*i.e.*, 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. Based on our DEA of the proposed designation, we provide our analysis below for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations, 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 Alabama sturgeon would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, such as activities that depend on water management, activities that affect water quality, dredging activities, and other activities such as construction of bridges and natural gas pipelines. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, permitted, or authorized by Federal agencies.

If we finalize this proposed critical habitat designation, Federal agencies

must consult with us under section 7 of the Act 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 the DEA, we evaluated the potential economic effects on small entities resulting from implementation of conservation actions related to the proposed designation of critical habitat for the Alabama sturgeon. Based on that analysis, only small business entities that rely on water management, water quality, dredging, or construction were identified as entities that could be affected by the incremental impacts from the proposed rule. Impacts described in Appendix A of the DEA are predominantly associated with pulp mills, wood pellet manufacturing, residential, commercial, or industrial development activities, construction activities, and dredging activities in areas proposed for final critical habitat for the Alabama sturgeon. These impacts would be expected to be borne by small businesses that rely on water management, water quality, dredging, or construction. The average cost to this type of small business over the next twenty years is estimated to range from \$604 to \$5,570, discounted at 7 percent. Please refer to our Draft Economic Analysis of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. We have identified small entities that may be impacted by the proposed critical habitat designation. For the above reasons and based on currently available information, we certify that, if promulgated, the proposed designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Authors

The primary authors of this notice are the Alabama Field Office and Southeast Regional Office, U.S. Fish and Wildlife Service.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 73 FR 30361, May 27, 2008, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

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.

2. Critical habitat for Alabama sturgeon (*Scaphirhynchus suttkusi*) in § 17.95(e), which was proposed to be added on May 27, 2008, at 73 FR 30373, is proposed to be amended by revising paragraph (2)(i) as follows:

§ 17.95 Critical habitat—fish and wildlife.

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(e) Fishes

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Alabama sturgeon (*Scaphirhynchus suttkusi*)

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(2) * * *

(i) A flow regime (*i.e.*, the magnitude, frequency, duration, seasonality of discharge over time) necessary to maintain all life stages of the species in the riverine environment, including migration, breeding site selection, resting, larval development, and protection of cool water refuges (*i.e.*, tributaries).

* * * * *

Authority

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

Dated: December 18, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E8–30750 Filed 12–29–08; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 0808011016–81595–02]

RIN 0648–AX14

Fisheries of the Exclusive Economic Zone Off Alaska; Bering Sea and Aleutian Islands and Gulf of Alaska License Limitation Program

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to implement Amendment 92 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area and Amendment 82 to the Fishery Management Plan for Groundfish of the Gulf of Alaska. This proposed action would remove trawl gear endorsements on licenses issued under the license limitation program in specific management areas if those licenses have not been used on vessels that met minimum recent landing requirements using trawl gear. This proposed action would provide exemptions to this requirement for licenses that are used in trawl fisheries subject to certain limited access privilege programs. This proposed action would issue new area endorsements for trawl catcher vessel licenses in the Aleutian Islands if minimum recent landing requirements in the Aleutian Islands were met. This proposed action is intended to promote the goals and objectives of the Magnuson-Stevens Fishery Conservation and Management Act, the Fishery Management Plans, and other applicable law.

DATES: Comments must be received no later than February 13, 2009.

ADDRESSES: Send comments to Sue Salvesson, Assistant Regional Administrator, Sustainable Fisheries Division, Alaska Region, NMFS, Attn: Ellen Sebastian. You may submit comments, identified by “0648–AX14”, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at <http://www.regulations.gov>.
- Mail: P. O. Box 21668, Juneau, AK 99802.
- Fax: 907–586–7557.
- Hand delivery to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in required fields if you wish to remain anonymous). Attachments to electronic comments