

**TESTIMONY OF CYNTHIA K. DOHNER, SOUTHEAST REGIONAL DIRECTOR,  
U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR  
BEFORE THE HOUSE NATURAL RESOURCES COMMITTEE  
ON  
“PROTECTING THE RIGHTS OF PROPERTY OWNERS:  
PROPOSED FEDERAL CRITICAL HABITAT DESIGNATIONS GONE WILD”**

**MAY 14, 2014**

Good morning Chairman Hastings and Members of the Committee. I am Cindy Dohner, Southeast Regional Director for the U.S. Fish and Wildlife Service (Service) within the Department of the Interior. As Regional Director, I provide leadership and oversight for the Service's conservation work across 10 southeastern states, Puerto Rico, and the U.S. Virgin Islands. Mr. Chairman, I appreciate the opportunity to discuss the Service's administration of the Endangered Species Act (ESA), especially our experience with critical habitat designations and the proactive work with states we are doing in the Southeast.

The Service is committed to making the ESA work for the American people to accomplish its purpose of conserving threatened and endangered species and protecting the ecosystems upon which they depend. In passing the ESA, Congress recognized we face an extinction crisis. Since that time, the ESA has prevented the extinction of hundreds of species and promoted the recovery of many others. This great conservation work has helped achieve Congress's call to preserve the Nation's natural resource heritage, and it has happened alongside sustained economic development. It is more important now than ever to have an effective, collaborative approach to conserving imperiled species.

The Service's biologists are working to complete the actions identified in its 5-year listing workplan that was solidified in the Multi-District Litigation settlement agreement. The workplan is publicly available at [www.fws.gov/endangered/improving\\_esa/listing\\_workplan\\_FY13-18.html](http://www.fws.gov/endangered/improving_esa/listing_workplan_FY13-18.html). At the same time, the Service is taking proactive steps with multiple partners to limit the need to list species where possible.

Here in the Southeast Region, we are working with states, industry, federal agencies, and large private landowners to employ creative, innovative, and voluntary strategies in the implementation of the ESA that are producing positive results for conservation, industry, and local economies. The results of this state-led collaboration are promising so far. Through these collaborative efforts, the Service has determined that listing is not needed for nearly 40 species, and are working with partners to put in place conservation tools that provide landowners with stability and clear expectations.

Our objective is to conserve species in a way that comports with the ESA, protects our southern way of life, continues to allow working lands to work, considers the probable economic impacts where possible, and ensures the enduring tradition of outdoor recreation that is so important to many of our citizens. I look forward to adding my perspective to this discussion today about the proposed critical habitat designation for the federally listed Neosho mucket and rabbitsfoot mussels.

## **Listing and Designating Critical Habitat**

Listing a species under the ESA is initiated either by the Service or through a petition from the public. This process is defined under Section 4(a) of the ESA. If listing is warranted, the Service must evaluate the information in its files and gather as much information on the species as possible from states, conservation partners, industry, and researchers, among others, to ensure we are using the best scientific and commercial information available to develop a listing proposal based on the factors described in Section 4(a) of the ESA. The proposal identifies threats (e.g., modification of habitat) and possible measures to address those threats, and any proposal must also have a public comment period and stakeholder engagement. We need to ensure that stakeholders such as landowners and businesses are engaged in the process during the proposed listing because it is that action—whether to list or not—that triggers the regulatory compliance under the ESA and the other statutory requirements.

There are numerous species that are listed under the ESA that do not have critical habitat designated at this time. For example, in Arkansas there are 37 listed species, and only two have critical habitat designated and two have critical habitat proposed.

When the Service proposes an animal or plant for listing, another statutory requirement under Section 4 of the ESA is triggered to consider whether there are areas of habitat determined to be essential to the species' recovery and to designate any such areas as critical habitat. The Service proposes critical habitat designations based on the best available scientific and commercial information on what an animal or plant needs to survive, reproduce, and recover. This proposal is then evaluated by interested stakeholders and the public. It is only after this public comment period and stakeholder involvement that the Service makes a final determination on the boundaries of the critical habitat.

Critical habitat designations do not affect land ownership or impose liens on property. Designating critical habitat does not allow the government to take or manage private property nor does it establish a refuge, reserve, preserve, or other conservation area. It also does not allow government or public access to private land. The designation only affects those activities that are performed, funded or authorized by permit of a Federal agency.

