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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R8-ES-2009-0019]

[MO 92210-0-0008 B2]

RIN 1018-AV91

#### Endangered and Threatened Wildlife and Plants; Listing Casey's June Beetle as Endangered and Designation of Critical Habitat

**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 our July 9, 2009, proposed listing and critical habitat designation for Casey's June beetle (*Dinacoma caseyi*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of the draft economic analysis (DEA), and an amended required determinations section of the proposal. We are reopening the comment period for an additional 30 days to allow all interested parties an opportunity to comment simultaneously on the proposed listing and critical habitat designation, the DEA, and the amended required determinations section. If you submitted comments previously, you do not need to resubmit them because we have already incorporated them into the public record and will fully consider them in preparation of the final rule.

**DATES:** We will consider comments that we receive on or before April 30, 2010.

**ADDRESSES:** You may submit comments by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS-R8-ES-2009-0019.

- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R8-ES-2009-0019; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the

Public Comments section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone (760) 431-9440; facsimile (760) 431-5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Public Comments

We intend that any final action resulting from the proposed rule will be based on the best scientific data available and will be as accurate and as effective as possible. Therefore, we request comments or information from the public, other concerned government agencies, the scientific community, industry, or other interested party during this reopened comment period on the proposed rule to list the Casey's June beetle (*Dinacoma caseyi*) with critical habitat that was published in the **Federal Register** on July 9, 2009 (74 FR 32857), including the DEA of the proposed critical habitat designation and the amended required determinations section provided in this document. We are particularly interested in comments concerning:

(1) Any available information on known or suspected threats and proposed or ongoing projects with the potential to threaten Casey's June beetle, specifically:

(a) The present or threatened destruction, modification or curtailment of its habitat or range;

(b) Overutilization for commercial, recreational, scientific, or educational purposes;

(c) Disease or predation;

(d) The inadequacy of existing regulatory mechanisms; and

(e) Other natural or manmade factors affecting its continued existence.

(2) Additional information concerning the range, distribution, and population size of this species, including the locations of any additional populations of this species.

(3) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), including whether there are threats to Casey's June beetle from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation, such that the designation of critical habitat is not prudent.

(4) Specific information on areas that provide habitat for Casey's June beetle that we did not discuss in the proposed rule, whether such areas contain the physical and biological features essential to the conservation of Casey's June beetle, and what special management considerations or protections may be required to maintain or enhance the essential features.

(5) Land-use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(6) Any foreseeable economic, national security, or other relevant impact that may result from designating particular areas as critical habitat, and, in particular, any impacts to small entities (such as small businesses or small governments), and the benefits of including or excluding areas from the proposed designation that exhibit these impacts.

(7) Whether any particular area being proposed as critical habitat should be excluded under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(8) Whether inclusion of tribal lands of the Agua Caliente Band of Cahuilla Indians of the Agua Caliente Indian Reservation, California (preferred name "Agua Caliente Band of Cahuilla Indians"), in Riverside County is appropriate and why.

(9) The likelihood of adverse social reactions to the designation of critical habitat, and how the consequences of such reactions, if they occur, would relate to the conservation of the species and regulatory benefits of the proposed critical habitat designation.

(10) Information on the extent to which the description of potential economic impacts in the DEA is complete and accurate.

(11) The potential effects of climate change on this species and its habitat and whether the critical habitat may adequately account for these potential effects.

(12) Whether our approach to designating critical habitat could be improved or modified in any way to provide an opportunity for greater public participation and understanding, or to assist us in accommodating public concerns and comments.

If you submitted comments or information on the proposed rule (74 FR 32857) during the initial comment period from July 9, 2009, to September 8, 2009, please do not resubmit them. These comments are included in the public record for this rulemaking, and

we will fully consider them in the preparation of our final determination. Our final determination concerning listing the Casey's June beetle as an endangered species and designating critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas within the proposed critical habitat designation do not meet the definition of critical habitat, that some modifications to the described boundaries are appropriate, or that areas may or may not be appropriate for exclusion under section 4(b)(2) of the Act.

You may submit your comments and materials concerning the proposed rule and the DEA associated with the proposed critical habitat designation by one of the methods listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via hard copy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>. Please include sufficient information with your comments to allow us to verify any scientific or commercial information you include.

