

March 26, 2001 to April 5, 2001. The extension was requested to allow parties filing reply comments in this proceeding more time to evaluate and respond to the voluminous comments filed by other parties.

**DATES:** Reply comments are due on or before April 5, 2001.

**ADDRESSES:** Federal Communications Commission, 445 12th Street, SW., Washington, DC 20054.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Burton, Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, at (202) 418-0680.

**SUPPLEMENTARY INFORMATION:**

1. This is a summary of the Commission's *Order Extending Reply Comment Period (Order)*, adopted, March 23, 2001, and released, March 23, 2001. The full text of the *Order* is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, SW., Washington, DC. The complete text may be purchased from the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, NW., Washington, DC 20037.

2. On March 21, 2001, DIRECTV, Inc. and EchoStar Satellite Corporation jointly filed a motion, pursuant to § 1.46 of the Commission's Rules, to extend the period for filing reply comments to the *Further Notice of Proposed Rule Making*, 66 FR 7607, in the above-captioned proceeding from March 26, 2001 to April 26, 2001. In response, Northpoint Technology, Ltd. and Broadwave USA, Inc. filed an Opposition to Motion for Extension of Time on March 23, 2001. For the reasons discussed below, we extend the reply comment period from March 26, 2001 to Thursday, April 5, 2001.

3. The Motion requests an extension of time to address the "voluminous comments" filed by a number of parties. It argues that no prejudice will result from the grant of the extension because there are other matters that need to be performed by third parties before the Commission can resolve the outstanding issues in this proceeding. The Opposition, on the other hand, contends that it is in the public interest to resolve this matter on a more expedited basis and that a thirty-day extension is simply not appropriate under such circumstances.

4. The Commission's general policy is that extensions of time are not routinely granted. Moreover, the Commission specifically disfavors requests for extensions of time filed on such short notice. Nevertheless, we still consider

and, in certain instances, grant limited requests for extensions of time where we find that the public interest would be best served by a more complete discussion of the matters pending before the Commission. We believe that it is in the public interest to decide this matter with the most complete and well-developed record possible. After weighing the parties' arguments, we find that a moderate extension of time is appropriate under the circumstances presented. We believe that a moderate extension of time appropriately balances the interests of commenting parties without unreasonably delaying the resolution of the proceeding. Therefore, we will grant a ten-day extension of time for the filing of reply comments. As a result, reply comments must be filed on or before April 5, 2001.

5. It is hereby ordered that pursuant to Section 1.46 of the Commission's Rules, 47 CFR 1.46, the request of DIRECTV, Inc. and EchoStar Satellite Corporation to extend the deadline for filing reply comments in this proceeding, filed March 21, 2001, is granted in part and denied in part to the extent indicated.

6. This action is taken under delegated authority pursuant to §§ 0.131 and 0.331 of the Commission's Rules, 47 CFR 0.131, 0.331.

**List of Subjects in 47 CFR Part 101**

Communications equipment, Radio.

Federal Communications Commission.

**Kathleen O'Brien Ham,**

*Deputy Chief, Wireless Telecommunications Bureau.*

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**RIN 1018-AH32**

**Endangered and Threatened Wildlife and Plants; Determination of Whether Designation of Critical Habitat Is Prudent for the Rock Gnome Lichen**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of proposed finding.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), have reconsidered our findings concerning whether designating critical habitat for the rock gnome lichen (*Gymnoderma lineare*) would be prudent. The rock gnome lichen was listed as an

endangered species under the Endangered Species Act of 1973, as amended (Act), on January 18, 1995. At the time the plant was listed, we determined that designation of critical habitat was not prudent because designation would increase the degree of threat to the species and/or would not benefit the species.

We repropose that the designation of critical habitat is not prudent for the rock gnome lichen, because it would likely increase the threat from collection, vandalism, or habitat degradation and destruction, both direct and inadvertent.

We solicit data and comments from the public on all aspects of this proposed finding. We may revise this proposed finding to incorporate or address comments and new information received during the comment period.

**DATES:** We will consider comments received by June 4, 2001.

**ADDRESSES:** If you wish to comment, you may submit your comments by any one of several methods:

1. You may submit written comments and information to the State Supervisor, Asheville Field Office, U.S. Fish and Wildlife Service, 160 Zillico Street, Asheville, North Carolina 28801.

