

of the species, on the basis of the best available information. Nonessential experimental populations located outside the National Wildlife Refuge System or National Park System lands are treated, for the purposes of section 7 of the Act, as if they are proposed for listing, while on National Wildlife Refuges or National Parks the species is treated as threatened. Section 7(a)(2) of the Act, which requires Federal agencies to ensure that their activities are not likely to jeopardize the continued existence of a listed species, would not apply except on National Wildlife Refuge System and National Park System lands only. Experimental populations determined to be "essential" to the survival of the species would remain subject to the consultation provisions of section 7(a)(2) of the Act.

The flexibility gained by establishment of an experimental population through section 10(j) would be of little value if a designation of critical habitat overlaps it. This is because Federal agencies would still be required to consult with us on any actions that may adversely affect critical habitat. In effect, the flexibility gained from section 10(j) would be rendered useless by the designation of critical habitat. In fact, section 10(j)(2)(C)(ii) of the Act states that critical habitat shall not be designated under the Act for any experimental population determined to be not essential to the continued existence of a species.

As mentioned above, the recovery strategy for the oyster mussel and Cumberlandian combshell outlined in the agency draft recovery plan requires the reestablishment/reintroduction of these two mussels into areas of their historic ranges. Because of their currently reduced and fragmented state, the mussels face enhanced threats and would never be able to repopulate these reaches naturally. We strongly believe that, in order to achieve recovery for these mussels, in accordance with the Service's Recovery Plan we would need the flexibility provided for in section 10(j) of the Act to help ensure the success of reestablishing these mussels in the specified areas of the lower French Broad, Rockcastle, and Holston Rivers which have been identified as having medium to high recovery potential. Use of section 10(j) is meant to encourage local cooperation through management flexibility. Nonessential experimental populations in certain areas are often our only mechanism to achieve recovery. We believe it is crucial for recovery of these two mussels that we have the support of the public in these three river reaches when

we move forward in the reintroduction efforts required in our agency draft recovery plan. However, critical habitat is often viewed negatively by the public since it is not well understood and there are many misconceptions about how it affects private landowners (Patlis 2001).

The specified areas in the lower Holston and French Broad Rivers represent years of planning and coordination between the Service, the State of Tennessee, TVA, and others to recover aquatic species and their habitat. We have cooperation and support from the State of Tennessee, TVA, and others in considering these areas as NEP. We continue to have extensive cooperation and support from these stakeholders in working towards aquatic species recovery in general in the Tennessee and Cumberland River Basins. Due to work done in large part by these agencies as well as by landowners, municipalities, and other stakeholders, we have collectively improved the water and habitat quality in these areas to the point where there are suitable reintroduction sites in certain areas for a host of listed species, including 1 federally listed, endangered, aquatic snail, 5 federally listed fishes (2 endangered and 3 threatened), and 14 additional federally listed, endangered, freshwater mussels. Designating these 2 reaches as critical habitat could jeopardize the establishment and success of the reintroductions as well as this cooperative effort that we are considering for the Cumberlandian combshell and oyster mussel as well as these other species to achieve their recovery criteria.

Similarly, the Rockcastle River contains a robust mussel community (Thompson 1985; Cicerello 1992) second only to the Big South Fork as the best remaining representation of preimpoundment (before the water was dammed) mussel fauna in the Cumberland River System (R.R. Cicerello, KSNPC, pers. comm. 2003). However, the oyster mussel and Cumberlandian combshell no longer occur in this river. We have worked for years with the Daniel Boone National Forest to protect the water quality and unique mussel community found in the Rockcastle River. Designating unoccupied critical habitat in the Rockcastle River would be viewed as an unnecessary regulatory intrusion into a cooperative relationship between our agencies. It would also likely be viewed negatively by local stakeholders, whose very support we need to effect the recovery of these rare mussel taxa by reintroducing them into suitable historic habitat found there.

In summary, we believe that the benefits of excluding the lower French Broad, Rockcastle, and Holston Rivers areas outweigh the benefits of their inclusion as critical habitat. Including these areas may result in some benefit through additional consultations with Federal agencies whose activities may affect critical habitat. However, overall this benefit is minimal because of the presence of other listed species with similar habitat requirements which are, and will continue to be, considered in consultation. A proposed designation in these two river reaches would also provide little additional informational benefit to the public, State and governmental agencies, and others. On the other hand, an exclusion will greatly benefit the overall recovery of the oyster mussel and Cumberlandian combshell (as well as 20 other federally listed species) by allowing us to use the flexibility and greater public acceptance of section 10(j) of the Act to reestablish the oyster mussel and Cumberlandian combshell in other portions of their historic range where they no longer occur. We also believe that the exclusion of the specified areas in the lower French Broad, lower Holston, and Rockcastle Rivers will not lead to the extinction of these two mussels based on their occurrences in other river and stream stretches, and the cooperative partnerships in place for establishing these NEPs. We seek comment on our preliminary determination to exclude these areas from critical habitat.

#### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

#### Public Hearings

The Act provides for one or more public hearings on this proposal, if