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Meeting Information

Individuals who are unable to attend the meetings may submit written comments to the docket identified at the beginning of this notice.

Issued on: March 7, 2007.

John H. Hill,
Administrator.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AU76

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Catesbaea melanocarpa*

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period, notice of availability of draft economic analysis, and amended required determinations.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the proposed designation of critical habitat for the plant *Catesbaea melanocarpa* (no common name) and the availability of the draft economic analysis of the proposed designation of critical habitat under the Endangered Species Act of 1973, as amended (Act). The draft economic analysis identifies potential costs of approximately \$132,300 to \$441,000 over a 20-year period as a result of the proposed designation of critical habitat, including those costs coextensive with listing. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed rule and the associated draft economic analysis. If you previously submitted comments on the proposed rule, you need not resubmit them, because we have incorporated them into the public record and will fully considered them in preparation of our final rule.

DATES: We will accept public comments on this document and the proposed rule published at 71 FR 48883, Aug. 22, 2006 until April 13, 2007.

ADDRESSES: If you wish to comment, you may submit your comments and information concerning this proposal by any one of several methods:

1. Mail or hand-deliver to Edwin E. Muñiz, Field Supervisor, U.S. Fish and Wildlife Service, Caribbean Fish and Wildlife Office, Road 301 Km. 5.1, P.O. Box 491, Boquerón, PR 00622.
2. Send by electronic mail (e-mail) to marelisa_rivera@fws.gov. Please see the "Public Comments Solicited" section below for file format and other information about electronic filing.
3. Fax to 787-851-7440.
4. Submit comments on the Federal E-Rulemaking Portal at <http://www.regulations.gov>. Follow the instructions for submitting comments.

Comments and materials we receive, as well as supporting documentation we used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the Caribbean Fish and Wildlife Office at the above address.

FOR FURTHER INFORMATION CONTACT:

Marelisa Rivera, Caribbean Fish and Wildlife Office (see **ADDRESSES**); telephone, 787-851-7297, extension 231; facsimile, 787-851-7440. If you use a telecommunications device for the deaf (TDD), you may call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we hereby solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule and the draft economic analysis. We particularly seek comments concerning:

- (1) The reasons we should or should not determine any habitat to be critical habitat as provided by section 4 of the Act;
- (2) Specific information on the presence of *Catesbaea melanocarpa*, particularly: of the areas that were occupied at the time of listing and contain features that are essential for the conservation of the species, which areas we should include in the designations, and why; and, of the areas that were not occupied at listing, which are essential to the conservation of the species, and why;
- (3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat;

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities;

(5) Whether the draft economic analysis identifies all State and local costs attributable to the proposed critical habitat designation, and information on any costs that we may have inadvertently overlooked;

(6) Whether the draft economic analysis makes appropriate assumptions regarding current practices and likely regulatory changes imposed as a result of the designation of critical habitat;

(7) Whether the draft economic analysis correctly assesses the effect on regional costs associated with any land use controls that may derive from the designation of critical habitat;

(8) Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, and in particular, any impacts on small entities or families; and other information that would indicate that the designation of critical habitat would or would not have any impacts on small entities or families;

(9) Whether the draft economic analysis appropriately identifies all costs and benefits that could result from the designation;

(10) Whether we could improve or modify our approach to critical habitat designation in any way, to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments; and

(11) Whether the benefits of exclusion in any particular area outweigh the benefits of inclusion.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES**). Please submit comments electronically to marelisa_rivera@fws.gov. Please also include "Attn: *Catesbaea melanocarpa*" in your e-mail subject header, and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your electronic message, contact us directly by calling the Caribbean Fish and Wildlife Service Office at 787-851-7297.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their names and home addresses, etc., but if you wish us to consider withholding this information, you must state this prominently at the beginning of your comments. In

addition, you must present rationale for withholding this information. This rationale must demonstrate that disclosure would constitute a clearly unwarranted invasion of privacy. Unsupported assertions will not meet this burden. In the absence of exceptional, documentable circumstances, we will release this information. We will always make 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. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the Caribbean Fish and Wildlife Office (see **ADDRESSES**).

You may obtain copies of the proposed rule and draft economic analysis for critical habitat designation by mail from the Caribbean Fish and Wildlife Office at the address listed under **ADDRESSES** or on the Internet at <http://www.fws.gov/southeast>.

