

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17**

[Docket No. FWS-R2-ES-2018-0021;  
FF09E21000 FXES1111090000 212]

RIN 1018-BD55

**Endangered and Threatened Wildlife and Plants; Designating Texas Hornshell Critical Habitat**

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the Texas hornshell (*Popenaias popeii*), a freshwater mussel, under the Endangered Species Act (Act). In total, the proposed critical habitat designation includes approximately 463.6 river miles (745.9 kilometers) in Eddy County, New Mexico, and in Culberson, Brewster, Terrell, Val Verde, Kinney, Maverick, and Webb Counties, Texas. If we finalize this rule as proposed, it would extend the Act's protections to this species' critical habitat. The effect of this regulation is to designate critical habitat for the Texas hornshell under the Act. We also announce the availability of a draft economic analysis of the proposed designation of critical habitat. We also are notifying the public that we have scheduled an informational meeting followed by a public hearing on the proposed rule.

**DATES:**

*Comment submission:* We will accept comments on this proposed rule or draft economic analysis that are received or postmarked on or before August 9, 2021. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** below) must be received by 11:59 p.m. Eastern Time on the closing date.

*Public informational meeting and public hearing:* We will hold a public informational session from 5:00 p.m. to 6:00 p.m., Mountain Time, followed by a public hearing from 6:30 p.m. to 8:30 p.m., Mountain Time, on June 29, 2021.

**ADDRESSES:**

*Comment submission:* You may submit comments on the proposed rule or draft economic analysis by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. In the Search box, enter FWS-R2-ES-2018-0021 to find this proposed rule. You may submit a comment by clicking on "Comment Now!"

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-R2-ES-2018-0021; U.S. Fish and Wildlife Service Headquarters, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041-3803.

We request that you send comments only by the methods described above. 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 Information Requested section below for more information).

*Public informational meeting and public hearing:* The public informational meeting and the public hearing will be held virtually using the Zoom platform. See Public Hearing, below, for more information.

*Document availability:* The draft economic analysis is available at <https://www.fws.gov/southwest/es/TexasCoastal/>, at <http://www.regulations.gov> in Docket No. FWS-R2-ES-2018-0021, and at the Texas Coastal Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at <https://www.fws.gov/southwest/es/TexasCoastal/>, at <http://www.regulations.gov> in Docket No. FWS-R2-ES-2018-0021, and at the Texas Coastal Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Service website and field office set out above, and may also be included in the preamble of the final rule and/or at <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Chuck Ardizzone, U.S. Fish and Wildlife Service, Texas Coastal Ecological Services Field Office, 17629 El Camino Real #211, Houston, TX 77058; by telephone 281-286-8282; or by facsimile 281-488-5882. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Executive Summary**

*Why we need to publish a rule.* Under the Endangered Species Act, critical habitat must be designated, to the maximum extent prudent and determinable, for all species determined to be endangered or threatened. The Lists of Endangered and Threatened Wildlife and Plants are in title 50 of the

Code of Federal Regulations (CFR) in part 17 (50 CFR 17.11(h) for wildlife and 50 CFR 17.12(h) for plants).

Designations and revisions of critical habitat can only be completed by issuing a rule.

*What this document does.* This document proposes the designation of critical habitat for the Texas hornshell and announces the availability of the draft economic analysis. The Texas hornshell has been listed as an endangered species under the Act. This rule proposes designation of critical habitat necessary for the conservation of the species.

*The basis for our action.* Under the Endangered Species Act, any species that is determined to be a threatened or endangered species shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat. Section 4(b)(2) of the Endangered Species Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

*Supporting analyses.* We prepared an analysis of the economic impacts of the proposed critical habitat designation and hereby announce the availability of the draft economic analysis for public review and comment.

Our species status assessment report (SSA report) documents the results of the comprehensive biological status review for the Texas hornshell and provides an account of the species' overall viability through forecasting of the species' condition in the future (Service 2018, entire). Additionally, the SSA report contains our analysis of required habitat and the existing conditions of that habitat.

*Peer review.* We sought comments from independent specialists on the SSA report to ensure that our critical habitat proposal is based on scientifically sound data and analyses. We received feedback from four scientists with expertise in freshwater mussel biology, ecology, and genetics as peer review of the SSA report. The reviewers were generally supportive of

our approach and made suggestions and comments that strengthened our analysis. We incorporated these comments into the SSA report, which can be found at <http://www.regulations.gov> under Docket No. FWS-R2-ES-2018-0021.

### Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal.

We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as “critical habitat” under section 4 of the Act (16 U.S.C. 1531 *et seq.*) including information to inform the following factors such that a designation of critical habitat may be determined to be not prudent:

(a) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(b) The present or threatened destruction, modification, or curtailment of a species’ habitat or range is not a threat to the species, or threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(c) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(d) No areas meet the definition of critical habitat.

(2) Specific information on:

(a) The amount and distribution of Texas hornshell habitat;

(b) What areas that were occupied at the time of listing and that contain the physical or biological features essential to the conservation of the species should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change; and

(d) What areas not occupied at the time of listing are essential for the conservation of the species. We particularly seek comments regarding:

(i) Whether occupied areas are inadequate for the conservation of the species; and,

(ii) Specific information that supports the determination that unoccupied areas will, with reasonable certainty, contribute to the conservation of the species and, contain at least one physical or biological feature essential to the conservation of the species.