2. You may hand-deliver written comments to our Asheville Field Office, at the above address or fax your comments to 828/258-5330.

3. You may send comments by electronic mail (e-mail) to nora\_murdock@fws.gov. For directions on how to submit electronic filing of comments, see the "Public Comments Solicited" section.

Comments and materials received, as well as supporting documentation used in preparation of this proposed finding, will be available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Nora A. Murdock, Fish and Wildlife Biologist, (828)258-3939.

**SUPPLEMENTARY INFORMATION:**

**Background**

*Taxonomy and Description*

*Gymnoderma lineare*, first described by Evans (1947) as *Cladonia linearis* from material collected in Tennessee, is a squamulose lichen in the reindeer moss family. This species is the only member of its genus occurring in North America (Yoshimura and Sharp 1968). *Gymnoderma* was considered a monotypic genus for over a century, until its revision by Yoshimura and Sharp (1968). These authors reclassified Evans' (1947) *Cladonia linearis* as

*Gymnoderma lineare* on the basis of its short and solid podetia (hollow upright structures) that lack symbiotic algae (algae that live cooperatively with a fungus). *Gymnoderma lineare* occurs in rather dense colonies of narrow straps (squamules). The only similar lichens are the squamulose species of the genus *Cladonia*. *Gymnoderma lineare* has terminal portions of the strap-like individual lobes that are blue-grey on the upper surface and generally shiny-white on the lower surface; near the base they grade to black (unlike squamulose *Cladonia*, which are never blackened toward the base) (Weakley 1988, Hale 1979). Hale's (1979) description of the species reads as follows: "Squamules dark greenish mineral grey; lower surface white to brownish toward the tips, weakly corticated; podetia lacking but small clustered apothecia common on low tips." Weakley (1988) further describes the species as having squamules about 1 millimeter (mm) (0.04 inches (in)) across near the tip, tapering to the blackened base, sparingly branched, and generally about 1 to 2 centimeters (cm) (0.39 to 0.79 in) long (though they can be longer or shorter, depending upon environmental factors). The squamules are nearly parallel to the rock surface, but the tips curl away from the rock, approaching or reaching a perpendicular orientation to the rock surface. The fruiting bodies (apothecia) are borne at the tips of the squamules and are black (contrasting to the brown or red apothecia of *Cladonia* spp.) (Weakley 1988). The apothecia are borne singly or in clusters, usually at the tips of the squamules but occasionally along the sides; these have been found from July through September (Evans 1947, North Carolina Natural Heritage Program records 1991). The apothecia are either sessile or borne on short podetia 1 to 2 mm (0.04 to 0.08 in) in height, and the largest of these have a diameter of about 1 mm (0.04 in), with most being much smaller. The apothecia are cylindrical in shape and radial in symmetry (Evans 1947). The primary means of propagation of this lichen appears to be asexual, with colonies spreading clonally.

#### *Distribution, Habitat, and Life History*

*Gymnoderma lineare* (Evans) Yoshimura and Sharp is endemic (native to a particular region) to the Southern Appalachian Mountains of North Carolina, Tennessee, South Carolina, and Georgia, and occurs only in areas of high humidity, either on high-elevation cliffs, where it is frequently bathed in fog, or in deep river gorges at lower elevations. It is

primarily limited to vertical rock faces, where seepage water from forest soils above flows at (and only at) very wet times, and large stream side boulders, where it receives a moderate amount of light but not high-intensity solar radiation. It is almost always found growing with the moss *Andreaea* in these vertical intermittent seeps. This association makes it rather easy to search for, due to the distinctive reddish-brown color of *Andreaea* that can be observed from a considerable distance (Weakley 1988). Most populations occur above 1,524 meters (5,000 feet) elevation. In Tennessee, it is apparently limited to the Great Smoky Mountains and one other mountain on the North Carolina-Tennessee state line. Very little specific information is known on the life history and population biology of the rock gnome lichen. Other common species found growing with or near this species include *Huperzia selago*, *Stereocaulon* sp., *Scirpus cespitosus*, *Carex misera*, *Rhododendron* spp., *Saxifraga michauxii*, *Krigia montana*, *Heuchera villosa*, *Geum radiatum*, and sometimes *Juncus trifidus*. The high-elevation coniferous forests adjacent to the rock outcrops and cliffs most often occupied by the species are dominated by red spruce (*Picea rubens*) and Fraser fir (*Abies fraseri*).