Under Section 7(a)(2) of the ESA, Federal agencies are required to consult with the Service to ensure that their actions do not jeopardize the continued existence of a listed species or adversely modify its critical habitat that the species needs to recover. The Service works with Federal agencies through the consultation process to avoid or minimize impacts to a species and critical habitat by developing appropriate conservation measures that can be incorporated into the project or, if needed, a biological opinion. In most cases, these conservation measures would be carried out regardless of whether critical habitat is designated because the species is listed under the ESA. Interagency consultation on critical habitat often does not result in additional conservation measures beyond what would already be required because of the listing itself in areas occupied by the species.

The Service may exclude an area from critical habitat if it determines the benefits of excluding the area outweigh the benefits of including it as critical habitat, provided such exclusion will not

result in the extinction of the species. Critical habitat exclusions are possible for lands that have secure, long-term conservation plans in place that are being implemented and benefit the species, and/or based on national security or economic impacts.

Just last week, the Service published a proposed policy to provide greater predictability, transparency and consistency regarding how the Services consider exclusions from critical habitat designations. Under the ESA, the Service evaluates the economic, national security and other impacts of a designation and may exclude particular areas if the benefits of doing so are greater than the benefits of designation. This proposal describes the general policy position of the Service for considering different types of impacts (e.g., impacts to voluntary conservation agreements, impacts to national security, economic impacts) and is intended to provide greater predictability and transparency to the process of considering exclusions within a critical habitat designation.

### **Considering Economic Impacts**

The Service is required under section 4(b)(2) of the ESA to evaluate and consider probable economic and national security impacts along with other relevant factors resulting from the designation of critical habitat. Since critical habitat applies only to federal actions, draft economic analyses identify costs primarily associated with interactions (consultations) between Federal agencies.

The ESA does not allow the Service to consider economic impacts when making listing determinations. For that reason, the Service focuses its economic impact analyses on the incremental effects resulting from a critical habitat designation. These impacts are over and above economic impacts that result from the listing action itself. This methodology is supported by Executive Order 12866, Office of Management and Budget Circular A-4 (issued in 2003), a 2008 Memorandum Opinion from the Solicitor of the Department of the Interior and relevant case law. The Service has consistently used this approach for economic analyses of critical habitat designations that occur in most states, including those in the Southeast, since 2007. This approach was codified in revisions to the ESA implementing regulations in October 2013.

Economic impacts of designating critical habitat are weighed against the benefits of designating critical habitat. Based on our experience and analysis with other listed mussels in Arkansas and the Southeast Region, the data suggests that the average person will not incur any additional costs associated with critical habitat designation over and above that required by the listing unless they are required to avoid adverse modification of critical habitat.

### **Proposed Critical Habitat for Neosho Mucket and Rabbitsfoot Mussels**

The Service proposed listing the Neosho mucket as endangered and rabbitsfoot as threatened in October 2012 after identifying both species as candidates in 1984 and 1994 respectively. Designating critical habitat for the two mussels was proposed along with the listing. The proposed designation totals approximately 783 river and stream miles for both mussel species in Arkansas, as well as segments of rivers and streams in Alabama, Kansas, Kentucky, Illinois, Indiana, Mississippi, Missouri, Ohio, Oklahoma, Pennsylvania and Tennessee. Notably, Arkansas is one of the remaining strongholds for rabbitsfoot with many small and sizable

populations, in part because of the Natural State's legacy of conservation and its commitment to stewardship. The proposed critical habitat is limited to the river itself, below the normal high water mark and not the watersheds. In Arkansas this is less than 8 percent of the State's total stream miles as defined by the Arkansas Department of Environmental Quality. This proposed designation underwent an independent peer review and was available for public comment for a total of 150 days to ensure it was based on the best scientific, commercial, and economic data available.

The benefits of the final critical habitat designation for the two mussels will include public awareness of the presence of the mussels and the importance of habitat protection, and, where a federal nexus exists, ensure there is no adverse modification of critical habitat. According to the Service's economic analysis of the critical habitat designation for both mussel species, the estimated cost for additional federal actions because of the designation will be between \$4.4 million and \$5.9 million over 20 years. Most of those costs are administrative (i.e., costs of determining effects to the critical habitat and preparing a biological assessment) and will be borne largely by Federal agencies during required consultations with Service on the impacts of their actions.

Federal agencies that fund, permit or perform actions that could negatively impact the protected mussels—or adversely modify their critical habitat—are required agency to consult with the Service under section 7(a)(2) of the ESA. Some of those activities might include building a dam or a road, or allowing a private logger to harvest trees from a National Forest. If the activity is likely to have an impact on the mussels or their critical habitat, the Service and the Federal agency work together through the informal or formal consultation process to ensure that the activity does not jeopardize the species or adversely modify the critical habitat and to find a reasonable conservation measures that would accomplish the goal of the project and conserve the species.