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

(4) Information on the projected and reasonably likely impacts of climate change on the Texas hornshell and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation, and the benefits of including or excluding areas that may be impacted.

(6) Information on the extent to which the description of probable economic impacts in the draft economic analysis is a reasonable estimate of the likely economic impacts.

(7) Whether any specific areas we are proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act, in particular for those covered by the Candidate Conservation Agreement (CCA) and Candidate Conservation Agreement with Assurances (CCAA) for the Texas hornshell in the Black and Delaware Rivers in New Mexico and Texas.

(8) Whether any lands should be considered for exclusion under section 4(b)(2) of the Act for national security reasons, whether such exclusion is or is not appropriate, and whether the benefits of excluding any specific area outweigh the benefits of including that area as critical habitat and why.

(9) Whether lands owned by the Kickapoo Indian Reservation of Texas should be considered for exclusion under section 4(b)(2) of the Act, whether such exclusion is or is not appropriate, and whether the benefits of excluding any specific area outweigh the benefits of including that area as critical habitat and why.

(10) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the associated documents of the draft economic

analysis, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(11) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

All comments submitted electronically via <http://www.regulations.gov> will be presented on the website in their entirety as submitted. For comments submitted via hard copy, we will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. You may request at the top of your document that we withhold personal information such as your street address, phone number, or email address from public review; however, we cannot guarantee that we will be able to do so.

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>.

### Previous Federal Actions

All previous Federal actions are described in the final rule listing the Texas hornshell as an endangered species under the Act published in the **Federal Register** on February 9, 2018 (83 FR 5720).

### Critical Habitat

#### Background

Critical habitat is defined in section 3 of the Act as:

(1) 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

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Our regulations at 50 CFR 424.02 define the geographical area occupied by the species as: An area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.*, migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) Which are

essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical or biological features that occur in specific areas, we focus on the specific features that are essential to support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied by the species would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106-554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions

are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information from the SSA report and information developed during the listing process for the species. Additional information sources may include any generalized conservation strategy, criteria, or outline that may have been developed for the species, the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in findings that the action jeopardizes the continued existence of the species in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information

available at the time of these planning efforts calls for a different outcome.

#### Habitat Outside the United States

Within the identified geographical area occupied at the time of listing (see below, *Areas Occupied at the Time of Listing*), the habitat areas used by the species are in Texas, New Mexico, and Mexico. Because we do not designate as critical habitat areas outside the United States (50 CFR 424.12(g)), we did not examine areas on the Mexican side of the Rio Grande; the critical habitat extends only as far into the river as the United States' jurisdictional boundary, *i.e.*, to the middle of the river. However, conservation of habitat that meets the conditions described in this designation in Mexico may be important to recovery of the species.

#### Prudence Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

We did not identify any of the factors above to apply to the Texas hornshell. Therefore, we find designation of critical habitat is prudent for the species.

#### Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the Texas hornshell is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking, or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of "critical habitat."

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

At the time of our August 10, 2016, proposed rule to list the species, we found that critical habitat was not determinable due to insufficient knowledge of the biological needs of the species. We have continued to review the available information related to the Texas hornshell and newly acquired information necessary to perform this assessment, and we reviewed the available information pertaining to the biological needs of the species and habitat characteristics where this species is located. We examined collection reports and occupancy models for the Texas hornshell (Randklev *et al.* 2017, *entire*). Additionally, we prepared a draft economic analysis. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the Texas hornshell.

#### Physical or Biological Features

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. The regulations at 50 CFR 424.02 define "physical or biological features essential to the conservation of the species" as the features that occur in specific areas and that are essential to support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat

characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity. For example, physical features might include gravel of a particular size required for spawning, alkaline soil for seed germination, protective cover for migration, or susceptibility to flooding or fire that maintains necessary early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a particular level of nonnative species consistent with conservation needs of the listed species.

The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species. In considering whether features are essential to the conservation of the species, the Service may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. These characteristics include, but are not limited to space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, or rearing (or development) of offspring; and habitats that are protected from disturbance.

#### Space for Individual and Population Growth and for Normal Behavior

Most freshwater mussels, including Texas hornshell, are found in aggregations, called mussel beds, that vary in size from about 50 to greater than 5,000 square meters (m<sup>2</sup>), separated by stream reaches in which mussels are absent or rare (Vaughn 2012, p. 983). Texas hornshell larvae (called glochidia) are parasites that must attach to a host fish (generally river carpsucker (*Carpiodes carpio*), grey redbhorse (*Moxostoma congestum*), and red shiner (*Cyprinella lutrensis*)). A population of Texas hornshell incorporates more than one mussel bed; it is the collection of mussel beds within a stream reach between which infested host fish may travel, allowing for ebbs and flows in mussel bed density and abundance over time throughout the population's occupied reach. Therefore, resilient

Texas hornshell populations must occupy stream reaches long enough so that stochastic events that affect individual mussel beds do not eliminate the entire population. Repopulation by infested host fish from other mussel beds within the reach can allow the population to recover from these events. Longer stream reaches are more likely to support populations of Texas hornshell into the future than shorter stream reaches. Therefore, we determine that long stream reaches are an important component of a riverine system with habitat to support all life stages of Texas hornshell.