Forty populations of *Gymnoderma lineare* have been reported historically; thirty-five remain in existence. The remaining populations are in Mitchell (two), Jackson (five), Yancey (four), Swain (one), Transylvania (four), Buncombe (four), Avery (two), Ashe (two), Haywood (one) and Rutherford (one) Counties, North Carolina; Greenville County (one), South Carolina; Rabun County (one), Georgia; and Sevier (seven) and Carter (part of this population is on the State line with Mitchell County, North Carolina) counties, Tennessee.

#### *Threats*

Five populations of rock gnome lichen are known to have been completely extirpated. The reasons for the disappearance of the species at most of these sites are undocumented; however, one population is believed to have been destroyed by highway construction. The explanation for the disappearance of the other four is a mystery. Among the other populations that still survive, one has been vandalized, and portions of two others are known to have been illegally collected. Although these acts of vandalism and collection did not completely eliminate the species at those latter sites, they did seriously

reduce the population sizes, and may well have adversely affected the species' chances of long-term survival at those places. Most of the formerly occupied sites are subjected to heavy recreational use by hikers, climbers, and sightseers, which can be highly destructive to the fragile plant communities that occupy vertical rock faces.

The majority of the high-elevation spruce-fir forests of the Southeast have suffered extensive changes and declines in extent and/or vigor during the past century as a result of several factors, including site deterioration due to the logging and burning practices of the early 1900's, possibly atmospheric pollution, exposure shock, and other factors not yet fully understood (Dull et al., 1988; White 1984). However, the greatest threat to the high-elevation Fraser fir forests, by far, is infestation by the balsam wooly adelgid (*Adelges picea* (Ratzeburg) (Homoptera, Adelgidae)). The balsam wooly adelgid is a nonnative insect pest believed to have been introduced into the Northeastern United States from Europe around 1900 (Eagar 1984). The adelgid was first detected in North Carolina on Mount Mitchell in 1957 (Hoffard et al., 1995), though it may have been established at that site as early as 1940. From Mount Mitchell, the adelgid spread to Fraser fir stands throughout the Southern Appalachians (Eagar 1984). All ages of fir trees are attacked by the adelgid, but effects are generally not lethal until the trees reach maturity, at around 30 years of age (Hoffard et al. 1995). Most mature Fraser firs are easily killed by the adelgid, with death occurring within 2 to 7 years of the initial infestation (Eagar 1984). The death of the fir trees and the resultant opening of the forest canopy causes the remaining trees (including the red spruce) to be more susceptible to wind and other storm damage. The adelgid is transported and spread primarily by the wind but may also be spread by contaminated nursery stock; on the fur or feathers of animals and birds; or by humans on contaminated clothes, equipment, or vehicles (Eagar 1984). All efforts to control the spread of the adelgid have failed thus far. The death of the forests above the rock faces occupied by the rock gnome lichen has resulted in locally drastic changes in microclimate, including desiccation and increased temperatures which can prove lethal to this species.

The continued existence of this species is threatened by trampling and associated soil erosion and compaction, other forms of habitat disturbance due to heavy recreational use of some inhabited areas by hikers, climbers, and

sightseers, as well as by development for commercial recreational facilities and residential purposes. It is also threatened by collectors and vandals, and is potentially threatened by logging, and possibly by air pollution. In addition, the extremely limited and restricted range of each of the rock gnome lichen populations makes them extremely vulnerable to extirpation from a single event. Currently, no one has succeeded in propagating the rock gnome lichen.

Only 7 of the remaining 35 populations cover an area larger than 2 square meters (m<sup>2</sup>) (2.4 square yards (yd<sup>2</sup>). Most are 1 m<sup>2</sup> (9 square feet (ft<sup>2</sup>) or less in size. It is unknown what constitutes a genetic individual in this species, and it is possible that each of these small colonies or patches consists of only a single clone (Weakley 1988). Over the past decade several of the currently extant populations have undergone significant declines (Paula DePriest, Smithsonian Institution, personal communication, 1992; Karin Heiman, Environmental Consultant, personal communication, 1992), some within as little as 1 year (Alan Smith, Environmental Consultant, personal communication, 1992). Although most of the remaining populations are in public ownership, they continue to be impacted by collectors, recreational use, and unknown environmental factors.

