



*Via Federal eRulemaking Portal and U.S. Mail*

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Public Comments Processing  
Attn: Docket No. FWS-R3-ES-2009-0009  
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**Re: Proposed Rule to List the Ozark Hellbender Salamander as Endangered**

Dear Mr. Scott and Ms. Ragan,

On behalf of the Center for Biological Diversity, I submit these comments on the Proposed Rule to List the Ozark Hellbender Salamander as Endangered. The Center applauds the proposed listing of this highly imperiled species but has grave concerns about the agency's refusal to designate critical habitat. Designation of critical habitat would benefit the Ozark

hellbender and could be done in a way that does not increase the threat of unauthorized collection. The Center therefore urges FWS to designate critical habitat.

## **BACKGROUND**

The Ozark hellbender (*Cryptobranchus alleganiensis bishopi*) is a large, strictly aquatic salamander found in streams of the Ozark plateau in southern Missouri and northern Arkansas. Hellbenders are uniquely adapted to their aquatic life with a flattened body that fits in crevices and allows it to cling to the river bottom avoiding strong currents. They also have numerous folds of skin on their sides that allow increased oxygen absorption from the water. They are the largest North American amphibian and can grow to nearly two feet long.

On October 30, 2001, FWS determined that the Ozark hellbender warrants listing as a threatened or endangered species but that such listing was precluded. Instead, the agency added it to the list of candidate species. On May 11, 2004, the Center for Biological Diversity petitioned FWS to list over 200 candidate species, including the Ozark hellbender. The Center followed the petition with a lawsuit arguing that continued delay of protection for all of the candidate species was illegal. This lawsuit is still pending in federal court.

Almost nine years after FWS first determined that the Ozark hellbender warrants listing as an endangered species, FWS has now issued a proposed rule to provide federal protection for these rare animals. *Endangered and Threatened Wildlife and Plants; Proposed Rule to List the Ozark Hellbender Salamander as Endangered*, 75 Fed. Reg. 54561 (Sept. 8, 2010). FWS found that the Ozark hellbender is threatened by habitat degradation, collection for the pet trade and scientific purposes, persecution by anglers, disease caused by chytrid fungus, stocking of predatory fish, and loss of genetic diversity.

The Endangered Species Act requires that FWS designate critical habitat – at the time that it finds the species to be endangered or threatened – to the maximum extent prudent and determinable. 16 U.S.C. § 1533(a)(3)(A)(i). In the proposed rule, FWS concluded that the designation of critical habitat would not be prudent based on its flawed finding that (1) the identification of critical habitat can be expected to increase the degree of threat of unauthorized collection, and (2) such designation of critical habitat would not be beneficial to the species. 75 Fed. Reg. 54575. Upon publication of the proposed rule, FWS opened a public comment period seeking information on a variety of subjects.

## **ANALYSIS**

The Center fully supports FWS's conclusion that the Ozark hellbender be listed as an endangered species. Such a conclusion is compelled by the best available science on the threats

faced by this highly imperiled species. The refusal to designate critical habitat under the imprudence exception, however, is unreasonable. First, the designation of critical habitat would not increase the risk of unauthorized collection because it can be accomplished without providing exact known locations of Ozark hellbenders. And in any event, detailed information about known locations is already publically available. Second, designation of critical habitat would provide real benefits to the species because any federal action affecting critical habitat would require consultation with FWS and because designation would inform the public about the conservation value of these lands. Because there is no risk of an increase in unauthorized collection and the critical habitat designation would provide benefits, the only logical conclusion is that the benefits of critical habitat designation outweigh the risks. For these reasons, which are discussed more fully below, FWS must designate critical habitat for the Ozark hellbender.

## **I. DESIGNATION OF CRITICAL HABITAT WOULD NOT INCREASE UNAUTHORIZED COLLECTION**

As an initial matter, the imprudence exception to the designation of critical habitat should only be invoked in rare and extraordinary circumstances. The fact that Congress intended the imprudence exception to be a narrow one is clear from the legislative history, which reads in part:

The committee intends that in most situations the Secretary will . . . designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in *rare circumstances* where the specification of critical habitat concurrently with the listing would not be beneficial to the species.

H.R. Rep. No. 95-1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467 (emphasis added); *see also Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (holding that the Secretary “may only fail to designate a critical habitat under rare circumstances”); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621, 626 (W.D. Wash. 1991) (“This legislative history leaves little room for doubt regarding the intent of Congress: The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances.”).

The Ozark hellbender does not fall within one of these rare circumstances. Under FWS regulations, critical habitat designation would be imprudent based upon the risk of unauthorized collection or other taking only if two conditions are met: first, that the species is threatened by such taking, and, second, that designation would increase that threat. 50 C.F.R. § 424.12(a)(1)(i). The Center does not dispute that the unauthorized collection of Ozark hellbenders for the pet trade is a factor contributing to its decline. But FWS has not – and cannot – establish that designation of critical habitat would increase the vulnerability of this species to unauthorized collection.