Texas hornshell need flowing water for survival. They are not found in lakes or in pools without flow, or in areas that are regularly dewatered. River reaches with continuous flow support all life stages of Texas hornshell, while those with little or no flow do not. Flow rates needed by the species will vary depending on river size, location, and substrate type.

Additionally, Texas hornshell occur in flow refuges such as crevices, undercut riverbanks, travertine shelves, and large boulders. These refuges must have seams of clay or other fine sediments within which the mussels may anchor, but not so much excess sediment that the mussels are smothered. Those areas with clean-swept substrate (substrate not covered in sediment) with seams of fine sediments in crevices are suitable Texas hornshell habitat, as well as habitat for their host fish.

#### Physiological Requirements: Water Quality Requirements

Freshwater mussels, as a group, are sensitive to changes in water quality parameters such as dissolved oxygen, salinity, ammonia, and pollutants. Habitats with appropriate levels of these parameters are considered suitable, while those habitats with levels outside of the appropriate ranges are considered less suitable. We have used information available for other species of freshwater mussels to inform the needs of Texas hornshell. Juvenile freshwater mussels are particularly susceptible to low dissolved oxygen levels. Juveniles will reduce feeding behavior when dissolved oxygen is between 2–4 milligrams per liter (mg/L), and mortality has been shown to occur at dissolved oxygen levels below 1.3 mg/L. Additionally, Texas hornshell will die at salinity levels of 7 parts per thousand (ppt) for more than several weeks (Lang 2001, pp. 10–11). Juvenile mussels of other species have been shown to experience complete mortality after 7 days at

salinity levels greater than 4 ppt (Blakeslee *et al.* 2013, p. 2851)

The release of pollutants into streams from point and nonpoint sources have immediate impacts on water quality conditions and may make environments unsuitable for habitation by mussels. Early life stages of freshwater mussels are some of the most sensitive organisms of all species to ammonia and copper (Naimo 1995, pp. 351–352; Augsperger *et al.* 2007, p. 2025). Additionally, sublethal effects of contaminants over time can result in reduced feeding efficiency, reduced growth, decreased reproduction, changes in enzyme activity, and behavioral changes to all mussel life stages. Even wastewater discharges with low ammonia levels have been shown to negatively affect mussel populations. Therefore, we determine that stream reaches with the following water quality parameters are suitable for Texas hornshell:

- Low salinity (less than 0.9 ppt)
- Low ammonia (less than 0.7 mg/L)
- Low levels of contaminants
- Dissolved oxygen levels within substrate greater than 1.3 mg/L.

#### Sites for Development of Offspring

As discussed above, Texas hornshell larvae are parasites that must attach to a host fish to develop into juvenile mussels. Texas hornshell primarily use river carpsucker, gray redhorse, and red shiner as hosts. The river carpsucker and red shiner are widespread throughout the Texas hornshell's occupied range (Hubbs 1990, pp. 90–91; Levine *et al.* 2012, p. 1857). The presence of these fish species, either singly or in combination, supports the life-history needs of the Texas hornshell.

#### Summary of Essential Physical or Biological Features

We derive the specific physical or biological features essential to the conservation of the Texas hornshell from studies of this species' habitat, ecology, and life history as described below. Additional information can be found in the final listing rule published in the **Federal Register** on February 9, 2018 (83 FR 5720), and the Species Status Assessment for the Texas Hornshell (Service 2018, entire). We have determined that the following physical or biological features are essential to the conservation of the Texas hornshell:

A riverine system with habitat to support all life stages of the Texas hornshell, which includes:

(a) Flowing water at rates high enough to support clean-swept substrate but not so high as to dislodge individuals;

(b) Crevices beneath boulders, shelves, and within undercut banks with seams of fine sediment;

(c) River carpsucker, red shiner, and gray redhorse present; and

(d) Water quality parameters within the following ranges:

(i) Salinity below 0.9 ppt;

(ii) Ammonia below 0.7 mg/L;

(iii) Low levels of contaminants; and

(iv) Dissolved oxygen levels within substrate greater than 1.3mg/L.

#### Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features that are essential to the conservation of the species and which may require special management considerations or protection. The features essential to the conservation of this species may require special management considerations or protection to reduce the following threats: Increased fine sediment, water quality impairment, loss of flowing water, and barriers to fish movement.

Management activities that could ameliorate these threats and protect the integrity of the stream ecosystem include restoring or maintaining the natural hydrology of the stream, removing livestock from Texas hornshell habitats, preventing chemical spills, and appropriately maintaining bridges and other stream crossings to limit sediment input.

#### Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b), we review available information pertaining to the habitat requirements of the species and identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat. We are not currently proposing to designate any areas outside the geographical area occupied by the species at the time of listing in February 2018.

The SSA report contains much of the information used to identify critical habitat for Texas hornshell, which includes existing State recovery plans, numerous survey reports on streams

throughout the species' range, and museum records of historical locations (Service 2018).

*Areas Occupied at the Time of Listing*

The proposed critical habitat designation does not include all streams known to have been occupied by the species historically; instead, it focuses on occupied streams within the historical range that have retained the necessary physical and biological features (PBFs) that will allow for the maintenance and expansion of existing populations. The following streams meet the definition of areas occupied by the species at the time of listing: Black River, Delaware River, Pecos River, Devils River, and Rio Grande. No developed areas occur within the proposed designation except for road crossings of streams, which do not remove the suitability of these areas for this species, because habitat is still present.