In a recent study funded cooperatively by the Service and the U.S. Forest Service, experts in lichenology and air pollution attempted to determine if air pollution constituted a significant threat to the rock gnome lichen, as it does to many lichen species. The study could not conclusively link documented declines with atmospheric pollutants. Heavy metal concentrations did not exceed toxic levels. However, the lowest sulfur concentrations were measured in the colonies having the best health status, and the highest in colonies with the worst health conditions. The authors of the study warned that future increases in sulfur compound deposition might cause damage to rock gnome lichen, especially where it occurs on substrates with low buffering capacity. The results of the study were further complicated by the discovery of parasitic algae and lichens that were found to be attacking the rock gnome lichen in several populations. The relationship between these parasitic organisms and environmental factors such as sedimentation, and accumulation of sulfur and phosphorus requires further study (Martin *et al* 1996).

### Previous Federal Actions

Federal Government actions on *Gymnoderma lineare* began with the 1990 publication in the **Federal Register** of a revised notice of review of plant taxa for listing as endangered or threatened species (55 FR 6184); *Gymnoderma lineare* was included in that notice as a category 2 species. Prior to 1996, a category 2 species was one that we were considering for possible addition to the Federal List of Endangered and Threatened Wildlife and Plants, but for which conclusive data on biological vulnerability and threats were not available to support a proposed rule. We discontinued designation of category 2 species in the February 28, 1996, Notice of Review (61 FR 7956).

Subsequent to the 1990 notice, the Service received additional information from the North Carolina Natural Heritage Program (Alan Weakley, North Carolina Natural Heritage Program, personal communication, 1991) and the Smithsonian Institution (Paula DePriest, personal communication, 1992); this information and additional field data gathered by us, the North Carolina Natural Heritage Program, and the National Park Service (Keith Langdon and Janet Rock, Great Smoky Mountains National Park, personal communication, 1992; Bambi Teague, Blue Ridge Parkway, personal communication, 1991) indicated that the addition of *Gymnoderma lineare* to the Federal Candidate List of endangered or threatened plants was warranted. A candidate species is a species for which we have on file sufficient information to propose it for protection under the Act.

The Service approved this species for elevation to category 1 status on August 30, 1993, and proposed it for listing as endangered on December 28, 1993 (58 FR 68623). The proposal provided information on the species' range, biology, status, and threats to its continued existence. The proposal included a proposed determination that designation of critical habitat was not prudent for the species because such designation would not be beneficial and could further threaten the rock gnome lichen. Through associated notifications, we invited comments on the proposal and factual reports or information that might contribute to the development of a final rule. We contacted and requested comments from appropriate Federal and State agencies, county governments, scientific organizations, individuals knowledgeable about the species or its habitat, and other interested parties. We published legal notices, which invited

public comment, in newspapers covering the range of the rock gnome lichen. We received 15 written comments. Eleven of these expressed strong support for the proposal, as presented, without critical habitat. One commenter presented additional information without stating a position. One additional respondent took no position on the proposal but expressed a negative view toward the potential designation of critical habitat. Two respondents opposed the proposal: one stated no reason for opposition; the other expressed the opinion that logging was not a potential threat to the lichen and that extinction is a natural process. One of those on record as supporting the proposal with no critical habitat designation was the Southern Appalachian Biodiversity Project (plaintiff in the current settlement discussed below against the Service for non-designation of critical habitat for this species).

Following our review of all the comments and information received throughout the listing process, by final rule (60 FR 3557) dated January 18, 1995, we listed the rock gnome lichen as endangered. We addressed all the comments received throughout the listing process and/or incorporated changes into the final rule as appropriate. That decision included a determination that the designation of critical habitat was not prudent for the rock gnome lichen because, after a review of all the available information, we determined that such designation would not be beneficial to the species and that designation of critical habitat could further threaten the lichen (see "Prudency Determination" section).

