

§ 17.11 Endangered and threatened wildlife. (h) \* \* \*

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Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*
Amphibians							
*	*	*	*	*	*	*	*
Hellbender, Ozark	<i>Cryptobranchus alleganiensis bishopi</i>	AR, MO	Entire	E		NA	NA
*	*	*	*	*	*	*	*

Dated: August 19, 2010.

Wendi Weber,

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

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 23

[Docket No. FWS-R9-IA-2009-0033]  
[96300-1671-0000-R4]

RIN 1018-AW93

**Inclusion of the Hellbender, Including the Eastern Hellbender and the Ozark Hellbender, in Appendix III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)**

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to include the hellbender (*Cryptobranchus alleganiensis*), a large aquatic salamander, including its two subspecies, the eastern hellbender (*Cryptobranchus alleganiensis alleganiensis*) and the Ozark hellbender (*Cryptobranchus alleganiensis bishopi*), in Appendix III of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES or Convention), including live and dead whole specimens, and all readily recognizable parts, products, and derivatives. Listing hellbenders in Appendix III of CITES is necessary to

allow us to adequately monitor international trade in the taxon; to determine whether exports are occurring legally, with respect to State law; and to determine whether further measures under CITES or other laws are required to conserve this species and its subspecies.

**DATES:** To ensure that we are able to consider your comment on this proposed rulemaking action, you must send it by November 8, 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 on Docket No. FWS-R9-IA-2009-0033.

- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R9-IA-2009-0033; 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:** Clifton A. Horton, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Room 212, Arlington, VA 22203; telephone 703-358-1908; facsimile 703-358-2298. 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 this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) Biological, trade, or other relevant data concerning any threats (or lack thereof) to this species (including subspecies), and regulations that may be addressing those threats.

(2) Additional information concerning the range, distribution, and population size of this species (including subspecies).

(3) Any information on the biological or ecological requirements of this species (including subspecies).

(4) Any information regarding legal or illegal collection of or trade in this species (including subspecies).

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. If you submit a hardcopy comment 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>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule,

will be available for public inspection on <http://www.regulations.gov>, or by appointment, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays, at the U.S. Fish and Wildlife Service, Division of Management Authority, 4401 N. Fairfax Drive, Room 212, Arlington, VA 22203; telephone 703-358-1908.

### Background

CITES, an international treaty, regulates the import, export, re-export, and introduction from the sea of certain animal and plant species. CITES was negotiated in 1973 in Washington, DC, at a conference attended by delegations from 80 countries. The United States ratified the Convention on September 13, 1973, and it entered into force on July 1, 1975, after it had been ratified by the required 10 countries. Currently 175 countries have ratified, accepted, approved, or acceded to CITES; these countries are known as Parties.

The text of the Convention and the official list of all species included in its three Appendices are available from the CITES Secretariat's website at <http://www.cites.org> or upon request from the Division of Management Authority at the address provided in **FOR FURTHER INFORMATION CONTACT** above.

Section 8A of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), designates the Secretary of the Interior as the U.S. Management Authority and U.S. Scientific Authority for CITES. These authorities have been delegated to the Fish and Wildlife Service. The original U.S. regulations implementing CITES took effect on May 23, 1977 (42 FR 10465, February 22, 1977), after the first meeting of the Conference of the Parties (CoP) was held. The CoP meets every 2 to 3 years to vote on proposed resolutions and decisions that interpret and implement the text of the Convention and on amendments to the list of species in the CITES Appendices. The current U.S. CITES regulations (50 CFR part 23) took effect on September 24, 2007.

### CITES Appendices

Species covered by the Convention are listed in one of three Appendices. Appendix I includes species threatened with extinction that are or may be affected by international trade, and are generally prohibited from commercial trade. Appendix II includes species that, although not necessarily threatened with extinction now, may become so unless the trade is strictly controlled. It also lists species that CITES must regulate so that trade in other listed species may be brought under effective control (e.g., because of similarity of

appearance between listed species and other species). Appendix III includes native species, identified by any Party, that are regulated to prevent or restrict exploitation, where the Party requests the help of other Parties to monitor and control the trade of the species.