Our final designation of critical habitat will take into consideration all comments and any additional information we receive during both comment periods. On the basis of public comment on this analysis and on the critical habitat proposal, and the final economic analysis, we may, during the development of our final determination, find that areas we proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) (Act), or not appropriate for exclusion. An area may be excluded from critical habitat if we determine that the benefits of such exclusion outweigh the benefits of including a particular area as critical habitat, unless the failure to designate such area as critical habitat will result in the extinction of the species. We may exclude an area from designated critical habitat based on economic impacts, national security, or any other relevant impact.

Background

On August 22, 2006, we published a proposed rule to designate critical habitat for *Catesbaea melanocarpa* (71 FR 48883). We proposed to designate approximately 50 acres (ac) (20 hectares (ha)) in one unit located in Christiansted, St. Croix, U.S. Virgin Islands, as critical habitat for *C. melanocarpa*. We will submit for publication in the **Federal Register** a final critical habitat designation for *C. melanocarpa* on or before August 15, 2007.

Critical habitat is defined in section 3 of the Act as 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 essential to the conservation of the species and that may require special management considerations or protection, and 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. If we make our proposed rule final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions affecting areas we have designated as critical habitat must consult with us on the effects of their proposed actions, pursuant to section 7(a)(2) of the Act.

Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific data available, after taking into consideration the economic or any other relevant impact of specifying any particular area as critical habitat. Based on the August 22, 2006, proposed rule (71 FR 48883) to designate critical habitat for *Catesbaea melanocarpa*, we have prepared a draft economic analysis of the proposed critical habitat designation.

The draft economic analysis considers the potential economic effects of actions relating to the conservation of *Catesbaea melanocarpa*, including costs associated with sections 4, 7, and 10 of the Act, and including those attributable to designating critical habitat. It further considers the economic effects of protective measures taken as a result of other Federal, State, and local laws that aid habitat conservation for *C. melanocarpa* in the critical habitat area. The draft analysis considers both economic efficiency and distributional effects. In the case of habitat conservation, efficiency effects generally reflect the “opportunity costs” associated with the commitment of resources to comply with habitat protection measures (such as lost economic opportunities associated with restrictions on land use). This analysis also addresses how potential economic impacts are likely to be distributed, including an assessment of any local or regional impacts of habitat conservation and the potential effects of conservation activities on small entities and the energy industry. Decision-makers can

use this information to assess whether the effects of the designation might unduly burden a particular group or economic sector. Finally, this draft analysis looks retrospectively at costs incurred since the date we listed the species as endangered (64 FR 13116, March 17, 1999) and considers those costs that may occur in the 20 years following a designation of critical habitat.

The draft economic analysis estimates the foreseeable economic impacts of the proposed critical habitat designation on government agencies and private businesses and individuals. The draft economic analysis identifies potential costs of approximately \$132,300 to \$441,000 to the private landowners over a 20-year period as a result of the proposed designation of critical habitat, including those costs coextensive with listing. The analysis measures lost economic efficiency associated with residential and commercial development, and public projects and activities. Overall, the analysis does not anticipate a decrease in the amount of construction activity on St. Croix as a result of the proposed rule. As a result, we do not anticipate small developers and construction firms to be affected.

As stated earlier, we solicit data and comments from the public on this draft economic analysis, as well as on all aspects of the proposal. We may revise the proposal, or its supporting documents, to incorporate or address new information we receive during the comment period.

Required Determinations—Amended

In our August 22, 2006, proposed rule (71 FR 48883), we indicated that we would be deferring our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders was available in the draft economic analysis. Those data are now available for our use in making these determinations. In this notice, we are affirming the information contained in the proposed rule concerning Executive Order 13132 and Executive Order 12988; the Paperwork Reduction Act; and the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951). Based on the information made available to us in the draft economic analysis, we are amending our Required Determinations, as provided below, concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Order 13211, Executive Order 12630,

and the Unfunded Mandates Reform Act.

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. Based on our draft economic analysis of the proposed designation of critical habitat for *Catesbaea melanocarpa*, we estimate costs related to conservation activities for *C. melanocarpa* pursuant sections 4, 7, and 10 of the Act to range from \$132,300 to \$441,000 over a 20-year period. Therefore, based on our draft economic analysis, we do not anticipate that the proposed designation of critical habitat would result in an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget did not formally review the proposed rule or accompanying draft economic analysis.