On June 30, 1999, the Southern Appalachian Biodiversity Project and the Foundation for Global Sustainability filed a lawsuit in United States District Court for the District of Columbia against the Service, the Director of the Service, and the Secretary of the Department of the Interior, challenging the not prudent critical habitat determinations for four species in North Carolina—the spruce-fir moss spider (*Microhexura montivaga*), Appalachian elktoe (*Alasmidonta raveneliana*), Carolina heelsplitter (*Lasmigona decorata*), and rock gnome lichen. On February 29, 2000, the U.S. Department of Justice entered into a settlement agreement with the plaintiffs in which we agreed to reexamine our prudency determination for the rock gnome lichen and submit a new proposed prudency determination to the **Federal Register**, by April 1, 2001. If prudent, we also agreed to submit by that same date a new proposed critical habitat

determination. If, upon consideration of all available information and comments, we determine that designating critical habitat is not prudent for the rock gnome lichen, we have agreed to submit a final notice of that finding to the **Federal Register** by October 1, 2001. If we determine that designation of critical habitat is prudent for the rock gnome lichen, we have agreed to send a final rule of this finding to the **Federal Register** by January 1, 2002.

This proposed finding is the product of our reexamination of our prudency determination for the rock gnome lichen and reflects our interpretation of the recent judicial opinions on critical habitat designation and the standards placed on us for making a "not prudent" determination. If additional information becomes available on the species' biology, distribution, and threats, we may reevaluate this proposed finding.

#### Prudency Determination

Section 4(a)(3) of the Act and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time a species is determined to be endangered or threatened. Regulations under 50 CFR 424.12(a)(1) state that designation of critical habitat is not prudent when one or both of the following situations exist—(1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (2) such designation of critical habitat would not be beneficial to the species. In our January 18, 1995, final rule, we determined that both situations applied to the rock gnome lichen.

The regulations that provide protection for critical habitat come into play through section 7 of the Act. Requirements under section 7 of the Act apply only to Federal actions and activities. They require Federal agencies to ensure, in consultation with us, that activities they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat. Regulations for the implementation of section 7 of the Act (50 CFR 402.2) provide for both a "jeopardy" standard and an "adverse modification or destruction of critical habitat" standard.

Because of the extremely restricted range and limited amount of suitable habitat available to the rock gnome lichen, we determined in the January 18, 1995, final rule that any action that would likely result in the destruction or

adverse modification of the species' habitat would also likely jeopardize the species' continued existence. Since Federal actions resulting in jeopardy are also prohibited by section 7, we determined that designation of critical habitat would not provide any additional protection benefitting the species beyond that provided by the jeopardy standard.

Further, we have documented evidence that collecting and other human disturbance have already detrimentally affected this species. Concern that the species would be over-collected by lichenologists led Mason Hale to state emphatically in his 1979 book, *How To Know the Lichens*, which is the standard reference for lichen identification for amateurs and professionals alike; "This [rock gnome lichen] is one of the most unusual endemic lichens in North America and should not be collected by individuals." Nevertheless, populations of rock gnome lichen have been decimated by scientific collectors. Paula DePriest (Smithsonian Institution, personal communication, 1992) observed that the type locality for rock gnome lichen was virtually wiped out by lichenologists who collected them during a field trip, in spite of the fact that this collection within a national park was not permitted. After the species was listed, another illegal collection occurred at a different location within a national park. Another population outside the park was vandalized for unknown reasons (the lichens were scraped off the rock to form graffiti). Illegal collection and/or vandalism is difficult to document, but is suspected as a possible cause for the precipitous declines in some of the other populations that are close to trails or roads. Some of these populations have been reduced in coverage by as much as 90 percent in a single year. A state park in South Carolina, upon discovering a small population of this species close to an existing trail, relocated the trail away from the rock face to deter potential collectors.

The National Park Service, which developed the recovery plan for this species in cooperation with the Service, requested that we remove any mention of particular mountains from the recovery plan because they feared that this would give enough information to knowledgeable collectors to allow them to find the lichen and collect it. Park Service personnel believe that divulging locations or producing maps of rock gnome lichen habitat would greatly compromise their ability to protect the species within the national parks where it occurs (K. Langdon, J. Rock, National

Park Service, personal communication, 1999).

