

(Service 2001b; Dudley and Platania 2001; 2002a). Still, availability of flow is likely not the only factor affecting the silvery minnow (July 20, 1994; 59 FR 36988).

(40) *Comment*: The designation of critical habitat within the middle Rio Grande will Federalize the water administration and usurp the powers of TX, NM, and Colorado to regulate their water.

Our Response: Designation of critical habitat will not affect the authorities of TX, NM, and Colorado to regulate their water. In fact, critical habitat applies only to actions carried out, funded, or permitted by the Federal Government.

(41) *Comment*: The proposed rule suggests that future section 7 consultations regarding the critical habitat designation will be analyzed on a case-by-case basis and can provide for flexibility. However, one commenter was concerned that current consultations will affect the outcome of future consultations, resulting in overly restrictive measures.

Our Response: Our regulations require that we use the best scientific and commercial data available for consultations (50 CFR 402.14(d)). This information is used to update and analyze the effects of past and ongoing human and natural activities or events that have led up to the current status of the species and its habitat. One of the benefits of formal consultation is that we are required to provide an up-to-date biological status of the species or critical habitat (*i.e.*, environmental baseline), which is used to evaluate a proposed action. Consequently, the status of the species or critical habitat influences the outcome of a particular consultation more than when that consultation is conducted.

(42) *Comment*: If the bankfull width of the middle Rio Grande increases, would the additional area be considered critical habitat? It is not clear which lands within the critical habitat boundary are considered critical habitat.

Our Response: Lands are considered critical habitat when they are within critical habitat boundaries, contain one or more of the primary constituent elements, and require special management and protection. In this case those boundaries are based in part on the bankfull stage, which can easily be determined by visual or physical indicators including: the top of the highest depositional features (*e.g.*, point bars), staining of rocks, exposed root hairs, and other features (Rosgen 1996). Federal actions conducted in areas within or outside the boundary of the mapped critical habitat that do not contain any of the primary constituent

elements would not trigger a section 7 consultation unless those activities may affect the silvery minnow or the primary constituent elements in the adjacent critical habitat (*see* "Effect of Critical Habitat Designation" section).

(43) *Comment*: The Service cannot substitute the proposed conservation strategy for critical habitat; critical habitat triggers section 7 consultation, whereas the proposed conservation strategy offers no protection to the silvery minnow.

Our Response: We believe that the benefits of excluding the middle Pecos River and lower Rio Grande outweigh the benefits of their inclusion as critical habitat (*see* "Exclusions Under Section 4(b)(2) of the Act" section below). We conclude that the exclusion of these areas is consistent with the Recovery Plan (Service 1999) and consistent with our regulations (50 CFR 424.19), and that the added management flexibility provided under section 10(j) will be beneficial to the conservation of the silvery minnow. Additionally, the adverse modification standard serves to preserve the status quo of critical habitat during section 7 consultations. But critical habitat, by itself, does not help to reestablish minnows into areas where they have been extirpated—a primary goal of the Recovery Plan for the minnow.

(44) *Comment*: If the lateral boundary of critical habitat extends from the bankfull stage, how does one determine the point of bankfull stage when the Rio Grande is not at this stage?

Our Response: Bankfull stage is the point at which the river overflows its lowest bank, which is the elevation at which flow can be carried by the main channel before spilling over into the floodplain. The bankfull stage is not defined by water, and can easily be determined by visual or physical indicators including: the top of the highest depositional features (*e.g.*, point bars), staining of rocks, exposed root hairs, and other features (Rosgen 1996).

(45) *Comment*: The designation for the silvery minnow and related documents are flawed and inaccurate, contain numerous errors, and make improper assumptions.

Our Response: As previously discussed, section 4(b)(2) of the Act and 50 CFR 424.19 require us to consider the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We published our proposed designation of critical habitat for the silvery minnow in the **Federal Register** on June 6, 2002 (67 FR 39206). The draft EIS and draft economic analysis of the proposed critical habitat designation were made

available for review and public comment concurrently with the proposed rule during the public comment period. Based on the public comments received during the open comment period, a final EIS and final Economic Analysis of critical habitat for the silvery minnow were completed. These documents and this final rule addressed or took into consideration information and concerns raised through the comment period. Please refer to the final EIS and final Economic Analysis. Copies of both the draft and final EIS and the draft and final economic analysis are in the supporting record for this rulemaking and can be inspected or obtained by contacting the New Mexico Ecological Services Field Office (refer to the **ADDRESSES** section of this rule).

(46) *Comment*: The draft economic analysis is not a full analysis. It is still an incremental analysis, and it is not in compliance with the recent Tenth Circuit Court ruling on the endangered southwestern willow flycatcher (*Empidonax traillii extimus*) critical habitat.

Our Response: The economic analysis is a full analysis. Our standard best practice in economic analyses is to apply an approach that measures costs, benefits, and other impacts arising from a regulatory action against a baseline scenario of the world without the regulation. Guidelines on economic analyses, developed in accordance with the recommendations set forth in Executive Order 12866 ("Regulatory Planning and Review"), for both the Office of Management and Budget and the Department of the Interior, note the appropriateness of the approach: "The baseline is the state of the world that would exist without the proposed action. All costs and benefits that are included in the analysis should be incremental with respect to this baseline." When viewed in this way, the economic impacts of critical habitat designation involve evaluating the "without critical habitat" baseline versus the "with critical habitat" scenario. Impacts of a designation equal the difference, or the increment, between these two scenarios. Measured differences between the baseline and the scenario in which critical habitat is designated may include (but are not limited to) changes in land use, environmental quality, property values, or time and effort expended on consultations and other activities by Federal landowners, Federal action agencies, and, in some instances, State and local governments and/or private third parties. Incremental changes may