

Critical habitat designations awaken Arkansans

3/29/2014

All of Arkansas' United States Congressional delegation members, Gov. Mike Beebe and Attorney General Dustin McDaniel have released statements regarding the United States Fish And Wildlife Service's (Service) proposed critical habitat designation for the Neosho mucket and Rabbitsfoot mussels. The Service proposed 42 percent of Arkansas' geographical area as critical habitat which includes the watersheds associated with that critical habitat for the two mussels.

The Service extended public comment period for critical habitat designation after Sen. Mark Pryor (D) submitted a letter in May 2013. The extension opened the door for the Association of Arkansas Counties (AAC) along with several supporting organizations both in the public and private sectors to submit independent comments and local environmental and economic impact studies.

The main goal of this public comment effort was to decrease the Service's overly broad geographical area being proposed as critical habitat. The decrease is based on sound science, adherence to the spirit of the Endangered Species Act of 1973 (ESA), and potential social and economic impacts to Arkansas. The effort suggested a 36-percent decrease in the proposed designation of critical habitat area.

These two species are among 46 Arkansas species that were listed as threatened or endangered under an agreement under the Endangered Species Act. The potential of more critical habitat designation in the state is evident.

Sen. Mark Pryor, D; Sen. John Boozman, R; Rep. Rick Crawford, R; Rep. Tim Griffin, R; Rep. Steve Womack, R; and Rep. Tom Cotton, R, all engaged against the Service's overly broad critical habitat designation in the Natural State.

A final decision on the critical habitat designation areas for the two mussels is expected early in the fall of this year.

In a four-page letter from the Arkansas delegation to Daniel M. Ashe, director of the U.S. Fish and Wildlife Service in Washington, D.C. the members expressed "concern with the scope of recently proposed critical habitat designations affecting the state of Arkansas. At more than 769 river miles, the proposed critical habitat designation for the Neosho mucket and Rabbitsfoot mussels has the potential to impact activities on 42 percent of Arkansas's surface area."

The letter went on to add that "90 percent of the rivers and streams included in the designation pass through private property, leading to a disproportionate impact on productive land."

The letter asked Ashe to respond to nine questions raised by the delegation. It also questioned the method in which the proposed critical habitat designation was developed, citing "a result of a closed-door settlement agreement ... that was closed to stakeholders and possible intervenors, such as state wildlife agencies."

The AAC and 13 other organizations collectively submitted comments to the Service that included independent environmental and economic studies.

Members of this effort for responsible critical habitat designation in Arkansas include:

AAC; Arkansas State Chamber of Commerce / Associated Industries of Arkansas; Arkansas Environmental Federation; Arkansas Forestry Association; Arkansas Farm Bureau; Arkansas Poultry Federation; Arkansas Independent Producers and Royalty Owners; Camp Ozark; Energy and Environmental Alliance of Arkansas; Arkansas

Cattlemen's Association; Arkansas Timber Producers Association; Agriculture Council of Arkansas; and Arkansas Association of Conservation Districts.

In response to concerns raised by families, businesses, and agricultural producers, Director Daniel M. Ashe of the U.S. Fish and Wildlife Service accepted Sen. Pryor's invite to Arkansas to see the impact that a critical habitat designation for the Neosho mucket and Rabbitsfoot mussels could have on the state.

"The Community Protection Act," a recent bill sponsored by Sen. Pryor and Sen. Mary Landrieu, (D - LA), aims to require a more fair and thorough economic impact analysis for proposed critical habitat designations under the ESA.

Congress of the United States
Washington, DC 20515

January 9, 2014

The Honorable Daniel M. Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Dear Director Ashe:

We write to express our concern with the scope of recently proposed critical habitat designations affecting the State of Arkansas. At more than 769 river miles, the proposed critical habitat designation for the Neosho Mucket and Rabbitsfoot Mussel (target species) has the potential to impact activities on 42% of Arkansas's surface area. Furthermore, 90% of the rivers and streams included in the designation pass through private property, leading to a disproportionate impact on productive land.