In summary, for areas proposed as critical habitat, we delineated critical habitat unit boundaries using the following criterion: Evaluate habitat suitability of stream segments within the geographic area occupied at the time of listing, and delineate those segments that contain some or all of the PBFs to support life-history functions essential for conservation of the species.

As a final step, we evaluated those occupied stream segments identified through the above analysis and refined the starting and ending points by evaluating the presence or absence of appropriate PBFs. We selected upstream and downstream cutoff points to omit areas that are highly degraded and are not likely to support the Texas hornshell. For example, permanently dewatered areas or areas in which there

was a change to unsuitable parameters (e.g., water quality, bedrock substrate) were used to mark the start or endpoint of a stream segment proposed for designation. Critical habitat stream segments were then mapped using ArcMap version 10 (Environmental Systems Research Institute, Inc.), a Geographic Information Systems program.

The areas proposed for designation as critical habitat provide sufficient stream habitat for adult Texas hornshell, as well as for the habitat needs for juveniles and the fish species that serve as hosts for the Texas hornshell's parasitic larvae. In general, the PBFs of critical habitat are contained within the riverine ecosystem formed by the channel at bankfull stage. Texas hornshell use the riverine ecosystem for feeding, breeding, and sheltering.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack physical or biological features necessary for the Texas hornshell. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect

the physical or biological features in the adjacent critical habitat.

We are proposing for designation of critical habitat river miles that we have determined were occupied at the time of listing and contain one or more of the physical or biological features that are essential to support life-history processes of the species.

The critical habitat designation is defined by the maps, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which each map is based available to the public on <http://www.regulations.gov> at Docket No. FWS-R2-ES-2017-0030, on our internet site (<https://www.fws.gov/southwest/es/TexasCoastal/>), and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT** above).

**Proposed Critical Habitat Designation**

We are proposing to designate 463.6 mi (745.9 km) in five units as critical habitat for Texas hornshell. The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for Texas hornshell. The five areas we propose as critical habitat are: (1) Pecos Tributary Unit; (2) Pecos River Unit; (3) Devils River Unit; (4) Rio Grande—Lower Canyons Unit; and (5) Rio Grande—Laredo Unit. Table 1 shows the occupancy of the units, the land ownership, and approximate areas of the proposed designated areas for the Texas hornshell.

TABLE 1—OCCUPANCY, LAND OWNERSHIP, AND SIZE OF TEXAS HORNSHELL PROPOSED CRITICAL HABITAT UNITS AND SUBUNITS

[BLM = Bureau of Land Management; NGO = non-governmental organization]

Unit	Subunit	Occupancy at time of listing	Current occupancy	Riparian ownership	Area
1—Pecos Tributary	1a—Black River	Occupied	Occupied	Private	9.7 mi (15.6 km).
	1b—Delaware River	Occupied	Occupied	BLM, Private	31.1 mi (50.0 km).
2—Pecos River		Occupied	Occupied	Private, Federal, NGO.	85.7 mi (137.9 km).
3—Devils River		Occupied	Occupied	Federal, Private, NGO, State.	33.0 mi (53.1 km).
4—Rio Grande—Lower Canyons.	4a—Lower Canyons Reach.	Occupied	Occupied	Federal, State	66.7 mi (107.3 km).
	4b—Langtry Reach	Occupied	Occupied	Private, Federal	46.5 mi (74.8 km).
5—Rio Grande—Laredo.	5a—Eagle Pass Reach.	Occupied	Occupied	Private, City, Tribal	138.7 mi (223.2 km).
	5b—Laredo Reach	Occupied	Occupied	Private, City	52.2 mi (84.0 km).

We present brief descriptions of all units, and reasons why they meet the definition of critical habitat for Texas hornshell, below.

#### *Unit 1: Pecos Tributary Unit*

*Subunit 1a: Black River:* Subunit 1a consists of 15.6 km (9.7 mi) in private ownership in Eddy County, New Mexico. The Texas hornshell occupies the entire stream in this subunit, and the subunit contains all of the PBFs essential to the conservation of Texas hornshell. The watershed of the Black River is characterized by rural ranching and farming, as well as oil and gas development. Diverted river water and groundwater are used for irrigation of farms and ranches as well as hydraulic fracturing by oil and gas development operations (Bren School of Environmental Management 2014, pp. 32, 130). Additionally, only a few roads cross the Black River at low-water crossings; therefore, traffic, including local and industrial, is concentrated in these areas. The relatively short length of this reach renders the population more susceptible to stochastic events. Consequently, special management may be necessary to ensure perennial flow in the river, prevent contaminant spills, and reduce livestock access to the river.

The Service has collaborated with water users, oil and gas developers, landowners, and other partners to develop a Candidate Conservation Agreement (CCA) and Candidate Conservation Agreements with Assurances (CCAAs) for the species on State, Federal, and private lands. The purpose of these agreements is to provide voluntary conservation that would reduce threats to the species while improving physical habitat and water quality. The key conservation measures in the agreements are designed to limit oil and gas development to areas outside of the Black and Delaware River floodplains, minimize erosion, and maintain minimum water flows in the rivers. Along with these measures, the partners to the agreement are evaluating alternatives to the multiple low water crossings on the Black River. Partners are considering alternate crossing locations that could include bridges designed to allow host fishes to pass through in addition to decreasing potential contamination events. We are considering excluding the subunit under section 4(b)(2) of the Act if these agreements are implemented in a manner sufficient to defray the need for additional special management.