Comments and materials we receive, as well as supporting documentation used to prepare this notice, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed listing and proposed critical habitat (74 FR 32857) and the DEA on the Internet at <http://www.regulations.gov> at Docket No. FWS-R8-ES-2009-0019, or by mail from the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

## Background

It is our intent to discuss only those topics directly relevant to the proposed designation of critical habitat for Casey's June beetle in this document. For more detailed information on the taxonomy, biology, and ecology of Casey's June beetle, please refer to the 90-day finding on the petition to list the species under

the Act, published in the **Federal Register** on August 8, 2006 (71 FR 44960); the 12-month finding, published in the **Federal Register** on July 5, 2007 (72 FR 36635); or the proposed listing and designation of critical habitat rule, published in the **Federal Register** on July 9, 2009 (74 FR 32857). Alternatively, you may contact the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Section 3 of the Act defines critical habitat as "(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with... [the Act], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species" (16 USC 1532(5)(A)). If the proposed rule is made 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 that may affect critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

## Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat.

We prepared a DEA (Industrial Economics Inc. 2010) that identifies and analyzes the potential impacts associated with the proposed designation of critical habitat for Casey's June beetle that we published in the **Federal Register** on July 9, 2009 (74 FR 32857). The DEA quantifies the economic impacts of all potential conservation efforts for Casey's June beetle; some of these costs will likely be incurred regardless of whether or not we finalize the critical habitat. The economic impact of the proposed critical habitat designation is analyzed by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, considering protections that are already in place for the species or that will be in place for the species upon listing (such as protections under

the Act and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the critical habitat designation for Casey's June beetle. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs. The DEA also discusses the potential benefits associated with the designation of critical habitat, but does not monetize these benefits. The incremental impacts are the impacts we may consider in the final designation of critical habitat when evaluating the benefit of excluding particular areas under section 4(b)(2) of the Act. The analysis forecasts both baseline and incremental impacts likely to occur if we finalize the proposed designation of critical habitat.

The primary intended benefit of critical habitat is to support the conservation of endangered and threatened species, such as the Casey's June beetle. Thus, attempts to develop monetary estimates of the benefits of this proposed critical habitat designation would focus on the public's willingness to pay to achieve the conservation benefits to the beetle resulting from this designation. Quantification and monetization of species conservation benefits requires information on the incremental change in the probability of Casey's June beetle conservation that is expected to result from the designation. No studies exist that provide such information for this species. Even if this information existed, the published valuation literature does not support monetization of incremental changes in conservation probability for this species. Because it is not possible to determine the probability that benefits will occur in this instance, the Service has decided not to include such estimates in the DEA. Rather than rely on economic measures, the Service believes that the direct benefits of the proposed rule are best expressed in biological terms that can be weighed against the expected cost impacts of the rulemaking.

The DEA (made available with the publication of this notice and referred to throughout this document unless otherwise noted) estimates the foreseeable economic impacts of the proposed critical habitat designation for Casey's June beetle. The economic analysis identifies potential incremental

costs as a result of the proposed critical habitat designation, which are those costs attributed to critical habitat over and above those baseline costs associated solely with the listing. It also discusses the potential economic benefits of the proposed designation. The DEA describes economic impacts of Casey's June beetle conservation efforts associated with the following categories of activity: (1) residential and commercial development, (2) tribal activities, (3) flood control activities, and (4) recreational activities.

Baseline economic impacts are those impacts that result from listing and other conservation efforts for Casey's June beetle. Conservation efforts related to development activities constitute the majority of total baseline costs (approximately 80 percent) in areas of proposed critical habitat. Impacts to flood control activities comprise the remaining approximately 20 percent of impacts. Total future baseline impacts are estimated to be \$12,703,600 (\$1,182,600 annualized) in present value terms using a 7 percent discount rate over the next 20 years (2010 to 2029) in areas proposed as critical habitat (Industrial Economics Inc. 2010, pp. ES-7).

Almost all incremental impacts attributed to the proposed critical habitat designation are expected to be related to development activities (approximately 100 percent). The DEA estimates total potential incremental economic impacts in areas proposed as critical habitat over the next 20 years (2010 to 2029) to be \$9,792,270 (\$924,131 annualized) in present value terms using a 7 percent discount rate (Industrial Economics Inc. 2010, p. ES-8). This value is based on an assumption of total avoidance of designated areas and thus represents the upper-bound potential cost for each project. As such, it likely overstates the expected absolute cost of future actions to protect critical habitat.