As Members of Congress, we appreciate the importance of protecting critical habitat for threatened and endangered species. At the same time, we are mindful that listings and critical habitat designations must be science-based and transparent. Also, economic justification documents provided by the U.S. Fish and Wildlife Service (FWS) should reflect the true impact on farmers, families, job creators, local governments, and communities. Given the scope of these critical habitat designations, the potential impact on Arkansas and other states, and the flawed process through which the proposal was produced, we request your prompt consideration of and response to numerous related concerns and questions.

First, we ask that you respond by addressing each of the following issues and/or questions that were raised in public comments to the FWS:

- The proposed critical habitat designations include areas that are outside the geographical areas occupied by the target species at the time of listing, without providing a science-based justification as to why inclusion of these areas are essential to the conservation of the target species. Please respond to this concern in detail and explain whether the failure to provide such a science-based justification is consistent with the requirements of the Endangered Species Act.
- The proposed critical habitat designations include areas with conditions (e.g. reduced water temperatures due to releases and spring-fed areas) that are not conducive to support population development for the target species.
- Does the FWS foresee impacts on NPDES permit holders that discharge either directly or indirectly to critical habitat areas? Please provide specific examples of potential impacts.
- Before designating critical habitat, does the FWS consider the adequacy of existing regulatory mechanisms for protection of critical habitat, such as Clean Water Act regulations, National River designations, or status as Extraordinary Resource Waters and Ecologically Sensitive Waterbodies under Arkansas Pollution Control and Ecology Commission Regulation No. 2 (providing a higher level of protection of water quality from point source

and non-point source pollution)? If so, what impact does this have on the extent of critical habitat designations? Please be specific and elaborate in detail on the impact that such existing regulatory mechanisms have on critical habitat designations for the target species in Arkansas.

- Does the economic impact analysis considered by the FWS include an evaluation of increased costs associated with increased consultations on agricultural related activities, especially conservation efforts?
- Does the FWS consider whether voluntary conservation efforts are likely to decrease as a result of increased compliance and consultation costs?
- On August 24, 2012, the Administration proposed a new rule that limits the type of economic analysis that is required for critical habitat designations. The current analysis is severely inadequate. Before finalizing critical habitat designations for the target species, will the FWS conduct a more realistic economic analysis that considers costs beyond inter-agency consultation, including but not limited to, the impact on public and private activities such as project delays to road and bridge improvements, impacts on agricultural, forestry, and grazing activities, recreational uses, access to and costs associated with water and wastewater treatment, and impacts to energy exploration and development? And will such an economic analysis be transparently available to the public for review and comment?
- The Arkansas Association of Counties has submitted an alternative economic impact analysis to the FWS. This alternative analysis estimates a much higher cost than the analysis provided by the FWS. Please provide a detailed explanation that describes and accounts for the disparity between these estimates.

Secondly, we have concerns beyond those presented in public comments. Listing of the target species and the subsequent work to designate critical habitat are, in part, a result of a closed-door settlement agreement in the recent multidistrict litigation (MDL)¹. These negotiations were closed to stakeholders and possible intervenors, such as state wildlife agencies. Subsequently, there have been issues with transparency requests that members of Congress (including Senator Boozman) have sent asking the FWS to work with the District Court and other litigants to make documents from the negotiations available to Congressional investigators. The MDL, like other lawsuits with federal agencies, is seen by many as an example of the inappropriate “sue and settle” strategy, in which the FWS entered into closed-door negotiations with litigants and thereby restructured federal Endangered Species Act priorities, without the involvement of Congress or affected third parties. According to the FWS Endangered Species Act Work Plan, final listings and/or critical habitat designations for additional species are likely to occur in Arkansas in fiscal years 2014, 2015, 2016, and 2017. Accordingly, we have several related questions:

- In response to a question from Senator Boozman during a Senate Appropriations Committee Hearing on June 6, 2013, Attorney General Eric Holder wrote that “while the Department would typically consult with the client agency, any decision regarding what position the government will take regarding intervention or participation in settlement negotiations ultimately rests with the Justice Department.” However, the Attorney General immediately continued that “the Department gives its client agencies’ views considerable weight as to all significant litigation decisions.” Therefore, since the Department of Justice (DOJ) gives the

¹ In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. MDL Docket No. 2165).