The Service understands that designating critical habitat for Neosho mucket and rabbitsfoot has caused concerns for some Arkansans. We are listening and considering the concerns expressed about the proposed designation on the private sector in Arkansas, particularly on small businesses, industry, and agriculture. A critical habitat designation itself, without a federal nexus, does not legally affect private landowners. The Service provided the public with three opportunities to submit comments on the proposed listing and critical habitat designation since it was announced in October 2012. We received 49 comments and anticipate additional comments when the comment period for the proposed critical habitat designation is reopened for a fourth time. Public involvement into the Service's ESA actions ensures that we have the best available scientific and commercial data available. In the case of rabbitsfoot and Neosho mucket, we can substantiate that public involvement in the rulemaking process is working. For instance, the Association of Arkansas Counties provided the Service with additional scientific information to the Service during a public comment period. As a result, the Service evaluated the information and is modifying the proposal as appropriate.

The Service has consulted with Federal agencies for decades on actions in Arkansas because of the presence of other listed mussels, such as the pink mucket and the winged mapleleaf, found in the same rivers as proposed critical habitat for the rabbitsfoot. The vast majority of the consultations were handled efficiently and informally by the Service's Arkansas Field Office. In

fact, 99 percent of the consultations completed in the last five years with other Federal agencies such as the Natural Resources Conservation Service (NRCS) and Farm Service Agency were done in less than 30 days. These informal consultations did not delay any projects. This is important trend data that demonstrates a productive track record in Arkansas.

The Service does not expect to require additional conservation measures for the proposed critical habitat for the two mussel species beyond those generated by the listing. We have indicated the final designation—expected later this year—would be smaller as a result of information shared during comment periods. The Service will soon announce an additional 60-day comment period on the proposed critical habitat designation and associated draft economic analysis. A final designation will consider all information received during the four public comment periods.

The Service already is reviewing the direct, indirect and cumulative effects of federal projects on the Neosho mucket and rabbitsfoot due to their listing in Arkansas rivers. For example, the Service informally consulted with Peco Foods on its plans to build a fully integrated poultry complex in Randolph and Clay Counties in northeastern Arkansas. The project required an Arkansas Pollutant Discharge Elimination System permit for the processing plant's proposed sewer outfall. The original plans proposed to discharge into a reach of the Black River where five federally protected mussel species are known to occur, including the rabbitsfoot. Possible ammonia concentrations below the outfall would likely have been too toxic for the mussels to survive. The Service worked with Peco Foods to determine the occurrence of federally protected mussels within the potential affected area. Surveys discovered a previously undocumented rabbitsfoot mussel bed near the proposed outfall and no federally protected species in an area upstream. As a result, Peco Foods was able to relocate its outfall to an alternate location 650 feet upstream of the original proposed location, which minimizes the impacts on the listed species. The cooperation between the Service and Peco Foods on the project's potential impact to listed species resulted in no delays in the permitting process and successfully avoided adverse effects to federally protected mussels.

The Service has continued its communication with stakeholders in Arkansas regarding the effects of the proposed critical habitat designation for the two mussels since finalizing their listing in September 2013. We have engaged stakeholders including the Governor of Arkansas, county judges, industry associations, and others to further clarify our species listing actions and critical habitat and what they mean to Arkansans. The Service met with the staff of the entire Arkansas congressional delegation last November on this matter, and I personally met with Arkansas Attorney General and his staff in February 2014 to discuss the implications of the proposed designation.

Last month, the Director and I traveled to Little Rock to meet with numerous stakeholders including the Agricultural Council of Arkansas, Arkansas Chamber of Commerce, Arkansas Cattlemen's Association, Arkansas Farm Bureau, Arkansas Forestry Association, Arkansas Game and Fish Commission, Arkansas Secretary of Agriculture, Association of Arkansas Counties, and the oil and gas industry, as well as several county judges and state representatives. This meeting was a productive dialogue with stakeholders on ESA actions where we answered questions and heard concerns about the size and implications of the proposed critical habitat designation and the way we consider economic impacts.

We are committed to continuing this engagement with stakeholders in Arkansas and other affected states as we move forward in finalizing the critical habitat designation for the two mussel species. We are also committed to continuing to work closely with the Arkansas Game and Fish Commission on conservation actions for other species.

