

This proposal is the product of our reexamination of our 1993 not determinable finding for 11 mussels in the Mobile River drainage. The 2000 lawsuit did not include the dark pigtoe or the orange-nacre mucket, but we are considering them because they were a part of the original 1993 listing, they overlap in range with some of the other 9 species, and they occupy similar habitats within that range. It reflects our interpretation of the recent judicial opinions on critical habitat designation and the standards placed on us for making a prudency determination. If additional information becomes available on these species' biology, distribution, or threats to the species, we may reevaluate this proposal to propose additional critical habitat, propose boundary refinements that substantially changes existing proposed critical habitat, or withdraw our proposal to designate critical habitat. If boundary refinements of existing proposed critical habitat are required for a single unit or on a similar small scale based on additional information, we will allow additional time for public comment within the constraints of our court order.

#### Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as (i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. "Conservation" is defined in section 3(3) of the Act as the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which listing under the Act is no longer necessary.

In order for habitat to be included in a critical habitat designation, the habitat features must be "essential to the conservation of the species." Such critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Regulations at 50 CFR 424.02(j) define special management considerations or protection to mean any methods or procedures useful in protecting the

physical and biological features of the environment for the conservation of listed species. If any areas containing the primary constituent elements are currently being managed to address the conservation needs of these mussel species, they may not require special management or protection, and, therefore, may not meet the definition of critical habitat in section 3(5)(A)(i) of the Act.

When we designate critical habitat, we may not have the information necessary to identify all habitat areas which are essential for the conservation of the species. Nevertheless, we are required to designate those areas we consider to be essential, using the best information available to us.

Within the geographic area of the species, we will designate only currently known essential areas. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area will not be included in the critical habitat designation. Our regulations state that, "The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species" (50 CFR 424.12(e)). Accordingly, when the best available scientific data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Section 4(b)(2) of the Act requires that we take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

Our Policy on Information Standards Under the Endangered Species Act, published on July 1, 1994 (59 FR 34271), provides guidance to ensure that our decisions are based on the best scientific and commercial data available. It requires that our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, use primary and original sources of information as

the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, information that should be considered includes the listing package for the species, the recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys, studies, and biological assessments, unpublished materials, and expert opinion or personal knowledge.

Section 4 of the Act generally requires that we designate critical habitat at the time of listing and based on what we know at the time of designation. If we make a not determinable finding regarding critical habitat at the time of listing, section 4(b)(6)(C) of the Act requires that the Service publish a final regulation by not more than 1 additional year, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat. There are several thousands of miles of perennial streams in the Mobile River Basin. Most of these flow through private property, and may not have been adequately surveyed for mussels. Mussels are cryptic species, living buried in the stream bottom under water, and rare mussels are difficult to locate. We recognize that additional small, limited populations for some of these species could exist in some of these streams and may be discovered over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. Therefore, critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) of the Act and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the take prohibitions pursuant to section 9 of the Act, as determined on the basis of the best available information at the time of the action. It is possible that federally funded or assisted projects affecting listed species outside their designated critical habitat areas could jeopardize those species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning and recovery efforts if new