*Subunit 1b: Delaware River:* Subunit 1b consists of 50.0 km (31.1 mi) of occupied habitat in the Delaware River

in Culberson County, Texas, and Eddy County, New Mexico. Texas hornshell were historically known from dead shells found within this subunit; the species was likely extirpated due to lack of water. Habitat improvements undertaken by the Bureau of Land Management (BLM) resulted in perennial flow through the rehabilitated section of the Delaware River (BLM 2005, p. 1). A total of 126 adult Texas hornshell were reintroduced to the river in New Mexico in 2014 and 2015. The reintroduced adults were recaptured alive and the females were gravid (brooding larvae) in 2016, indicating preliminary success. A spill of 11 barrels of oil and 18,000 barrels of water that has been collected as a byproduct of oil and gas production occurred upstream of the reintroduced individuals in August 2017; the effects of this spill and the subsequent flooding has resulted in only two of the reintroduced individuals still remaining in the Delaware River. The New Mexico Department of Game and Fish plan to continue their reintroduction efforts to ensure a diverse, reproducing population persists in the river; successful freshwater mussel reintroductions typically require multiple years of effort. Riparian ownership consists of the BLM and private landowners. The BLM helped restore perennial flow to the river through riparian management, and now the reach contains all of the PBFs essential to the conservation of Texas hornshell.

The Delaware River is included in the CCA/CAA described in Subunit 1a; therefore, we are considering it for exclusion under section 4(b)(2) of the Act.

#### *Unit 2: Pecos River Unit*

This unit consists of 137.9 km (85.7 mi) in private, non-governmental organization (NGO), and Federal ownership of the Pecos River in Val Verde and Terrell Counties, Texas. This unit is occupied. Three live Texas hornshell were collected from the Pecos River Unit in 2016, which, based on species survey efforts, indicates several other living Texas hornshell were likely in the unit at that time. In addition, the 2016 collection resulted in numerous shells of the Texas hornshell (Bosman *et al.* 2016, p. 6; Randklev *et al.* 2016, p. 9), which is further evidence that additional members of the species were in the Pecos River. The live specimens collected in 2016 were very old, but we have no indication that they were no longer occupying the Pecos River at the time of listing. The direct evidence of multiple living specimens of Texas

hornshell in the Pecos River as recently as 2016, along with the conclusion that other members of the species were likely present at that time, allows us to conclude that the Pecos River Unit was occupied at the time of listing. This unit contains some of the PBFs essential to the conservation of Texas hornshell, such as flowing water and adequate crevices, but salinity is relatively high in this unit, compromising water quality. Special management may be necessary to improve water quality in this reach.

#### *Unit 3: Devils River Unit*

This unit consists of 53.1 km (33.0 mi) of the Devils River in Val Verde County, Texas. Riparian lands are primarily in private ownership, including The Nature Conservancy (TNC), and both the Texas Parks and Wildlife Department (TPWD) and the Federal Government owns portions of these lands. Texas hornshell are historically known from the Devils River and currently occupy the unit. The Devils River represents a relatively intact watershed, with no dams, little development, and much of it under conservation management. Texas hornshell sites are located on Dolan Falls Preserve, which is 4,800 acres (ac) (1,943 hectares (ha)) owned by TNC, as well as an additional 13,722 ac (5,553 ha) managed under a conservation easement. TNC also owns Nix 2 Ranch (87,000 ac (35,209 ha)), and TPWD owns the Devils River State Natural Area (37,000 ac (15,000 ha)), resulting in conservation management of much of the land along the river (TNC 2004, p. 9; TPWD 2016, p. 1). The PBFs essential to the conservation of Texas hornshell are present in the Devils River. Special management may be necessary to maintain instream flows in the river.

#### *Unit 4: Rio Grande—Lower Canyons*

*Subunit 4a: Lower Canyons Reach:* This subunit consists of 107.3 km (66.7 mi) of occupied habitat on the U.S. side of the Rio Grande in Terrell and Brewster Counties, Texas. Most of this reach is part of the Rio Grande Wild and Scenic River, owned by the United States and managed by the National Park Service. A small portion of the subunit is owned by the State of Texas. The PBFs essential to the conservation of Texas hornshell are present in this subunit. It was designated a National Wild and Scenic River in 1978 (Garrett and Edwards 2004, p. 396), which affords some protection from Federal development projects, but does not limit State, local, or private development (National Wild and Scenic Rivers System 2016, p. 1). Special management



may be necessary to maintain instream flows in the river.

**Subunit 4b: Langtry Reach:** This subunit consists of 74.8 km (46.5 mi) of the U.S. side of the Rio Grande in Terrell and Val Verde Counties, Texas, most of which is also owned and managed by the National Park Service. A small portion of this subunit is in private ownership. This unit contains all of the PBFs and is connected to the known population of Texas hornshell in Subunit 4a, but the remote nature of this reach has prevented surveys. There are no instream structures in Subunit 4b that would impede water flow; the flow regime is the same as in Subunit 4a; and the host fish may move between the subunits freely. Based on this information, it is reasonable to conclude that the population in Subunit 4a is unlikely to stop at the most downstream survey location; therefore, we conclude this subunit is occupied.