To include a species in or remove a species from Appendices I or II, a Party must propose an amendment to the Appendices for consideration at a meeting of the CoP. The adoption of such a proposal requires approval of at least two-thirds of the Parties present and voting. However, a Party may add a native species to Appendix III independently, without the vote of other Parties, under Articles II and XVI of the Convention. Likewise, if the status of an Appendix-III species improves or new information shows that it no longer needs to be listed, the listing country can remove the species from Appendix III without consulting the other CITES Parties.

Inclusion of native U.S. species in Appendix III provides the following benefits:

(1) An Appendix-III listing ensures the assistance of the other CITES Parties, through the implementation of CITES permitting requirements in controlling international trade in the species.

(2) Listing U.S. native species in Appendix III would, in appropriate cases, enhance the enforcement of State and Federal conservation measures enacted for the species by regulating international trade in the species. Shipments containing CITES-listed species receive greater scrutiny from border officials in both the exporting and importing countries. When a shipment containing a non-listed species is exported from the United States, it is a lower inspection priority for the Service than a shipment containing a CITES-listed species. Furthermore, many foreign countries have limited legal authority and resources to inspect shipments of non-CITES-listed wildlife. Appendix-III listings for U.S. species will give these importing countries the legal basis to inspect such shipments, and deal with CITES and national violations when they detect them.

(3) Another practical outcome of listing a species in Appendix III is that records are kept and international trade in the species is monitored. We will gain and share new information on such trade with State fish and wildlife agencies, and others who have jurisdiction over resident populations of the Appendix-III species. They will then be able to better determine the impact of the trade on the species and the

effectiveness of existing State management activities, regulations, and cooperative efforts. International trade data and other relevant information gathered as a result of an Appendix-III listing will help policymakers determine whether we should propose the species for inclusion in Appendix II, remove it from Appendix III, or retain it in Appendix III.

(4) When any live CITES-listed species (including an Appendix-III species) is exported (or imported), it must be packed and shipped according to the International Air Transport Association (IATA) Live Animals Regulations to reduce the risk of injury and cruel treatment. This requirement helps to ensure the survival of the animals while they are in transport.

### Criteria for Listing a Native U.S. Species in Appendix III

Article II, paragraph 3, of CITES states that "Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other parties in the control of trade." Article XVI, paragraph 1, of the Convention states further that "Any Party may at any time submit to the Secretariat a list of species which it identifies as being subject to regulation within its jurisdiction for the purpose mentioned in paragraph 3 of Article II. Appendix III shall include the names of the Parties submitting the species for inclusion therein, the scientific names of the species so submitted, and any parts or derivatives of the animals or plants concerned that are specified in relation to the species for the purposes of subparagraph (b) of Article I."

At the ninth meeting of the Conference of the Parties to CITES (CoP9), held in the United States in 1994, the Parties adopted Resolution Conf. 9.25 (amended at the 10<sup>th</sup> and 14<sup>th</sup> meetings of the CoP), which provides further guidance to Parties for the listing of their native species in Appendix III. The Resolution, which is the basis for our criteria for listing species in Appendix III provided in our regulations at 50 CFR 23.90(c), recommends that a Party:

(a) Ensure that (i) The species is native to its country; (ii) Its national regulations are adequate to prevent or restrict exploitation and to control trade, for the conservation of the species, and include penalties for illegal taking, trade or possession and provisions for confiscation; and (iii) Its national enforcement measures are adequate to implement these regulations;

(b) Determine that, notwithstanding these regulations and measures, there are indications that the cooperation of the Parties is needed to control illegal trade; and

(c) Inform the Management Authorities of other range States, the known major importing countries, the Secretariat and the Animals Committee or the Plants Committee that it is considering the inclusion of the species in Appendix III and seek their opinion on the potential effects of such inclusion.

Therefore, we have used the following criteria in deciding to list U.S. species in Appendix III as outlined in 50 CFR 23.90(c):

(1) The species must be native to the country listing the species.

(2) The species must be protected under that country's laws or regulations to prevent or restrict exploitation and control trade, and the laws or regulations are being implemented.

(3) The species is in international trade, and there are indications that the cooperation of other Parties would help to control illegal trade.

(4) The listing Party must inform the Management Authorities of other range countries, the known major importing countries, the Secretariat, and the Animals Committee or the Plants Committee that it is considering the listing and seek their opinions on the potential effects of the listing.