First, it would not make sense from a biological standpoint to designate critical habitat only around known locations of adult Ozark hellbenders because the critical habitat designation should address the needs of all life stages of the species. The needs of juveniles differ from adults because Ozark hellbender larvae can drift with the current and be carried away from the nesting site. Habitat protection for juvenile hellbenders is particularly important given the lack of juvenile recruitment observed by scientists. B.A. Wheeler et al., *Population declines of a long-lived salamander: a 20+ year study of hellbenders*, *Cryptobranchus alleganiensis*, *BIOLOGICAL CONSERVATION* 109: 151-56 (2003) (explaining that the low survival rate of juveniles may be causing the rapid overall decline in hellbender numbers); M.E. Solis, et al., *Occurance of organic chemicals in two rivers inhabited by Ozark hellbenders* (*Cryptobranchus alleganiensis bishop*), *ARCH. ENVIRON. CONTAM. TOXICOL.* 53: 426-34 (2007) (explaining that increased estrogenic chemical levels and alterations of physicochemical properties in habitat may play a significant role in the population declines and rare recruitment of juvenile Ozark hellbenders). A critical habitat designation that includes all streams where the Ozark hellbender has been known to exist – from the headwaters to the confluence with a larger water body – would provide protection for habitats used in all life stages and would not reveal known locations of adult Ozark hellbenders, which are the ones susceptible to unauthorized collection.

Second, FWS can designate critical habitat without disclosing the exact known locations where Ozark hellbenders occur. Contrary to FWS’s assertion, nothing in the ESA or its implementing regulations requires FWS in designating critical habitat to include “a very specific narrative description of critical habitat areas” that will reveal “the exact locations where Ozark hellbenders occur.” 75 Fed. Reg. 54575. The ESA does not discuss what level of specificity is required.<sup>1</sup> And FWS’s implementing regulations provide only that:

Each critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area. Each area will be referenced to the State(s), county(ies), or other local governmental units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for information only and do not constitute the boundaries of the area. Ephemeral reference points (*e.g.*, trees, sand bars) shall not be used in defining critical habitat.

50 C.F.R. § 424.12(c). In other words, the level of detail required would not direct people to individual animals. Rather, the scale of mapping and narrative description would only need to

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<sup>1</sup> Of course, the designation of critical habitat must be consistent with the ESA’s definition of critical habitat. 16 U.S.C. § 1532(5). Only those “specific areas” that meet the statutory definition may be designated as critical habitat, but FWS’s designation would be underinclusive if it included only those areas presently occupied by adult Ozark hellbenders.

define the outer boundary of the designation. As such, there is no reason to believe that publication of such information would increase the threat of unauthorized collection.

Third, the threat of unauthorized collection would not increase with designation of critical habitat because the public already has access to information about known locations of Ozark hellbenders. See *Conservation Council v. Babbitt*, 2 F. Supp. 2d 1280, 1284 (D. Haw. 1998) (explaining that FWS must “consider, in each case, the degree to which information about the location of the [species] already exists and is readily available”). For example, a 2003 conservation assessment for the Ozark hellbender, which is available on the United States Forest Service’s Region 9 website, provides as much detail as would be involved in a critical habitat designation. USDA Forest Service, *Conservation Assessment for Ozark hellbender* (*Cryptobranchus alleganiensis bishop* Grobman) (Sept. 25, 2003), available at [www.fs.fed.us/r9/wildlife/tes/ca-overview/docs/9\\_25\\_03\\_version\\_CA\\_Ozark\\_Hellbender.pdf](http://www.fs.fed.us/r9/wildlife/tes/ca-overview/docs/9_25_03_version_CA_Ozark_Hellbender.pdf) (last visited Nov. 7, 2010). It details the distribution of Ozark hellbenders within the White River and Black River system at the tributary level.

Moreover, even the description of the range included in FWS’s own proposed rule to list the Ozark hellbender details which streams have known Ozark hellbender populations. 75 Fed. Reg. 54563 (Sept. 8, 2010). No additional detail would have to be published to designate critical habitat. As such, designation of critical habitat would not lead to increased threats beyond the level caused by listing itself.

It is well-established that FWS must provide specific evidence and reasonable explanation for a determination that designation of critical habitat is not prudent. *Conservation Council*, 2 F. Supp. 2d at 1284 (holding that “the FWS, therefore, must consider evidence specific to each species regarding the increased likelihood of taking caused by the designation of a critical habitat”); *Building Indus. Ass’n v. Babbitt*, 979 F. Supp. 893, 906 (D.D.C. 1997) (holding that “FWS must provide adequate record support and reasoned explanation for the determination that such a designation is not prudent”). Here, where FWS could designate critical habitat without providing any new information that would facilitate unauthorized collection, FWS’s concern about increasing such risk is unfounded.