However, due to the lack of recent surveys, we are analyzing this subunit against the second prong of the definition of critical habitat for unoccupied habitat out of an abundance of caution. If Subunit 4b is not, in fact, occupied, it would provide for needed growth and expansion of the species in this portion of its historical range. The longer the occupied reach, the more likely it is that the Texas hornshell population can withstand stochastic events such as extreme flooding, dewatering, or water contamination. Therefore, Subunit 4b is essential for the conservation of the species.

Like Subunit 4a, this subunit is part of the Rio Grande Wild and Scenic River, which affords some protection from Federal development projects, but does not limit State, local, or private development (National Wild and Scenic Rivers System 2016, p. 1). Special management may be necessary to maintain instream flows in the river.

#### *Unit 5: Rio Grande—Laredo*

**Subunit 5a: Eagle Pass Reach:** This subunit consists of 223.2 km (138.7 mi) of the U.S. side of the Rio Grande from Del Rio, Texas, to upstream of the Laredo population of Texas hornshell in Kinney and Maverick Counties, Texas. This subunit is primarily privately owned, with small portions owned by the City of Eagle Pass and the Kickapoo Tribe of Texas. We conclude that this reach was occupied at the time of listing. This conclusion is based on the collection of two live individuals near Del Rio between 2008 and 2011 (Karatajev *et al.* 2015, p. 8). The immobility of Texas hornshell and the continued presence of suitable habitat indicates the species remained in the

area at the time of listing. This reach includes all of the PBFs necessary to support the continued existence of the species. Additionally, the hydrological connection with Subunit 5b, which contains the largest known population of Texas hornshell, allows for host fish movement between the subunits.

However, due to the lack of recent records, we are analyzing this subunit against the second prong of the definition of critical habitat for unoccupied habitat out of an abundance of caution. If Subunit 5a is not occupied, it would provide for needed growth and expansion of the species in this portion of its historical range. The longer the occupied reach, the more likely it is that the Texas hornshell population can withstand stochastic events such as extreme flooding, dewatering, or water contamination. Therefore, Subunit 5a is essential for the conservation of the species.

The Rio Grande in this subunit is heavily influenced by development along the Texas-Mexico border, and the river has a high sediment load in this reach (Texas Clean Rivers Program 2013, p. 9). Flows are regulated by releases from Amistad Reservoir based on hydropower generation and water deliveries for downstream irrigation needs (Texas Water Development Board 2016, p. 1). Special management may be necessary to improve water quality and reduce sedimentation.

**Subunit 5b: Laredo Reach:** This subunit consists of 84.0 km (52.2 mi) of the U.S. side of the Rio Grande upstream of Laredo in Webb County, Texas, in private and city ownership. This subunit is occupied and contains the largest known Texas hornshell population (Randklev *et al.* 2015, p. 7). Like subunit 5a, this subunit is heavily influenced by development along the Texas-Mexico border, and rapid human population growth as well as industrialization on the Mexican side of the river has stressed the existing wastewater treatment facilities, and Rio Grande water quality is impaired as a result (Texas Clean Rivers Program 2013, p. 7). All of the PBFs essential to the conservation of Texas hornshell are found in this reach, although special management to improve water quality may be necessary.

### **Effects of Critical Habitat Designation**

#### *Section 7 Consultation*

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened

species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final regulation with a revised definition of destruction or adverse modification on August 27, 2019 (84 FR 44976). Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded, authorized, or carried out by a Federal agency, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define “reasonable and prudent alternatives” (at 50 CFR



402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinstate formal consultation on previously reviewed actions. These requirements apply when the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law) and, subsequent to the previous consultation, we have listed a new species or designated critical habitat that may be affected by the Federal action, or the action has been modified in a manner that affects the species or critical habitat in a way not considered in the previous consultation. In such situations, Federal agencies sometimes may need to request reinitiation of consultation with us, but the regulations also specify some exceptions to the requirement to reinstate consultation on specific land management plans after subsequently listing a new species or designating new critical habitat. See the regulations for a description of those exceptions.

#### *Application of the "Adverse Modification" Standard*

The key factor related to the destruction or adverse modification determination is whether implementation of the proposed Federal action directly or indirectly alters the designated critical habitat in a way that appreciably diminishes the value of the critical habitat as a whole for the conservation of the listed species. As discussed above, the role of critical habitat is to support physical or biological features essential to the conservation of a listed species and provide for the conservation of the species. Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final

regulation that designates critical habitat, activities involving a Federal action that may violate 7(a)(2) of the Act by destroying or adversely modifying such designation.

Activities that the Services may, during a consultation under section 7(a)(2) of the Act, find are likely to destroy or adversely modify critical habitat include, but are not limited to:

(1) Actions that would alter the existing flow regime. Such activities could include, but are not limited to, impoundment, water diversion, and water withdrawal. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of these mussels.

(2) Actions that would significantly alter water chemistry or temperature. Such activities could include, but are not limited to, release of chemicals, biological pollutants, or heated effluents into the surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could alter water conditions to levels that are beyond the tolerances of the mussels or their fish host and result in direct or cumulative adverse effects to these individuals and their life cycles.

(3) Actions that would significantly increase sediment deposition within the stream channel. Such activities could include, but are not limited to, excessive sedimentation from livestock grazing, road construction, channel alteration, and other watershed and floodplain disturbances. These activities could eliminate or reduce the habitat necessary for the growth and reproduction of these mussels and their fish host by increasing the sediment deposition to levels that would adversely affect their ability to complete their life cycles.