Three internationally recognized lichen experts are on record as being opposed to making public the specific locations of rare lichens because of the danger from collectors (P. DePriest, Smithsonian Institution, personal communication, 2000; J. Dey, Illinois Wesleyan University, personal communication, 2000; J. Martin, EuroUniversity, Estonia, personal communication, 2000). Dr. Paula DePriest, Associate Curator in Charge of Lichen Collections at the National Museum of Natural History, Smithsonian Institution, emphasized that the Smithsonian deliberately deletes location data for rare lichens from its publically disseminated database. She further related several incidents of damaging collections of rare lichens in areas within the range of rock gnome lichen. In at least one instance, this collecting was done on a field trip led by professional lichenologists who had forewarned the participants that no collecting of rare species would be tolerated; the rarest species were collected anyway when the field trip leaders were not looking. Dr. Juri Martin, Rector of Estonia's EuroUniversity, further emphasized the danger of making public the locations of rare lichen species. In Estonia, as well as in Italy, Switzerland, and other European countries, databases with specific location data for rare lichen species are kept in guarded locations where only a few professionals have access to them. They are never made public because of the danger of collecting. Dr. Martin emphasized that in these countries, even though there are regulations prohibiting the collection of these rare species, those laws have been found to be ineffective; the only real protection for those lichens is the safeguarding of specific location data and maps. Nothing more specific than county or forest distribution is ever made public. Dr. Martin recommended that rock gnome lichen be included on the World Red List of Endangered Lichens. Dr. Jon Dey, eminent lichenologist at Illinois Wesleyan University, further emphasized that he believed it would be inadvisable to publish specific location data for endangered lichen species, since the general public and hobbyists could, as a result, inadvertently or even purposely damage them. He further stated his belief that, although it might be necessary to allow legitimate professionals access to a single closely monitored population for the purposes of observation and research, that even

scientists should not be able to collect endangered lichens from the wild.

The Great Smoky Mountains National Park has recently undertaken an All Taxa Biodiversity Inventory; in the process of this comprehensive survey, experts on different taxa from all over the world are being brought into this half-million acre park to inventory and document occurrences of all species within its boundaries. In the process of this ambitious inventory, several watersheds within the Park were identified by experts as having internationally significant concentrations of rare bryophytes and lichens, and the guest scientists petitioned the Park Service to formally designate these areas as lichen/bryophyte sanctuaries (K. Langdon, pers. com. 2000). The Park Service declined because of their fear of attracting collectors to the areas; not only collectors of rare species, but indiscriminate moss collectors who routinely ravage the Park and the adjacent National Forests for "log moss" to sell in mass quantities (truck loads have been confiscated from poachers in the Great Smokies) in the commercial florist trade.

Rock gnome lichen is extremely fragile and is easily scraped off its rocky substrate; denuded habitat is not recolonized quickly, if at all. Because this species occupies such limited areas (with most of the populations being less than a square meter in size), even a single person climbing on a rock face could cause significant damage to the species and its habitat that could lead to the extirpation of an entire population. Increased visits to population locations stimulated by critical habitat designation, even without deliberate collecting, could adversely affect the species due to the associated increase in trampling of its fragile habitat. We believe that the designation of critical habitat and the required public dissemination of maps and descriptions of occupied sites could result in the demise or severe diminishment of this species. The moss collectors or poachers (referred to above) that the Park Service is trying to combat have been caught leaving the Great Smoky Mountains National Park (Park) with dump truck loads full of moss and anything that looks like moss including lichens, liverworts, and other bryophytes. Many species of moss and lichens are superficially similar in appearance and are similarly decorative in floral arrangements. Earlier, we mentioned that the rock gnome lichen is almost always found growing with the moss *Andreaea*. These collectors or poachers are indiscriminate, stripping everything

moss-like from logs, rocks, and trees within entire coves and watersheds. This includes essentially anything they think can be sold in the commercial florist trade. The largest and best remaining populations of rock gnome lichen are located within the Great Smoky Mountains National Park, where they are more accessible and therefore more susceptible to intentional or inadvertent collection. Therefore, the Park Service has expressed concerns that attracting moss collectors to watersheds designated as sanctuaries and occupied by the endangered lichen could result in devastating incidental collection of the listed species.