FWS's views considerable weight as to all significant litigation decisions, did the FWS express any views to the DOJ during the MDL regarding the inclusion of intervenors or other possible participants (such as state wildlife agencies from Arkansas or other states) in settlement negotiations? If so, please explain in detail, and provide copies of any related records of communication between the FWS and DOJ. If not, why not?

- Many of these “sue and settle” scenarios lead to significant litigation costs, with the taxpayers paying plaintiffs’ attorney fees. Millions of taxpayer dollars are paid to plaintiffs’ attorneys without transparent access to related information. In 2012, the Government Accountability Office (GAO) found that “Most ... Interior agencies did not have readily available information on attorney fee claims and payments made under [the Equal Access to Justice Act] and other fee-shifting statutes for fiscal years 2000 through 2010. As a result, there was no way to readily determine who made claims, the total amount each department paid or awarded in attorney fees, who received the payments, or the statutes under which the cases were brought for the claims over the 11-year period.”² With regard to the MDL, please provide a detailed description of the amounts that the federal government paid or awarded in attorney fees, including a description of who received the payments. Also, please provide a description of actions the FWS has taken to address inadequacies identified by GAO in the Report GAO-12-417R.
- Given the far-reaching consequences of these “sue and settle” scenarios, will the FWS work with DOJ to reject this tactic going forward and attempt to include interested intervenors, such as state wildlife management agencies, local governments, and affected private citizens, in similar settlement negotiations? If so, please explain specific steps that will be taken to ensure that such openness and transparency will be pursued in cooperation with DOJ? If not, why not?
- The settlement agreement requires the FWS to make listing determinations on hundreds of species over the course of several years. Why did the FWS decide to make the determination on these target species early in the process of carrying out the negotiated listing determinations, rather than waiting later in the process? Was the State of Arkansas consulted with respect to the timing of the determination for the target species?

We request your review and response to a few final questions that may not have been directly addressed in public comments and that do not pertain to the “sue and settle” scenario issue:

- Please provide and explain the specific criteria, including but not limited to water quality characteristics, that must be present for a stream or river to be designated as critical habitat for the target species. Please be specific, and address issues such as the extent of areal patches which the FWS assumes are necessary to support each life phase of the target species, as well as critical threshold values for flow, sediment, and other characteristics that would provide critical habitat. If the FWS cannot provide a detailed science-based explanation of these criteria, please say so and provide a more detailed explanation for the basis of the current critical habitat designation proposal in lieu of a science-based justification.

² U.S. Government Accountability Office, *Limited Data Available on USDA and Interior Attorney Fee Claims and Payments*, GAO-12-417R, April 12, 2012.

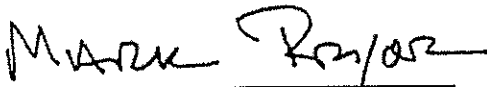
- How will the FWS address potential competing management goals? For example, *if* the EPA's efforts to achieve certain water quality characteristics within critical habitat areas are in some way counterproductive to attempts to achieve target species recovery (such as by reducing the populations of non-endangered, non-threatened host fish species) how would such competing environmental quality goals be managed?

While the Rabbitsfoot Mussel designation is proposed in 13 states, approximately half of the critical habitat lies within Arkansas. The proposed designation appears to be excessively broad, lacking a firm scientific basis, and community leaders and individuals alike have warned us of the wide economic impact this designation will have on Arkansans. Furthermore, we have not received an accurate cost-benefit analysis from the FWS that describes the realistic costs that would likely result from this critical habitat designation.