#### **Exemptions**

##### *Application of Section 4(a)(3) of the Act*

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) provides that: "The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation." There are no Department of Defense lands within the proposed critical habitat designation.

#### **Consideration of Impacts Under Section 4(b)(2) of the Act**

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

When identifying the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive due to the protection from destruction of adverse modification as a result of actions with a Federal nexus; the educational benefits of mapping essential habitat for recovery of the listed species; and any benefits that may result from a designation due to State or Federal laws that may apply to critical habitat. In the case of the Texas hornshell, the benefits of critical habitat include public awareness of the presence of the Texas hornshell and the importance of habitat protection, and, where a Federal nexus exists, increased habitat protection for the Texas hornshell due to protection from destruction or adverse modification of critical habitat.

When considering the benefits of exclusion, we consider, among other things, whether exclusion of a specific area is likely to result in conservation or the continuation, strengthening, or encouragement of partnerships. Continued implementation of an ongoing management plan that provides equal to or more conservation than a critical habitat designation would reduce the benefits of including that specific area in the critical habitat designation.

We evaluate the existence of a conservation plan when considering the benefits of inclusion. We consider a variety of factors, including but not limited to, whether the plan is finalized; how it provides for the conservation of the essential physical or biological features; whether there is a reasonable expectation that the conservation

management strategies and actions contained in a management plan will be implemented into the future; whether the conservation strategies in the plan are likely to be effective; and whether the plan contains a monitoring program or adaptive management to ensure that the conservation measures are effective and can be adapted in the future in response to new information.

After identifying the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to evaluate whether the benefits of exclusion outweigh those of inclusion. If our analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, we then determine whether exclusion would result in extinction of the species. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the designation.

The final decision on whether to exclude any areas will be based on the best scientific data available at the time of the final designation, including information obtained during the comment period and information about the economic impact of designation. Accordingly, we have prepared a draft economic analysis concerning the proposed critical habitat designation, which is available for review and comment (see **ADDRESSES**).

### Consideration of Economic Impacts

Section 4(b)(2) of the Act and its implementing regulations require that we consider the economic impact that may result from a designation of critical habitat. To assess the probable economic impacts of a designation, we must first evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. We then must evaluate the impacts that a specific critical habitat designation may have on restricting or modifying specific land uses or activities for the benefit of the species and its habitat within the areas proposed. We then identify which conservation efforts may be the result of the species being listed under the Act versus those attributed solely to the designation of critical habitat for this particular species.

The probable economic impact of a 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, which includes the existing regulatory and socio-economic burden imposed on landowners, managers, or other resource users potentially affected by the designation of critical habitat (e.g., under the

Federal listing as well as other Federal, State, and local regulations). The baseline, therefore, represents the costs of all efforts attributable to the listing of the species under the Act (i.e., conservation of the species and its habitat 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 would not be expected without the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat, above and beyond the baseline costs. These are the costs we use when evaluating the benefits of inclusion and exclusion of particular areas from the final designation of critical habitat should we choose to conduct a discretionary section 4(b)(2) exclusion analysis.

For this particular designation, we developed an Incremental Effects Memorandum (IEM) considering the probable incremental economic impacts that may result from this proposed designation of critical habitat. The information contained in our IEM was then used to develop a screening analysis of the probable effects of the designation of critical habitat for the Texas hornshell (Industrial Economics, Inc. 2019).

We began by conducting a screening analysis of the proposed designation of critical habitat in order to focus our analysis on the key factors that are likely to result in incremental economic impacts. The purpose of the screening analysis is to filter out the geographic areas in which the critical habitat designation is unlikely to result in probable incremental economic impacts. In particular, the screening analysis considers baseline costs (i.e., absent critical habitat designation) and includes probable economic impacts where land and water use may be subject to conservation plans, land management plans, best management practices, or regulations that protect the habitat area as a result of the Federal listing status of the species. The screening analysis filters out particular areas of critical habitat that are already subject to such protections and are, therefore, unlikely to incur incremental economic impacts. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis also assesses whether units that

are unoccupied by the species may require additional management or conservation efforts as a result of the critical habitat designation, thereby possibly incurring incremental economic impacts. This screening analysis combined with the information contained in our IEM are what we consider our draft economic analysis of the proposed critical habitat designation for the Texas hornshell, and this analysis is summarized in the narrative below.

Executive Orders 12866 and 13563 direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible) and qualitative terms. Consistent with the E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. If sufficient data are available, we assess to the extent practicable the probable impacts to both directly and indirectly affected entities. As part of our screening analysis, we considered the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation.