The DEA 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). The DEA 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 government agencies, private businesses, and individuals. The DEA measures lost economic efficiency

associated with residential and commercial development and public projects and activities, such as economic impacts on water management and transportation projects, Federal lands, small entities, and the energy industry. Decision-makers can use this information to assess whether the effects of the critical habitat designation might unduly burden a particular group or economic sector.

#### Required Determinations—Amended

In our proposed rule that published in the **Federal Register** on July 9, 2009 (74 FR 32857), we indicated we would defer 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 became available in the DEA. We have now made use of the DEA to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (*Regulatory Planning and Review*), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), the Paperwork Reduction Act, the National Environmental Policy Act, the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), and E.O. 12630 (Takings). However, based on the DEA data, we revised our required determinations concerning the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), and E.O. 13211 (Energy Supply, Distribution, or Use).

#### *Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 802(2)), 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 (i.e., small businesses, small organizations, and small government jurisdictions), as described below. 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. Based on our DEA of the proposed critical habitat designation, we provide our analysis for determining

whether the proposed designation would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of a final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and 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 the proposed 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 Casey's June beetle would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities, such as residential and commercial development. In order to determine whether it is appropriate for our agency to certify that this rule would not have a significant economic impact on a substantial number of small entities, we considered each industry or category individually. If we finalize this proposed listing and proposed critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect the species or the designated critical habitat. Incremental impacts to small entities may occur as a direct result of a required consultation under section 7 of the Act. Additionally, even in the absence of a Federal nexus, indirect incremental impacts may still result because, for example, a city may request project modifications due to the designation of critical habitat via its review under the California Environmental Quality Act (CEQA).

In the DEA of the proposed critical habitat designation, we evaluate the

potential economic effects on small business entities resulting from implementation of conservation actions related to the proposed critical habitat for Casey's June beetle. The DEA identifies the estimated incremental impacts associated with the proposed rulemaking as described in Appendix A of the DEA, and evaluates the potential for economic impacts related to activity categories including residential and commercial development, tribal activities, flood control activities, and recreational activities (Industrial Economics, Inc. 2010). The DEA concludes that the incremental impacts resulting from this rulemaking that may be borne by small businesses will be associated only with development. Incremental impacts are either not expected for the other types of activities considered or, if expected, will not be borne by small entities.

As discussed in Appendix A of the DEA, the only impacts of the proposed rule on small businesses would potentially result from lost land values associated with the identified development projects. In the 20-year timeframe for the analysis, three developers may experience impacts. The potential incremental costs are expected to vary by project, depending on the size and the value of the land. The total annualized incremental impacts are forecast at approximately \$965,000 (discounted at 7 percent). The SBREFA analysis estimates that three small businesses may be affected by the designation of critical habitat (Industrial Economics, Inc. 2010, pp. A-3-A-6). Because only three small businesses may be affected, we do not find that the number of small entities that would be significantly affected is substantial.

In summary, we considered whether the proposed rule would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if adopted, the proposed critical habitat would not have a significant economic impact on a substantial number of small entities. Therefore, an initial regulatory flexibility analysis is not required.

#### *Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

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

(a) This rule would 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. "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. Designation of critical habitat may indirectly impact non-Federal entities that receive Federal funding, assistance, or permits, or that 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 on to State governments.

(b) As discussed in the DEA of the proposed designation of critical habitat for Casey's June beetle, we do not believe that the rule would significantly or uniquely affect small governments because it would not produce a Federal mandate of \$100 million or greater in any year; that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. The DEA

concludes incremental impacts may occur due to project modifications that may need to be made for development and flood control activities; however, these are not expected to affect small governments. Incremental impacts stemming from various species conservation and development controls are expected to be borne by the Riverside County Flood Control and Water Conservation District (FCWCD), which is not considered a small government based on the county's population. Consequently, we do not believe that the critical habitat designation would significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

#### *Executive Order 13211—Energy Supply, Distribution, and Use*

On May 18, 2001, the President issued E.O. 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. The OMB's guidance for implementing this Executive Order outlines nine outcomes that may constitute "a significant adverse effect" when compared to no regulatory action. As discussed in Appendix A, the DEA finds that none of these criteria are relevant to this analysis. The DEA identified no potentially affected entities involved in the production of energy, and a Statement of Energy Effects is therefore not required.

#### **References Cited**

A complete list of all references we cited in the proposed rule and in this document is available on the Internet at <http://www.regulations.gov> or by contacting the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section).

#### **Author**

The primary authors of this notice are the staff members of the Carlsbad Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

#### **Authority**

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

Dated: March 23, 2010

#### **Will Shafroth,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

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