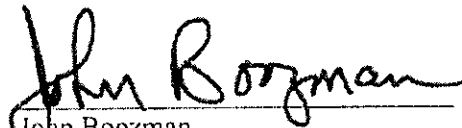
Due to the scope of the proposed critical habitat designations, the potential impact on Arkansas and other states, as well as the flawed process through which the proposal was formulated, we urge a reconsideration of and reduction in the size of the proposed critical habitat designations for the target species. Also, we urge the FWS to carefully consider the critical feedback it has received from our citizens and both the Governor and Attorney General of Arkansas.

Thank you for your prompt attention to these concerns. We look forward to working with you to reform and improve the critical habitat designation process, while we urge you to revise the scope of the Neosho Mucket and Rabbitsfoot Mussel critical habitat designation. Please do not hesitate to contact us with any questions or concerns, or if we can be helpful to you.

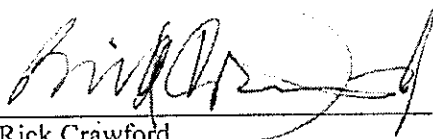
Sincerely,



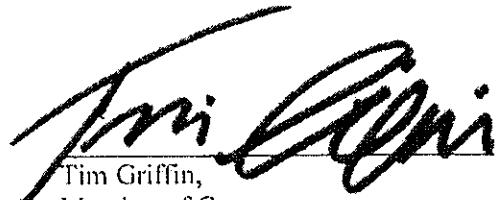
Mark Pryor,
U.S. Senator



John Boozman,
U.S. Senator



Rick Crawford,
Member of Congress



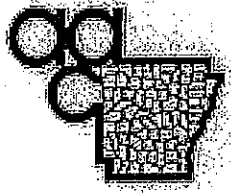
Tim Griffin,
Member of Congress



Steve Womack,
Member of Congress



Tom Cotton,
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For More Information:

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Friday, Nov. 8, 2013

For Immediate Release

Entire Arkansas Congressional delegation members release statements regarding US Fish and Wildlife Service's proposed critical habitat designation in Arkansas

(Info box / sidebar possibility): Arkansas State Sen. Missy Irvin (R, Mountain View), chair of the Senate Committee on City, County and Local, helped to schedule a combined joint hearing at 1 p.m. Tuesday in Room A of the MAC building on the matter with both City, County and Local committees and Agriculture, Forestry and Economic Development committees.

LITTLE ROCK — All of Arkansas' United States Congressional delegation members released statements today regarding the United States Fish And Wildlife Service's proposed critical habitat designation for the Neosho mucket and Rabbitsfoot mussels. The Service proposed 42 percent of Arkansas' geographical area as critical habitat which includes the watersheds associated with that critical habitat for the two mussels.

The Service extended public comment period for critical habitat designation after Sen. Mark Pryor (D) submitted a letter in May. The extension opened the door for the Association of Arkansas Counties along with several supporting organizations both in the public and private sectors to submit independent comments and local environmental and economic impact studies. The main goal of this public comment effort is to decrease the Service's overly broad geographical area being proposed as critical habitat. The decrease is based on sound science, adherence to the spirit of the Endangered Species Act of 1973 (ESA), and potential social and economic impacts to Arkansas. The effort suggested a 36-percent decrease in the proposed designation of critical habitat area.

These two species are among 46 Arkansas species that were listed as threatened or endangered under an agreement under the Endangered Species Act. The potential of more critical habitat designation in the state is evident.

Sen. Mark Pryor, D; Sen. John Boozman, R; Rep. Rick Crawford, R; Rep. Tim Griffin, R; Rep. Steve Womack, R; and Rep. Tom Cotton, R, all released statements against the Service's overly broad critical habitat designation in the Natural State.