Further, Executive Order 12866 directs Federal agencies promulgating regulations to evaluate regulatory alternatives (Office of Management and Budget, Circular A-4, September 17, 2003). Pursuant to Circular A-4, once an agency has determined that the Federal regulatory action is appropriate, the agency will need to consider alternative regulatory approaches. Since the determination of critical habitat is a statutory requirement under the Act, we must then evaluate alternative regulatory approaches, where feasible, when promulgating a designation of critical habitat.

In developing our designations of critical habitat, we consider economic impacts, impacts to national security, and other relevant impacts pursuant to section 4(b)(2) of the Act. Based on the discretion allowable under this provision, we may exclude any particular area from the designation of critical habitat providing that the benefits of such exclusion outweigh the benefits of specifying the area as critical habitat and that such exclusion would not result in the extinction of the species. We believe that the evaluation of the inclusion or exclusion of particular areas, or combination thereof, in a designation constitutes our regulatory alternative analysis.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare

and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. In our proposed rule, we withheld our determination of whether this designation would result in a significant effect as defined under SBREFA until we completed our draft economic analysis of the proposed designation so that we would have the factual basis for our determination.

According to the Small Business Administration (SBA), small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than \$5 million in annual sales, general and heavy construction businesses with less than \$27.5 million in annual business, special trade contractors doing less than \$11.5 million in annual business, and agricultural businesses with annual sales less than \$750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term significant economic impact is meant to apply to a typical small business firm's business operations.

To determine if the proposed designation of critical habitat for *C. melanocarpa* would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (such as residential and commercial development). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only affects activities conducted, funded,

permitted, or authorized by Federal agencies; non-Federal activities are not affected by the designation.

In our draft economic analysis of the proposed critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of *Catesbaea melanocarpa* and proposed designation of critical habitat. The property proposed for designation is managed by the Virgin Islands Title and Trust Company on behalf of several individual landowners. This analysis estimates that these landowners could lose from \$132,300 to \$441,000 over a 20-year period. However, private landowners are generally not considered to be small entities. Furthermore, this analysis does not anticipate a decrease in the amount of construction activity on St. Croix as a result of the proposed rule. As a result, we do not anticipate that small developers and construction firms would be affected. Please refer to our draft economic analysis of the proposed critical habitat designation for a more detailed discussion of potential economic impacts.

Executive Order 13211—Energy Supply, Distribution, and Use

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed designation of critical habitat for *Catesbaea melanocarpa* is considered a significant regulatory action under Executive Order 12866 due to its potential raising of novel legal and policy issues. The Office of Management and Budget has provided guidance for implementing this Executive Order that outlines nine outcomes that may constitute “a significant adverse effect” when compared without the regulatory action under consideration. The draft economic analysis finds that none of these criteria are relevant to this analysis. Thus, based on the information in the draft economic analysis, we do not expect energy-related impacts associated with *C. melanocarpa* conservation activities within proposed critical habitat. As such, we do not expect the proposed designation of critical habitat to significantly affect energy supplies, distribution, or use. A Statement of Energy Effects is not required.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5)–(7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments,” with two exceptions. It excludes “a condition of federal assistance.” It also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding” and the State, local, or Tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty

upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.”

The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7 of the Act. Non-Federal entities that receive Federal funding, assistance, or permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(b) As discussed in the draft economic analysis of the proposed designation of critical habitat for *Catesbaea melanocarpa*, we expect the impacts on nonprofits and small governments to be negligible. There is no record of consultations between us and any of these governments since we listed *C. melanocarpa* as endangered on March 17, 1999 (64 FR 13116). It is likely that small governments involved with developments and infrastructure projects will be interested parties or involved with projects involving section 7 (of the Act) consultations for *C. melanocarpa* within their jurisdictional

areas. Any costs associated with this activity are likely to represent a small portion of a local government’s budget. Consequently, we do not believe that the designation of critical habitat for *C. melanocarpa* will significantly or uniquely affect these small governmental entities. As such, a Small Government Agency Plan is not required.

Executive Order 12630—Takings

In accordance with Executive Order 12630 (“Government Actions and Interference with Constitutionally Protected Private Property Rights”), we have analyzed the potential takings implications of proposing critical habitat for *Catesbaea melanocarpa*. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. In conclusion, the designation of critical habitat for *C. melanocarpa* does not pose significant takings implications.

Author

The primary authors of this notice are the staff of the Caribbean Fish and Wildlife Service Office.

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: March 5, 2007.

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E7–4542 Filed 3–13–07; 8:45 am]

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