

to identify. Information is available for us to refine the 300-foot lateral width including National Wetlands Inventory data. The Rio Grande Compact Engineer Advisor from the State of Colorado submitted comments in October 2001 that suggested we use the "daily" Elephant Butte Reservoir water line as the lower terminus of critical habitat. Comments submitted in October 2002 suggested that the boundary as proposed would change from day to day and create total chaos in the operation of Elephant Butte Dam and Reservoir.

*Our Response:* The critical habitat designation includes the middle Rio Grande from Cochiti Dam to the utility line crossing the Rio Grande with UTM coordinates of UTM Zone 13: 311474 E, 3719722 N, just east of the Bosque Well demarcated on USGS Paraje Well 7.5 minute quadrangle (1980), Socorro County, NM. The designation also includes the tributary Jemez River from Jemez Canyon Dam to the upstream boundary of Santa Ana Pueblo, which is not included. (see the "Regulation Promulgation" section of this rule for exact descriptions of boundaries of critical habitat). We believe that with the revision to the downstream terminus of critical habitat, the boundary should be clear. Moreover, this final rule describes in the greatest detail possible the primary constituent elements important to the silvery minnow. In addition, please see responses to comments 26 and 45 for information related to this particular issue.

In our proposal and this final rule, we indicate our belief that the primary constituent elements provide for a flow regime that allows for short periods of low or no flow. In the proposal, we also highlighted the difficulties in describing the existing conditions of areas with low or no flow and solicited further information to refine the primary constituent elements and how they relate to the existing conditions (e.g., flow regime). We noted that flow requirements are dynamic and change during the year and among years. The status of the species also contributes to specific flow requirements at specific areas or stream gages, for example. Consultation under section 7, rather than regulation, is the proper procedure for outlining specific flow requirements.

During the comment period we requested, but did not receive, any information that would either enable us to further refine the primary constituent elements or conduct further analysis on whether particular reaches contained or lacked one or more primary constituent elements. Further, while we welcome and encourage additional studies on the biological requirements of the silvery

minnow, we believe the best available information has been used in defining the primary constituent elements necessary for the species' conservation. Nevertheless, we recognize that not all of the developed lands area within the boundaries of the designation will contain the habitat components essential to the conservation of the silvery minnow. For this reason, some developed lands are excluded by definition (see the "Regulation Promulgation" section below).

We considered National Wetlands Inventory data and other sources of information to refine the lateral width of the designation. Because of the dynamic nature of the Rio Grande and the corresponding ephemeral nature of wetland and riparian vegetation adjacent to the river (Middle Rio Grande Biological Interagency Team 1993; Taylor *et al.* 1999; BOR 2001c), we believe that using National Wetlands Inventory or other data to select the lateral width of critical habitat would not be consistent with our regulations (50 CFR 424.12(c)), which do not allow us to use ephemeral reference points. Consequently, we are designating critical habitat using specific limits and reference points.

(35) *Comment:* Depletion of stored water in reservoirs by supplemental water releases to benefit critical habitat will affect BOR's ability to deliver water to the MRGCD.

*Our Response:* According to BOR (2001c), the voluntary supplemental water program for the silvery minnow is not expected to have an adverse affect on the MRGCD. Thus, it is the Service's understanding that BOR's voluntary supplemental water program will be consistent with existing laws and contracts to ensure delivery of water to the MRGCD and to the six middle Rio Grande Pueblos (Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta) (BOR 2001c). Moreover, section 7 consultation has been occurring regardless of critical habitat designation because of the Federal listing alone. We note that despite one of the State's worst droughts in 50 years, "the Rio Grande helped some farms grow bumper crops of alfalfa \* \* \*" (Albuquerque Tribune December 16, 2002).

(36) *Comment:* One commenter believes that the proposed rule should be incontrovertible, but it is currently laced with supposition and conjecture, and it contains no conclusive data.

*Our Response:* As required by section 4(b)(2), the Service used the best available scientific and commercial data. In accordance with our policy published on July 1, 1994 (59 FR

34270), we sent the proposed rule to five peer reviewers to solicit their expert opinions. The purpose of such review is to ensure listing decisions are based on scientifically sound data, assumptions, and analyses. We received only one reply from our peer reviewers. The peer reviewer concluded that our proposal was scientifically sound.

(37) *Comment:* It does not appear that your EIS analyzed evaporation losses from restoration activities.

*Our Response:* This issue is discussed in the EIS. We concluded that the extent to which riverine and riparian restoration results in a net gain or net loss to the water supply depends on the design of the project.

(38) *Comment:* Several commenters suggested that the San Acacia reach be excluded from the designation because of economic or other relevant impacts.

*Our Response:* This is described as alternative D in the EIS. The analysis in the EIS found a lower likelihood that habitat essential for the conservation of the silvery minnow would be preserved if this reach were excluded from the critical habitat designation. We also conclude in this final rule that this area is essential to the conservation of the silvery minnow because it likely serves as connecting corridors for fish movements between areas of sufficient flowing water (e.g., see Deacon and Minckley 1974; Eberle *et al.* 1993). Moreover, this reach is important because the additional loss of any habitat that is currently occupied could increase the likelihood of extinction (Hoagstrom and Brooks 2000, Service 1999).

(39) *Comment:* Several commenters noted that the San Acacia reach has historically experienced prolonged periods of low or no flow, but the construction of reservoirs has actually benefitted the silvery minnow by allowing runoff to extend over a longer time period than was previously possible.

*Our Response:* The construction and operation of reservoir dams has changed the natural flow regime of the river and thus may affect the survival of the Rio Grande silvery minnow. In the proposed rule, we acknowledged the historic periods of drying in the middle Rio Grande and suggested that reservoirs can facilitate management of water on the Rio Grande to avoid prolonged periods of low or no flow and provide sufficient flowing water during critical time periods, such as from May to October (Service 2001a, 2001b). Reservoirs and diversion dams have fragmented the middle Rio Grande and prevented silvery minnows from movement upstream after hatching