### **Engaging Landowners in ESA Listing and Critical Habitat Actions**

I first came to Arkansas to discuss many of these ESA-related issues with stakeholders in October 2012. I met with farmers, industry representatives, association groups such as the Association of Arkansas Counties and the Arkansas Forestry Association in Hot Springs to address concerns about impending listing decisions under our workplan. At that time, I informed them of the Southeast Region's plan to evaluate the need to list 61 candidates, including the Neosho mucket and rabbitsfoot, as well as Mega-Petition, one of the largest petitions ever received by the Service to list 404 aquatic and aquatic-dependent species found in the Southeast. Since then, the Service has continued to engage these stakeholders and others on not only the listing and critical habitat designation for the two mussels, as well as other listing actions.

Between our listing workplan and other petitions under the ESA, the Southeast Region is required to evaluate whether more than 400 species need federal protection. Of this total, 48 species occur in Arkansas. The Service's goal is to ensure, in working with partners, that sufficient conservation measures are in place such that these species would not warrant listing under the ESA. With the states leading the way and sound science as our guide, the Service and our partners—state agencies including the Arkansas Game and Fish Commission, other Federal agencies, universities, industries, and large private landowners—are prioritizing species and coordinating our resources. Partners are acquiring the best science, documenting conservation activities already taking place, and using voluntary, non-regulatory conservation programs to proactively conserve as many of these species as possible, so listing will not be necessary. The Service also is encouraging state, federal, and private landowners to use voluntary conservation tools that protect private land interests and provide incentives and regulatory certainty for landowners to manage lands and waters in ways that benefit at-risk species. The Southeast Region is developing more than 20 voluntary conservation agreements covering many species, including one that would cover 28 at-risk cave species in Arkansas.

Another part of the Service's at-risk conservation effort is that we are working closely with the Southeast Association of Fish and Wildlife Agencies' Wildlife Diversity Committee and moving aggressively to share expertise, available science and monitoring data that I believe is crucial to our efforts to evaluate the status of fish, wildlife and plants that are included in our listing workload. The states are leading the way, and I believe this expanded partnership will help us efficiently speed progress in our collective effort to achieve the conservation needed to render the listing of as many species as possible unnecessary. Using the ESA proactively, it is possible to manage species in need and secure conservation as well as keeping working lands working.

If together we can address the need to protect additional plants and animals without listing, landowners and the species benefit. From the landowner perspective, proactive conservation is

voluntary and flexible while the ESA can be more rigid and includes regulatory requirements. Fish, wildlife and plants benefit when we focus limited resources where they are most needed. This helps species on a larger, landscape scale. Another benefit is counted in savings to the American taxpayer. In general, it costs less money to protect a species that is beginning to face threats than it does to recover critically endangered species.

This collaborative effort with federal and state agencies, industry, and private landowners is at work conserving at-risk species in Arkansas. The Service is developing voluntary agreements with the Arkansas Game and Fish Commission, NRCS, and The Nature Conservancy (TNC), including a Candidate Conservation Agreement with Assurances that includes 20 aquatic species. One example: The Service is part of a coalition of a dozen organizations and associations led by TNC, the Arkansas Farm Bureau, the Arkansas Game and Fish Commission and the Association of Arkansas Counties, to work collaboratively to develop simple best management practices to make it easier for the counties to maintain and repair rural, unpaved roads while reducing costs and improving water quality. This is important to us all because about 85 percent of Arkansas county roads are unpaved. These roads are critically important to local economies and these actions may minimize erosion and improve the health of lakes and rivers. Reducing sedimentation, thereby improving water quality, from unpaved roads is key to conserving many of the aquatic species that need to be evaluated over next five years. We also support the use of voluntary conservation programs like those offered by the NRCS and the Service's Partners for Fish and Wildlife Program, to conserve and enhance fish and wildlife habitat, which are essential for helping preclude the need to list at-risk species in Arkansas.

This proactive conservation of at-risk species is starting to pay dividends, and we have determined that listing is not needed for nearly 40 species—some based on new information, some on voluntary conservation actions, and some are already secure. For example, the Service recently announced that five southeastern crayfishes that occur in parts of Alabama, Georgia and Mississippi will not require federal protection due to new scientific information. The crayfish species were withdrawn from the Mega-Petition and precluded needing to be listed. Our partnerships are growing, and we believe the ESA is working.

## **Conclusion**

In closing, Mr. Chairman, I would like to emphasize the importance the Service places upon having a science-driven, transparent decision-making process in which people and businesses in affected communities can participate easily and effectively. The Service and I are committed to conserving America's fish and wildlife by relying upon strong partnerships and creative solutions to achieve conservation.

Thank you for your interest in endangered species conservation here in Arkansas and the Southeast Region, and ESA implementation more generally. I appreciate the opportunity to testify here today in Batesville. I would be pleased to answer to any questions you and other members of the Committee might have.