## **II. DESIGNATION OF CRITICAL HABITAT WOULD BENEFIT OZARK HELLBENDERS**

FWS concludes that the benefits of designating critical habitat for the Ozark hellbender are “minimal.” 75 Fed. Reg. 54577. Yet at the same time, FWS acknowledges several benefits of the designation. As explained below, the benefits of critical habitat designation would be significant.

The primary benefit of critical habitat designation comes where there is a federal nexus that would bring an action within the purview of section 7 of the ESA. Section 7(a)(2) of the

statute requires federal agencies to consult with FWS to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of that species’s critical habitat. Regardless of whether critical habitat is designated, an agency must consult with the Secretary where an action will “jeopardize the continued existence” of a species. But if critical habitat has been designated, the ESA imposes an *additional* consultation requirement where an action will result in the “destruction or adverse modification” of critical habitat. *See, e.g., Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 439 (5th Cir. 2001). The imposition of this additional consultation requirement for actions affecting critical habitat is a real benefit to the species that cannot be ignored. *Id.* at 441. Any federal actions – on federal or non-federal lands – that are likely to result in the destruction or adverse modification of critical habitat would require consultation with FWS, even if those actions do not jeopardize the continued existence of the species. 16 U.S.C. § 1536(a)(2); *Sierra Club*, 245 F.3d at 439-41.

Here, Ozark hellbenders will benefit from the additional consultation requirement because many actions affecting the taxon have a federal nexus. In particular, Ozark hellbenders are found on federal lands managed by the National Park Service (Ozark National Scenic Riverway) and the U.S. Forest Service (Mark Twain National Forest). 75 Fed. Reg. 54576. The fact that most Ozark hellbenders occur on private lands is not sufficient reason to withhold a critical habitat designation. *Natural Resources Defense Council v. United States DOI*, 113 F.3d 1121, 1126 (9th Cir. 1997) (holding that FWS unreasonably concluded that critical habitat designation would not be beneficial when only 20 percent of the occupied range was federally owned). Many actions on non-federal land will have a federal nexus, such as the requirement for a permit from the U.S. Corp of Engineers to discharge dredge and fill material. 75 Fed. Reg. 54576. In short, the designation would be beneficial because the consultation requirement would be triggered for many actions affecting the species.

Even when there is no federal nexus, designation of critical habitat has value because it serves to educate landowners, State and local governments, and the public regarding the potential conservation value of an area. It is well established that public outreach is a benefit of a critical habitat designation. *Conservation Council*, 2 F. Supp. 2d at 1286 (“[T]he designation itself informs the public as well as the state and local governments.”). Although FWS acknowledges this benefit, it concluded that the outreach value would be “limited” because there are already extensive efforts to promote hellbender conservation. 75 Fed. Reg. 54576. But this is not a sufficient reason to refuse a critical habitat designation. *See Natural Resources Defense Council*, 113 F.3d at 1127 (“Neither the Act nor the implementing regulations sanctions nondesignation of habitat when designation would be merely *less* beneficial to the species than another type of protection.”). Even if there are other existing conservation efforts, the critical habitat designation would contribute to those efforts and could even help focus efforts by delineating areas with the highest conservation area.

### III. THE BENEFITS OF CRITICAL HABITAT DESIGNATION OUTWEIGH THE RISKS

Section 4(b)(2) of the ESA states that FWS may only exclude portions of habitat from critical habitat designation if “the benefits of such exclusion *outweigh* the benefits of specifying such area as part of the critical habitat.” 16 U.S.C. § 1533(b)(2) (emphasis added); *Natural Resources Defense Council*, 113 F.3d at 1125 (holding that FWS’s reliance on the “increased threat” exception to critical habitat designation was improper because the agency failed to balance the relative threat of takings both with and without critical habitat designation). Here, FWS concluded that, “even if some benefit from designation may exist, the increased threat to the species from unauthorized collection and trade outweighs any benefit to the taxon.” 75 Fed. Reg. 54577. Because the Center has established that critical habitat would not increase the risks of unauthorized collection, it follows that the agency reached the wrong conclusion when it engaged in this balancing. The benefits of critical habitat designation outweigh the risks and would therefore be prudent. FWS must designate critical habitat for the Ozark hellbender.

### CONCLUSION

The Center for Biological Diversity appreciates that FWS has proposed to list the Ozark hellbender as endangered, but we are concerned about the agency’s conclusion that designation of critical habitat would not be prudent. Designation of critical habitat could be accomplished without providing exact locations of adult Ozark hellbenders and would provide significant benefits for the species. When weighing the non-existent risk of an increase in unauthorized collection with the significant benefits that critical habitat designation would provide, the only reasonable conclusion is that designation of critical habitat would be prudent. The Center for Biological Diversity urges FWS to reexamine the conclusions in its proposed rule and designate critical habitat for the Ozark hellbender. Specifically, all streams where the Ozark hellbender has been known to exist should be designated as critical habitat.

Sincerely,



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