The Park Service has expressed definite concerns about any plans to designate critical habitat for the rock gnome lichen because of the collection danger to this species' tiny, vulnerable populations. In fact, legislation has recently been enacted that gives the Park Service the authority to withhold from the public any specific locality data for endangered, threatened, rare, or commercially valuable resources within a park (Thomas Bill, Section 207, 16 U.S.C. 5937).

Given the very small size of most colonies and the slow growth rate of this species, extirpation by collecting, vandalism, and habitat degradation by curiosity seekers is a distinct possibility (Weakley 1988; personal observation). Many of the populations are easily accessible, being close to trails or roads, but they are currently unadvertised and therefore mostly unnoticed by the general public. Publicity could generate an increased demand and intensify collecting pressure, or facilitate opportunities for further vandalism. This species has already been subjected to excessive collecting by scientific collectors at several sites. Increased publicity and a provision of specific location information associated with critical habitat designation could result in increased collection from the remaining wild populations. Although taking of endangered plants from lands under Federal jurisdiction and reduction to possession is prohibited by the Act, these taking provisions are difficult to enforce. We believe publication of critical habitat descriptions would make rock gnome lichen more vulnerable to collectors and curiosity-seekers, and would increase enforcement problems for the U.S. Forest Service and the National Park Service. Also, the populations on private lands would be more vulnerable to taking, where they receive little or no protection under the Act.

Our fears of increased human threats to the species from publication of maps

of the occupied sites is based upon specific experience, not on conjecture. Another federally listed North Carolina mountain plant for which critical habitat was designated was severely impacted by collectors immediately after the maps were published. This collection happened even though this plant was not previously known to be desired by rare plant collectors and had never been offered for sale in commercial trade. Some of the collectors appeared in the local Forest Service district offices, with the critical habitat map from the local newspaper in their hands, asking directions to the site. Such incidents are extremely difficult to document. The only reason we were able to do so in this case was because, for this very rare and restricted plant, every individual was mapped. When plants vanished from our permanent plots, we were able to find the carefully covered excavations where they had been removed. Otherwise, we would have only observed a precipitous crash in the populations without knowing that the cause was directly attributable to collection apparently stimulated by publication of specific critical habitat maps.

Increased visits to population locations stimulated by critical habitat designation, even without collection of the species, could adversely affect rock gnome lichen due to the associated increase in trampling of the fragile habitat it occupies. This might not be as serious a concern in other parts of the country where there is relatively little recreational pressure, but the Great Smoky Mountains National Park has more visitors annually than any other park in the United States. Even if just a small percentage of those people visited the sites occupied by the lichen, the potential adverse effects to the species could be tremendous and irreparable.

Another concern for this species is the fact that, despite attempts by lichenologists and tissue culture experts, no one has been able to propagate rock gnome lichen. If populations are vandalized or collected to the point of extirpation, it is not possible to restore them. Similarly, restoration of devastated populations of other lichens has often not been successful (Science News, August 2000). We believe that anything that increases the chances of losing additional populations, such as publicizing locations of remaining sites, represents an unconscionable risk to the species' chance of survival and recovery.

In addition, we believe that designation would not provide significant benefits that would outweigh these increased risks. A majority of the

remaining populations are on public lands, primarily under the jurisdiction of the United States Forest Service and National Park Service. These agencies are cooperating with us to protect the species from trampling and inappropriate collection, as well as to monitor the effects of air pollution. We are also working with the North Carolina and Tennessee Heritage Programs, the North Carolina Plant Conservation Program, and The Nature Conservancy to determine protection priorities for the remaining populations. The Nature Conservancy has recently secured a conservation easement for one of the most significant privately owned sites. We, along with all of these agencies, work to inform the public about the lichen and its importance, while at the same time ensuring the protection of the species and its habitat from potential threats. Within the National Parks, there is no commercial logging. Occupied sites outside the Parks are almost exclusively on steep rock faces and cliffs where no federal projects are likely to occur. In cases where excessive degradation of the lichen's cliff habitat has resulted from recreational overuse, both the National Park Service and the U.S. Forest Service have acted to close those sensitive areas to the public. No greater protection would be afforded by critical habitat designation.