CITES does not allow the exclusion of particular parts or products for any species listed in Appendix I or the exclusion of parts or products of animal species in Appendix II. However, Article XVI of the Convention allows for either all specimens of a species or only certain identifiable parts or products of a specimen (in addition to whole specimens) to be listed in Appendix III. For example, the current listing in CITES Appendix III of *Cedrela odorata* (Spanish cedar) by Colombia, Guatemala, and Peru includes only logs, sawn wood, and veneer sheets. Therefore, if the criteria listed above are met, we could list any designated parts or products of a species in Appendix III, if we inform the CITES Secretariat of the limited listing.

#### *Submission of Information to the CITES Secretariat*

For this listing, consultation with other range countries is not applicable since hellbenders are endemic to the United States. After reviewing the information submitted in response to this proposal, we will make a final decision on whether to include this species in CITES Appendix III. We will publish our decision in the **Federal**

**Register.** If we decide to list the species in CITES Appendix III, we will notify the CITES Secretariat. The listing will take effect 90 days after the CITES Secretariat informs the CITES Parties of the listing.

#### *Change in Status of Appendix-III Species Based on New Information*

We monitor the trade of all U.S. Appendix-III species. If either of the following occurs, we will consider removing the species from Appendix III: (1) We determine that international trade in the species is very limited (as a general guide, fewer than 5 shipments per year or fewer than 100 individual animals or plants); and (2) we determine that trade (legal and illegal) in the species (either internationally or in interstate commerce) is not a concern. If, after monitoring the trade of any U.S. Appendix-III species and evaluating its status, we determine that the species meets the CITES criteria for listing in Appendix I or II, based on the criteria contained in 50 CFR 23.89, we will consider whether to propose the species for inclusion in Appendix I or II.

#### *Practical Effects of Listing a Native U.S. Species in Appendix III*

*Permits and other requirements:* The export of an Appendix-III species listed by the United States requires an export permit issued by the Service's Division of Management Authority (DMA). DMA will issue a permit only if the applicant obtained the specimen legally, without violating any applicable U.S. laws, including relevant State wildlife laws and regulations, and the live specimen is packed and shipped according to the IATA Live Animals Regulations to reduce the risk of injury and cruel treatment. DMA, in determining if the applicant legally obtained the specimen, is required to consult relevant State and Federal agencies. Since the conservation and management of these species is primarily under the jurisdiction of State agencies, we will consult those agencies to ensure that specimens destined for export were obtained in compliance with State laws and regulations. Unlike species listed in Appendices I and II, no scientific non-detriment finding is required by the Service's Division of Scientific Authority (DSA) for export of an Appendix-III species. However, DSA will monitor and evaluate the trade, to decide if there is a conservation concern that would require any further Federal action. With a few exceptions, any shipment containing wildlife must be declared to a Service Wildlife Inspector upon export and must comply with all applicable regulations.

*Process, Findings, and Fees:* To apply for a CITES permit, an applicant is required to furnish to DMA a completed CITES export permit application (with check or money order to cover the cost of processing the application). You may obtain information about CITES permits from our website at <http://www.fws.gov/permits/ImportExport/ImportExport.shtml> or from DMA (see **FOR FURTHER INFORMATION CONTACT**). We will review the application to decide if the export meets the criteria in 50 CFR 23.60.

In addition, live animals must be shipped to reduce the risk of injury, damage to health, or cruel treatment. We carry out this CITES requirement by stating clearly on all CITES permits that shipments must comply with the IATA Live Animals Regulations. The Service's Office of Law Enforcement (OLE) is authorized to inspect shipments of CITES-listed species during export to ensure that they comply with these regulations. Additional information on permit requirements is available from DMA (see **FOR FURTHER INFORMATION CONTACT**); additional information on declaration of shipments, inspection, and clearance of shipments is available upon request from the OLE:

U.S. Fish and Wildlife Service, Office of Law Enforcement, 4401 North Fairfax Drive, MS-LE-3000, Arlington, VA 22203; telephone 703-358-1949; facsimile 703-358-2271. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### Federal Actions

In a series of five notices published in the **Federal Register** between 1982 and 1994 (47 FR 58454, 50 FR 37958, 54 FR 554, 56 FR 58804, and 59 FR 58982), we identified the hellbender (*Cryptobranchus alleganiensis*) as a taxon native to the United States with a listing candidate status under the Endangered Species Act of category 2. At that time, taxa included in category 2 were those taxa for which we had information indicating that it was possibly appropriate to list such taxa as threatened or endangered, but for which persuasive data was not sufficiently available to support proposed rules.