Sen. Mark Pryor: "After hearing from Arkansans, I pressed the Fish and Wildlife Service for answers about their proposed critical habitat rule for two mussels. I wanted to ensure that Arkansans were able to weigh in on the negative economic impact this rule will have on our state's landowners, counties, and agriculture. The Fish and Wildlife Service needs to gather all the facts in order to fully understand the adverse economic impact, including the devastating effect it will have on landowners' ability to use their land. While I'm pleased Fish and Wildlife granted my request for an extension, the fight's not over yet. I'll continue to push to ensure Arkansas landowners have the freedom they deserve."

Sen. John Boozman: "Arkansas is facing this crisis because the Administration pursued a closed-door settlement agreement with activist organizations that want hundreds of new species listed. Now the agency is resisting transparency requests from Congress. Objections and concerns to the scope of this 'critical habitat' designation raised in public comments are serious and substantive, and they deserve the careful and prompt attention of the U.S. Fish and Wildlife Service. I will work with the Arkansas Congressional delegation and use my position as the Ranking Member on the Subcommittee on Water and Wildlife to hold the Service's feet-to-the-fire on this issue. Arkansans deserve to be treated fairly by federal government agencies. Openness and transparency are a must."

Rep. Rick Crawford: "Simply put, the overreaching critical habitat designation for the Neosho Mucket and Rabbitsfoot mussels is a job killer in Arkansas. The federal government cannot continue to hide behind the Endangered Species Act, pushing an environmental agenda and expanding far beyond the original intent of the law at

there is insufficient information to determine the area is essential for conservation of the species. Furthermore, in some instances the USFWS designated entire stream and river reaches in the critical habitat area when this approach is not consistent with the requirements for designation of critical habitat under the ESA.

the expense of Arkansas families and job creators. Placing the welfare of mollusks over the good of everyday Arkansans who are still working hard just to make ends meet reveals a complete disregard for common sense warranting strong oversight and action. I look forward to representing the voice of the people of Arkansas in this matter."

Rep. Tim Griffin: "While we must be good stewards of the environment, including endangered species, I oppose this Washington-knows-best designation that would tie up nearly half of Arkansas in red tape and bureaucracy, potentially affecting paychecks and jobs for thousands of families."

Rep. Steve Womack: "Instead of pushing another unwanted and unnecessary environmental mandate on the state, the federal government should fully vet the real, significant repercussions this overreaching designation will have on Arkansas and our economy. Doing so will surely provide more than enough reason to reduce, if not eliminate, this job-killing habitat designation."

Rep. Tom Cotton: "Most Arkansans agree we should protect and preserve our environment; but we must do so sensibly, in a way that also protects taxpayers and jobs. This designation needlessly hinders our economic growth and hurts Arkansas families."

Background

About 1/3 of Arkansas private landowners face federal restrictions on land due to this overly broad critical habitat designation by the federal government.

The AAC and 10 other organizations collectively submitted comments to the Service that included independent environmental studies conducted by GBMc & Associates, an environmental services company, and Histecon Associates, Inc., in Little Rock, conducted the economic impact studies while the firm Gill Ragon Owen P.A. submitted the final comments for submission to the USFWS.

Members of this effort for responsible critical habitat designation in Arkansas include:

Association of Arkansas Counties; Arkansas State Chamber of Commerce; Arkansas Environmental Federation; Arkansas Forestry Association; Arkansas Farm Bureau; Arkansas Poultry Federation; Arkansas Independent Producers and Royalty Owners; Camp Ozark; Energy and Environmental Alliance of Arkansas; Arkansas Cattlemen's Association; and Arkansas Association of Conservation Districts.

In total Arkansas is faced with an additional 42 potential listings in the next several years. All of which were a part of a settlement agreement with environmentalists where the affected public had no input or knowledge the settlement was occurring.

The local environmental studies found that many areas that have been proposed for critical habitat designation have no recent occurrences of the target species and