The Service has always recognized the value of habitat to the conservation of endangered and threatened species, and continues to work with other agencies and non-federal land managers to accomplish the most effective protection and management of lands critical to the survival of listed species. The Federal and State agencies and landowners involved in managing the habitat of this species have been informed of the species' locations and of the importance of protection. In addition, we are working with several private landowners of significant sites to protect the populations on their lands. Although we have not yet been able to definitively link population declines in rock gnome lichen to air pollution, we remain concerned that air quality may be an important factor for this species, as it is for many other lichens. The largest and best remaining populations of rock gnome lichen are within the Great Smoky Mountain National Park, which is designated by the Environmental Protection Agency as a Class I Air Quality Area, where no degradation of air quality is allowed. Therefore, designation of areas of the Park as critical habitat for this species would offer no additional protection of

the species from air quality problems if these are determined to be a critical factor for this species' continued existence.

For species like rock gnome lichen, that have extremely small populations (most are less than 1 m<sup>2</sup> [approx. 9 ft<sup>2</sup>]) and a very small, restricted range, the triggers for "jeopardy" and "adverse modification" of critical habitat under section 7 of the Act are essentially identical. Because the triggers for "jeopardy" and "destruction or adverse modification" of critical habitat both require that the Service find that a Federal action is likely to have an appreciable effect on both the survival and recovery of the species, we have determined that because of the precarious status of the species, the small size of the surviving populations, the restricted range of the species, and the limited amount of suitable habitat available to the species, any Federal action with the potential to trigger the standard for destruction or adverse modification of critical habitat would also jeopardize the species' continued existence (the jeopardy standard without critical habitat). Therefore, no additional protection would be provided to this species through designation of critical habitat that would not already be provided through the jeopardy standard. We acknowledge that critical habitat designation in some situations may provide some value to the species, for example, by identifying areas important for conservation. However for the rock gnome lichen, we have weighed the potential benefits of designating critical habitat against the significant risks of doing so, and find that the minor benefits of designating critical habitat do not outweigh the potential increased threats from collection, vandalism, and inadvertent habitat degradation caused by curiosity-seekers. Therefore, we propose that designation of critical habitat for the rock gnome lichen is not prudent.

#### **Secretarial Order 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities and the Endangered Species Act**

In accordance with the Presidential Memorandum of April 29, 1994, and Executive Order 13175, we are required to assess the effects of determinations on tribal land and tribal trust resources. We propose that designation of critical habitat for the rock gnome lichen is not prudent. Therefore, we do not anticipate any effects on tribal trust resources if this proposed finding is made final.

#### **Public Comments Solicited**

We intend that any final action resulting from this proposed finding will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, Native American tribes, the scientific community, industry, or any other interested party concerning this proposed finding. We particularly seek comments concerning whether designating critical habitat for the rock gnome lichen is prudent, and the possible risks and benefits of such designation.

Please submit comments as an ASCII file format and avoid the use of special characters and encryption. Please also include "Attn: [1018-AH32]" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Asheville Field Office (see **ADDRESSES** section).

Our practice is to make all comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

#### **Peer Review**

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed finding. The purpose of such review is to ensure that listing decisions are based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed finding 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 non-designation of critical habitat.

We will consider all comments and information received during the 60-day comment period on this proposed finding during preparation of a final finding. Accordingly, the final decision may differ from this proposed finding.

#### Clarity of the Rule

Executive Order 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this document easier to understand, including answers to questions such as the following: (1) Are the requirements in the document clearly stated? (2) Does the document contain unnecessary technical language or jargon that interferes with the clarity? (3) Does the format of the proposed finding (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the notice in the **SUPPLEMENTARY INFORMATION** section of the preamble helpful in understanding the notice? (5)

What else could we do to make the notice easier to understand?

Send a copy of any comments that concern how we could make this notice easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW, Washington, DC 20240. You may e-mail your comments to this address: Execsec@ios.doi.gov.

#### Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This proposed finding does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* This proposed finding will not impose new record-keeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

#### National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment or an Environmental Impact

Statement as defined by the National Environmental Policy Act of 1969 in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

#### References Cited

A complete list of all references cited in this proposed finding is available upon request from the Asheville Field Office (see **ADDRESSES** section).

#### Author

The primary author of this document is Nora Murdock (see **ADDRESSES** section).

Dated: March 29, 2001.

**Marshall P. Jones, Jr.,**

*Acting Director, U.S. Fish and Wildlife Service.*

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