We first identified the Ozark hellbender (*Cryptobranchus alleganiensis bishopi*) as a candidate species in a notice of review published in the **Federal Register** on October 30, 2001 (66 FR 54808). We gave the Ozark hellbender a listing priority number (LPN) of 6 due to nonimminent threats of a high magnitude.

On May 11, 2004, we received a petition dated May 4, 2004, from the

Center for Biological Diversity to list 225 candidate species, including the Ozark hellbender. We received another petition on September 1, 2004 (dated August 24, 2004), from The Missouri Coalition for the Environment and Webster Groves Nature Study Society requesting emergency listing of the Ozark hellbender. Based on information presented in that petition, we determined that emergency listing was not warranted at that time. We notified the petitioners of this determination in November 2004.

In a May 11, 2005, notice published in the **Federal Register** (70 FR 24870), we changed the LPN from 6 to 3 because of the increased immediacy of threats since the Ozark hellbender was elevated to candidate status in 2001. The threat of particular concern was the annual increases in recreational pressures on rivers the Ozark hellbender inhabits.

Elsewhere in today's **Federal Register**, the Service proposes to list the Ozark hellbender as federally endangered under the Endangered Species Act of 1973, as amended.

#### Summary of Threats

The destruction and modification of habitat, siltation, construction of dams, water quality, disease, lack of genetic variation, predation by nonnative fish, climate change, and the inadequacy of existing regulatory mechanisms have been implicated as contributing to the decline of hellbenders (Mayasich *et al.* 2003, pp. 18–24 and Briggler *et al.* 2007, pp. 16–44). Additionally, overcollecting has been considered a serious threat in some areas; a decline in hellbender populations in the early 1990s was apparently due to collecting (Stuart *et al.* 2008, p. 637). Moreover, it has been suggested that scientific collecting may have negatively impacted hellbender populations (Mayasich *et al.* 2003, p. 20).

Information on the legal and illegal take of hellbenders and the number of hellbenders that enter into the pet trade is limited. However, between 1969 and 1989, the documented harvest of 558 Ozark hellbenders from the North Fork of the White River (NFWR) in Missouri comprised 49.6 percent for scientific study, 45.9 percent for the pet trade, 1.8 percent for educational programs, and 2.7 percent that were unattributed (Nickerson and Briggler 2007, p. 208). Approximately 48.5 percent of this documented take (or 271) of 558 Ozark hellbenders was illegal and was a substantial factor in the decline of Ozark hellbender populations in the NFWR (Nickerson and Briggler 2007, p. 214). Likewise, information on the number of hellbenders that enter international

trade is also limited. We have recently documented hellbenders in international trade. Also, since hellbenders are not currently a CITES-listed species, it is possible that past hellbender shipments have been recorded generically in the Service's Declaration System as non-CITES amphibians rather than as hellbenders. In addition, at the 2005 Hellbender Symposium (June 19–22, 2005, Lakeview, Arkansas), it was reported that U.S.-origin hellbenders were found for sale in Japanese pet stores, which is likely the largest overseas market for this species (Briggler, pers. comm. with Okada, 2005).

For more information on the threats contributing to the decline of hellbenders, see our proposal to list the Ozark hellbender as federally endangered under the Endangered Species Act of 1973, as amended, elsewhere in today's **Federal Register**.

#### Species and Subspecies for Listing in Appendix III

We propose to list the hellbender (*Cryptobranchus alleganiensis*), including its two subspecies, the eastern hellbender (*Cryptobranchus alleganiensis alleganiensis*) and the Ozark hellbender (*Cryptobranchus alleganiensis bishopi*), in CITES Appendix III, including live and dead whole specimens, and all readily recognizable parts, products, and derivatives. This proposed rule, if adopted, would apply to all living and dead hellbenders and their readily recognizable parts, products, and derivatives. The term readily recognizable is defined in our regulations at 50 CFR 23.5 and means any specimen that appears from a visual, physical, scientific, or forensic examination or test; an accompanying document, packaging, mark, or label; or any other circumstances to be a part, product, or derivative of any CITES wildlife or plant, unless such part, product, or derivative is specifically exempt from the provisions of CITES or 50 CFR part 23.

