

*Comment 13:* Two commenters asked how we determined the upstream limit on the Suwannee River, and one commenter stated that the published literature does not report the use of the Suwannee River upstream of 230 rkm (143 rmi).

*Our Response:* We received unpublished information from Gulf sturgeon experts (Ken Sulak, USGS, pers. comm. 2002; Jim Clugston, retired USGS, pers. comm. 2002) of sightings of young-of-the-year Gulf sturgeon as far upstream on the Suwannee River as to the confluence with Roaring Creek at 304 rkm (200 rmi). This is approximately 11 rkm (18 rmi) upstream of the designated critical habitat, which stops at 293 rkm (182 rmi). We believe that the area known as Big Shoals on the Suwannee River captures the upstream-most significant spawning areas and, therefore, we included upstream to this point. We have included the 0.31 rkm (0.50 rmi) of habitat upstream from Big Shoals to the confluence with Long Branch for ease of identification. It is correct that the published literature on the Suwannee River documents spawning sites no further upstream than at 230 rkm (143 rmi), but we have relied on the above unpublished literature from reliable sources to determine the upstream limit on this system.

*Comment 14:* Two commenters requested that the Services omit areas adjacent to military lands from the designation under the Act's section 4(b)(2). The rationale presented included proximity to a military base that is used for military testing and training, restricting military's ability to quickly respond to training and testing due to long-lead time administrative considerations required for consultations, and reducing the number of formal consultations performed by the Services.

*Our Response:* The Department of Defense (DOD) did not request that areas adjacent to military lands be excluded from critical habitat designation. In any case, we have no data indicating that these areas should be excluded. We have been successfully and efficiently conducting section 7 consultations with military bases in these critical habitat areas for over 10 years, and we intend to continue working as partners with the armed forces to uphold the Act without compromising national security. We do not foresee any impacts to military readiness as a result of the adjacent critical habitat designation.

*Comment 15:* One commenter reported that unusually large fish have been taken from a fish trap on the Tennessee River near the mouth of

Chickamauga Creek, above Chattanooga, Tennessee.

*Our Response:* Historic information indicates that Gulf sturgeon did not venture as far inland as Tennessee, so we are fairly certain the large fish captured in the fish traps were not Gulf sturgeon. These fish may have been lake sturgeon (*A. fulvescens*) or shovelnose sturgeon (*Scaphirhynchus platorhynchus*), although these species are uncommon, particularly in east Tennessee. Paddlefish (*Polyodon spathula*), which attain weights of over 45 kg (100 lb) are found in the Tennessee River; however, additional information would be necessary to clearly identify the species involved and none was provided by the commenter.

Issue C: National Environmental Policy Act (NEPA) Compliance

*Comment 16:* One commenter stated that the Services should withdraw the proposed rule pending compliance with NEPA, through preparation of an environmental assessment or an environmental impact statement (EIS). The commenter stated that FWS's position that NEPA only applies to critical habitat designations in the 10th Circuit, based upon that circuit's 1996 decision in *Catron County Bd. of Comm. v. USFWS*, 75 F.3d 1429, is unlawful. The commenter stated that the two exceptions to NEPA compliance identified by the 10th Circuit (*i.e.*, unavoidable conflict between NEPA and another statute or duplicative procedures provided by NEPA and a second statute) are not present in the case of critical habitat designation. The commenter stated that the proposed critical habitat rule was subject to NEPA because the effects of the designation are broader than protecting habitat. They believe that future Federal actions that are likely to adversely affect critical habitat will be prohibited. They also believe that an environmental assessment may reveal a more effective alternative to preventing extinction of the sturgeon than designating critical habitat.

*Our Response:* The Services believe that in *Douglas Co. v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Court correctly interpreted the relationship between NEPA and critical habitat designation under the Act. The Ninth Circuit Court rejected the suggestion, identical to that raised by the commenter, that irreconcilable statutory conflict or duplicative statutory procedures are the only exceptions to application of NEPA to Federal actions. The Court held that the legislative history of the Act demonstrated that Congress intended to displace NEPA procedures with

carefully crafted procedures specific to critical habitat designation. Further, the *Douglas County* Court held that the critical habitat mandate of the Act conflicts with NEPA in that, although the Secretary may exclude areas from critical habitat if such exclusion would be more beneficial than harmful, the Secretary has no discretion but to include areas in the designation if exclusion of such areas would result in extinction. This lack of discretion renders application of NEPA procedures (*e.g.*, consideration of broad environmental impacts, alternatives analysis) superfluous (this lack of discretion to consider broad environmental impacts was the basis for the 6th Circuit's determination that NEPA does not apply to listing decisions under the Act, in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981)). The Court noted that the Act also conflicts with NEPA's demand for impact analysis, in that the Act dictates that the Secretary "shall" designate critical habitat for listed species based upon an evaluation of economic and other "relevant" impacts, which the Court interpreted as narrower than NEPA's directive. Finally, the 9th Circuit, based upon a review of precedent from several circuits including the 5th Circuit, held that an EIS is not required for actions that do not change the physical environment.

In addition, we note that Federal actions that might adversely affect critical habitat are not necessarily prohibited. Many Federal actions may adversely affect critical habitat without the effect rising to the level of destruction or adverse modification of the critical habitat. In those cases where we find that a Federal project would destroy or adversely modify critical habitat, we must identify reasonable and prudent alternatives (RPAs) to the project that would avoid the destruction or adverse modification (see "Effects of Critical Habitat Designation" section). The RPAs must be capable of being implemented in a manner consistent with the intended purpose of the action, be consistent with the action agency's legal authority and jurisdiction, and be economically and technically feasible.

Issue D: Section 7 Consultation Issues

*Comment 17:* One commenter expressed concerns that the critical habitat designation will make it more difficult for fisheries managers to sample for non-endangered fish in these rivers and fears they will be required to apply for permits and provide annual reports, and that in some cases, fishery activities may be stopped due to