Endangered Species Act/Western Fanshell and Ouachita Fanshell: U.S. Fish & Wildlife Services Proposes Threatened Listing/Arkansas Critical Habitat



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On Thursday, March 3, 2022, the U.S. Fish & Wildlife Service (the Service) published a rule proposing to list the western fanshell (*Cyprogenia aberti*) and Ouachita fanshell (*Cyprogenia cf. aberti*), both freshwater mussels, as threatened species and designate "critical habitat" for the species under the Endangered Species Act (ESA). *See* 87 Fed. Reg. 12,338 (Mar. 3, 2022). Both species are present in a number of Arkansas watersheds. The proposal also includes a rule issued under section 4(d) of the ESA. *Id.*

The Service is accepting public comments on the proposal on or before May 2, 2022. Persons and entities requesting a public hearing on the proposed rule must submit a request in writing by April 18, 2022.

Background

Under the ESA, the Service may determine that a species is endangered or threated species because of any of five factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a). The ESA defines an "endangered species" as a species that is in danger of extinction throughout all or a significant portion of its range. In turn a species is "threatened" if it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. § 1532(6) and (20).

Section 4(a)(3) of the ESA requires the Secretary to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. 16 U.S.C. § 1533(a)(3). Critical habitat is defined as:

- The specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations; and
- Specific areas outside the geographical area occupied by the species at the time it is listed …, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

Section 4(d) of the ESA provides that whenever a species is listed as threatened, the Secretary "shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species," and "may by regulation prohibit with respect to any threatened species any act prohibited" under the ESA for endangered species. 16 U.S.C. § 1533(d). This is commonly referred to as a Section 4(d) Rule.

Proposed Listing Decision

The Service's proposal concludes that both the western fanshell and Ouachita fanshell are likely to become in danger of extinction within the foreseeable future throughout all of the species' respective range. 87 Fed. Reg. 12,347–49. The Service determined that "water quality degradation, altered flow, landscape changes, and habitat fragmentation, all of which are exacerbated by the effects of climate change, are the primary threats" facing both species. *Id.* 12,338.

The proposed critical habitat designation for the western fanshell totals approximately 360 river miles, all of which are occupied by the species, in Arkansas, Kansas, and Missouri. *Id.* This includes:

- certain portions of the Black River and Strawberry River in Independence, Jackson, Lawrence, and Sharp Counties, Arkansas;
- certain portions of the Middle Fork Little Red River in Cleburne, Stone, and Van Buren Counties, Arkansas;
- certain portions of the South Fork Spring River in Fulton County, Arkansas; and
- certain portions of the Spring River in Lawrence and Randolph Counties, Arkansas.

Id. 12,357–59

The proposed critical habitat designation for the Ouachita fanshell totals approximately 294 river miles, all of which are occupied by the species, in Arkansas. The designation includes:

- certain portions of the Little Missouri River in Clark, Nevada, and Ouachita Counties, Arkansas;
- certain portions of the Ouachita Headwaters in Montgomery and Polk Counties, Arkansas;
- certain portions of the Ouachita River in Clark, Dallas, and Ouachita Counties, Arkansas; and
- certain portions of the Saline River in Ashley, Bradley, Cleveland, Dallas, Drew, Grant, and Saline Counties, Arkansas.

Id. 12,359-60.

The proposed Section 4(d) Rule would prohibit, except as otherwise permitted: "[i]mporting or exporting; take; possession and other acts with unlawfully taken specimens; delivering, receiving, transporting, or shipping in interstate or foreign commerce in the course of commercial activity; or selling or offering for sale in interstate or foreign commerce." *Id.* at 12,351. More importantly, perhaps, the 4(d) rule would prohibit actions resulting in the incidental take of western fanshell and Ouachita fanshell "by altering or degrading the habitat." *Id.* The proposal does offer some exceptions for: (1) channel and bank restoration projects; (2) silviculture and forest management that implements best management practices; and (3) transportation projects that avoid instream disturbances in waters occupied by the species. *Id.*

Public Comments

Final action under the ESA must be based on the "best scientific and commercial data available." The Service is therefore requesting comments and information from other governmental agencies, the scientific community, industry, and interested parties concerning species' biology, range and population trend, and other related items. *Id.* 12,339-40.

A copy of the Service's proposed rule can be found HERE.