#### Hellbender

The hellbender is a large, aquatic salamander attaining a maximum length of 29 inches (in) (74 centimeters (cm)) (Petranka 1998, p. 140). Native to cool, fast-flowing streams of the central and eastern United States (Briggler *et al.* 2007, p. 8), the hellbender usually avoids water warmer than 68 °Fahrenheit (F) (20 °Celsius (C)) (Stuart *et al.* 2008, p. 636). The rarity of specific habitats that hellbenders require, especially at low elevations, may severely limit hellbender migration

between rivers and render the range of hellbenders highly fragmented (Sabatino and Routman 2008, p. 7). Successful migration to and colonization of new locations by hellbenders may only occur when geologic or climatic changes result in the formation of migratory paths suitable to hellbenders (Sabatino and Routman 2008, p. 8). Populations of the once-common hellbender have declined by 77 percent since the 1970s (Briggler *et al.* 2007, p. 8). Population declines are likely due to a combination of factors such as diminished water quality, human-caused siltation, collection, and persecution (Briggler *et al.* 2007, p. 8). Crayfish and small fish are the dietary mainstay of hellbenders (Petranka 1998, p. 144).

Although two hellbender subspecies are recognized, the eastern hellbender and the Ozark hellbender, the taxonomic differentiation between hellbender subspecies is not well agreed upon by experts, and discussion continues on whether the eastern hellbender and the Ozark hellbender are distinct species or subspecies (Mayasich *et al.* 2003, p. 2). Irrespective of the taxonomic differentiation of hellbenders, all currently recognized hellbender subspecies of *Cryptobranchus alleganiensis* would be included in the CITES Appendix III listing.

#### Eastern Hellbender and Ozark Hellbender

Eastern and Ozark hellbenders are very similar in habitat selection, movement, and reproductive biology (Nickerson and Mays 1973a, pp. 44–55). Although some differences in color pattern exist, the eastern subspecies is described as having dorsal spotting and a uniformly colored chin and the Ozark subspecies is described as having dark dorsal blotching and pronounced chin mottling (Mayasich *et al.* 2003, p. 2). Hellbender subspecies are most easily identified by geographic range (Mayasich *et al.* 2003, p. 2). The Ozark hellbender inhabits streams that drain south out of the Ozark Plateau in the highlands of Missouri and Arkansas (Sabatino and Routman 2008, p. 2). All other populations of hellbenders, including those inhabiting streams draining northward from the Ozarks, belong to the eastern hellbender subspecies (Sabatino and Routman 2008, p. 2).

#### Range and Distribution

The eastern hellbender ranges from southern and western New York southward to northern Georgia, Alabama, and Mississippi and westward to central Missouri (Nickerson and Mays

1973a, p. 3). It is estimated that there are over 300 metapopulations across the eastern United States, containing approximately 350,000 eastern hellbenders over one year of age (Briggler *et al.* 2007, p. 85).

Ozark hellbenders are endemic to the White River drainage in northern Arkansas and southern Missouri (Johnson 2000, pp. 40-41), historically occurring in portions of the Spring, White, Black, Eleven Point, and Current Rivers and their tributaries (North Fork White River, Bryant Creek, and Jacks Fork) (LaClaire 1993, p. 3). It is estimated that there are 4 metapopulations of Ozark hellbenders, containing approximately 600 Ozark hellbenders over one year of age (Briggler *et al.* 2007, p. 83).

#### Conservation Status

The hellbender is considered "Near Threatened" by the International Union for Conservation of Nature (IUCN) because the species is probably in significant decline and because of widespread habitat loss throughout much of its range. The CITES Technical Work Group of the Association of Fish and Wildlife Agencies has concluded that including hellbenders in CITES Appendix III is warranted in order to help ensure conservation of the species in the wild and to assist State agencies in regulating harvest and trade.

Eastern hellbenders are protected to varying degrees, ranging from "Not Protected" to "Endangered," by State laws within the United States. Although there are stable populations in some areas, the eastern hellbender is declining throughout its range, which includes portions of the following 16 States: Alabama, Georgia, Illinois, Indiana, Kentucky, Maryland, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia.

One State (North Carolina) indicates the ecological status of eastern hellbenders in that State as stable. North Carolina lists the eastern hellbender as a "Special Concern Species" and take is regulated and may occur under certain provisions.

Five States (Maryland, Missouri, New York, Pennsylvania, and Virginia) indicate the ecological status of eastern hellbenders in those States as declining or seriously declining. Maryland and Missouri list the eastern hellbender as "Endangered" and take is generally prohibited. New York lists the eastern hellbender as "Special Concern" and as a small game species with no open season. In Pennsylvania, the eastern hellbender is classified as a protected

salamander with no open season. Virginia lists the eastern hellbender as "Special Concern" and adult eastern hellbenders can not be taken for private use. However, in Virginia juvenile eastern hellbenders less than six inches in total length may be used as fish bait.

One State (Georgia) indicates the ecological status of eastern hellbenders in that State as rare, lists the species as "Rare" and prohibits take. One State (Illinois) indicates the ecological status of eastern hellbenders in that State as possibly extinct, lists the species as "Endangered" and generally prohibits take.

Six States (Alabama, Mississippi, Ohio, South Carolina, Tennessee, and West Virginia) indicate that the ecological status of eastern hellbenders in those States is not known. Alabama and Mississippi classify the eastern hellbender as a non-game species; Alabama generally prohibits take while regulated take is permitted in Mississippi. Ohio lists the eastern hellbender as "Endangered" and take is generally prohibited. In South Carolina, the eastern hellbender is not protected and take is not regulated. In Tennessee, the eastern hellbender is protected as a non-game native species in need of management and take is prohibited. The eastern hellbender is not protected in West Virginia and regulated take for commercial purposes is allowed. We have not received information on the ecological status of eastern hellbenders in two States (Indiana and Kentucky). Indiana lists the species as "Endangered" and prohibits take. Kentucky lists the eastern hellbender as "Special Concern" and the species can not be taken for commercial purposes. However, in Kentucky eastern hellbenders may be collected from public waters for use as fish bait for personal use.

The Ozark hellbender only occurs in Arkansas and Missouri. The Ozark hellbender is listed as "Protected" by Arkansas and "Endangered" by Missouri and take is prohibited in both States. Despite these designations, Arkansas and Missouri indicate that the Ozark hellbender in those States is in serious decline. Evidence indicates that no populations of Ozark hellbenders appear to be stable (Wheeler *et al.* 2003, pp. 153 and 155). As stated earlier, elsewhere in today's **Federal Register**, the Service proposes to list the Ozark hellbender as federally endangered under the Endangered Species Act of 1973, as amended.

Under section 3372(a)(1) of the Lacey Act Amendments of 1981 (16 U.S.C. 3371-3378), it is unlawful to import, export, transport, sell, receive, acquire,

or purchase any wildlife taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States. This prohibition of the Lacey Act would apply in instances where hellbenders were unlawfully collected from Federal lands, such as those Federal lands within the range of hellbenders that are owned and managed by the U.S. Forest Service or the National Park Service.

It is unlawful under section 3372(a)(2)(A) of the Lacey Act to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State. Because many State laws and regulations prohibit or strictly regulate the take of hellbenders, certain acts with hellbenders acquired unlawfully under State law would result in a violation of the Lacey Act Amendments of 1981 and thus provide for federal enforcement due to a violation of State law.

#### Decision to Propose to List All Hellbenders in CITES Appendix III

Based on the recommendations contained in Resolution Conf. 9.25 (Rev. CoP14) and the listing criteria provided in our regulations at 50 CFR 23.90, the hellbender qualifies for listing in CITES Appendix III. Despite the protective status for hellbenders in many States, declines have been evident throughout the range of the hellbender. Existing State laws have not been completely successful in preventing the unauthorized collection and trade of hellbenders. Listing hellbenders in Appendix III is necessary to allow us to adequately monitor international trade in the taxa; to determine whether exports are occurring legally, with respect to State law; and to determine whether further measures under CITES or other laws are required to conserve this species and its subspecies. An Appendix-III listing would lend additional support to State wildlife agencies in their efforts to regulate and manage hellbenders, improve data gathering to increase our knowledge of trade in hellbenders, and strengthen State and Federal wildlife enforcement activities to prevent poaching and illegal trade. Furthermore, listing all hellbenders in Appendix III would enlist the assistance of other Parties in our efforts to monitor and control trade in this species and its subspecies.

#### Effect of Proposal to List Hellbender in CITES Appendix III

Our regulations at 50 CFR 23.90 require us to publish a proposed rule and a final rule for a CITES Appendix-

III listing even though, if a proposed rule is adopted, the final rule would not result in any changes to the Code of Federal Regulations. Instead, this proposed rule, if finalized, would result in DMA notifying the CITES Secretariat to amend Appendix III by including the hellbender, including its two subspecies, the eastern hellbender and the Ozark hellbender, in Appendix III of CITES for the United States. After analysis of the comments on the proposed rule, we will publish our final decision in the **Federal Register**. If this proposed rule is finalized, the listing would take effect 90 days after the CITES Secretariat informs the Parties of the listing. If we adopt a final rule, we will contact the Secretariat prior to publishing the rule to clarify the exact time period required by the Secretariat to inform the Parties of the listing.

### Required Determinations

#### *Regulatory Planning and Review* (Executive Order 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

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

Under the Regulatory Flexibility Act (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). 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. The Department of the Interior certifies

that this action would not have a significant effect on a substantial number of small entities for the reasons discussed below.

This proposed rule establishes the means to monitor the international trade in a species native to the United States and does not impose any new or changed restriction on the trade of legally acquired specimens. Based on current exports of hellbenders, we estimate that the costs to implement this rule will be less than \$2,000,000 annually due to the costs associated with obtaining permits.

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. This proposed rule:

(a) Would not have an annual effect on the economy of \$100 million or more.

(b) Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(c) Would not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501), the Service makes 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." This proposed rule would not impose a legally binding duty on non-Federal Government entities or private parties and would not impose an unfunded mandate of more than \$100 million per year or have a significant or unique effect on State, local, or tribal governments or the private sector because we, as the lead agency for CITES implementation in the United States, are responsible for the authorization of shipments of live wildlife, or their parts and products, that are subject to the requirements of CITES.

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

This proposed rule does not contain any new collections of information that require approval by Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. Information that we would collect under this proposed rule on FWS Form 3-200-27 is covered by an existing OMB approval and has been assigned OMB control number 1018-0093, which expires on November 30, 2010. We may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*)

This proposed rule does not constitute a major Federal action significantly affecting the quality of the human environment. The action is categorically excluded under 516 DM 2, Appendix 1.10 in the Departmental Manual. A detailed statement under the National Environmental Policy Act of 1969 is not required.

**Takings (Executive Order 12630)**

In accordance with Executive Order (E.O.) 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have determined that this proposed rule would not have significant takings implications since there are no changes in what may be exported.

**Federalism (Executive Order 13132)**

In accordance with E.O. 13132 (Federalism), this proposed rule would not have significant Federalism effects. A Federalism assessment is not required because this proposed rule would not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Although this proposed rule would generate information that would be beneficial to State wildlife agencies, it is not anticipated that any State monitoring or control programs would need to be developed to fulfill the purpose of this proposed rule. We have consulted the States, through the Association of Fish and Wildlife Agencies, on this proposed action. The CITES Technical Work Group of the Association of Fish and Wildlife Agencies has concluded that including hellbenders in CITES Appendix III is warranted in order to help ensure conservation of the species in the wild and to assist State agencies in regulating harvest and trade.

**Civil Justice Reform (Executive Order 12988)**

The Department, in promulgating this rule, has determined that it will not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

**Government-to-Government Relationship with Tribes**

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we have a responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. We determined that this proposed action would have no effect on Tribes or tribal lands.

**Energy Supply, Distribution, or Use (Executive Order 13211)**

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed action is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

**Clarity of the Rule**

We are required by Executive Orders 12866 and 12988, and by the

Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

**References Cited**

A complete list of all references cited in this proposed rule is available on the Internet at <http://www.regulations.gov> or upon request from the Division of Management Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

**Author**

The primary author of this proposed rule is Clifton A. Horton, Division of Management Authority, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

\* \* \* \* \*

Dated: August 19, 2010.

**Wendi Weber,**

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

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