In our evaluation of the probable incremental economic impacts that may result from the proposed designation of critical habitat for the Texas hornshell, first we identified, in the IEM dated December 5, 2016, probable incremental economic impacts associated with the following categories of activities: (1) Federal lands management (National Park Service, Bureau of Land Management); (2) roadway and bridge construction; (3) agriculture; (4) grazing; (5) groundwater pumping; (6) in-stream dams and diversions; (7) oil and gas production; and (8) border protection. We considered each industry or category individually. Additionally, we considered whether their activities have any Federal involvement. Critical habitat designation generally will not affect activities that do not have any Federal involvement; under the ESA, designation of critical habitat affects only activities conducted, funded, permitted, or authorized by Federal agencies. In areas where the Texas hornshell is present, Federal agencies already are required to consult with the Service under section 7 of the Act on activities they fund, permit, or implement that may affect the species. If we finalize this proposed critical habitat designation, consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our IEM, we attempted to clarify the distinction between the effects that will result from the species being listed and those attributable to the critical habitat designation (*i.e.*, difference between the jeopardy and adverse modification standards) for the Texas hornshell's critical habitat. The Texas hornshell has not been listed long enough for us to have conducted any section 7 consultations. It has been our experience that, for such species, it is more difficult to discern which conservation efforts are attributable to the species being listed and which will result solely from the designation of critical habitat. However, the following specific circumstances in this case help to inform our evaluation: (1) The essential physical or biological features identified for critical habitat are the same features essential for the life requisites of the species and (2) any actions that would result in sufficient harm or harassment to constitute jeopardy to the Texas hornshell would also likely adversely affect the essential physical or biological features of critical habitat. The IEM outlines our rationale concerning this limited distinction between baseline conservation efforts and incremental impacts of the designation of critical habitat for this species. This evaluation of the incremental effects has been used as the basis to evaluate the probable incremental economic impacts of this proposed designation of critical habitat.

The proposed critical habitat designation for the Texas hornshell totals 463.6 mi (745.9 km) in five units, all of which were occupied at the time of listing. However, two subunits—4b and 5a (comprising 40 percent of the proposed critical habitat designation)—have few records of Texas hornshell and are so remote that we do not believe listing the species made the public aware of its presence in these areas. As a result, we do not expect section 7 consultations to be initiated in these areas until additional awareness is brought to these areas when they are designated as critical habitat. Therefore, while all units of the proposed critical habitat were occupied at the time of listing, we conducted an economic analysis that modeled Subunits 4b and 5a as unoccupied so that we could more accurately represent the anticipated increase in public awareness and cost of project modifications when these areas are designated as critical habitat. As a result, our economic effects analysis demonstrates the maximum economic effects of the critical habitat designation.

All other subunits (besides the two modeled as unoccupied) comprise 60 percent of the designation and were

modeled as occupied in the economic analysis. In these areas, any actions that may affect the species or its habitat would also affect designated critical habitat and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the Texas hornshell. Therefore, only administrative costs are expected in approximately 60 percent of the proposed critical habitat designation. While this additional analysis will require time and resources by both the Federal action agency and the Service, we believe that in most circumstances these costs would predominantly be administrative in nature and would not exceed \$89,000 in a single year.

The remaining subunits (185.2 mi (298.0 km), or 40 percent of the total proposed critical habitat designation) that were analyzed as unoccupied by the species for the purposes of the economic analysis are essential for the conservation of the species. In these areas, any conservation efforts or associated probable impacts would be considered incremental effects attributed to the critical habitat designation. Subunit 4b (Rio Grande–Lower Canyons, Langtry Reach) is very remote with little to no development, and activities that could affect the Texas hornshell or its habitat are not expected to occur in these areas. We do not anticipate any projects because of how remote Subunit 4b is, as well as the lack of historical, current, or planned activities in this area. Subunit 5a (Rio Grande–Laredo, Eagle Pass Reach) has potential for projects to occur; however, because this reach is upstream of occupied habitat, for large projects, project modifications requested to avoid adverse modification are likely to be the same as those that would be needed to avoid jeopardizing the species in downstream, occupied critical habitat. For small projects that may affect critical habitat in this reach, project modifications would be the same as conservation measures currently included in best management practices under Clean Water Act section 404 permits issued by the U.S. Army Corps of Engineers. Therefore, costs are unlikely to exceed \$100 million in any single year and would not be significant, based on the definition of significance in E.O. 12866.

The entities most likely to incur incremental costs are parties to section 7 consultations, including Federal action agencies and, in some cases, third parties, most frequently State agencies

or municipalities. Activities we expect will be subject to consultations that may involve private entities as third parties are residential and commercial development that may occur on private lands. However, based on coordination efforts with State and local agencies, the cost to private entities within these sectors is expected to be relatively minor (administrative costs of less than \$10,000 per consultation effort) and would not be significant (exceed \$100 million in a single year).

The probable incremental economic impacts of the Texas hornshell critical habitat designation are expected to be limited to additional administrative effort as well as minor costs of conservation efforts resulting from a small number of future section 7 consultations. This is due to two factors: (1) In proposed critical habitat stream reaches that were analyzed as occupied by the species (60 percent), incremental economic impacts of critical habitat designation, other than administrative costs, are unlikely; and (2) in proposed areas that were analyzed as if they were unoccupied by the Texas hornshell (40 percent), few actions are anticipated that will result in section 7 consultation or associated project modifications. At approximately \$10,000 or less per consultation, in order to reach the threshold of \$100 million of incremental administrative impacts in a single year, critical habitat designation would have to result in more than 11,000 consultations in a single year. Thus, the annual administrative burden is unlikely to reach \$100 million.

As we stated earlier, we are soliciting data and comments from the public on the draft economic analysis, as well as all aspects of the proposed rule and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusion will not result in the extinction of this species.

### Exclusions

Based on the information provided by entities seeking exclusion, as well as any additional public comments received, we will evaluate whether certain lands are appropriate for exclusion from the final designation under section 4(b)(2) of the Act. If the analysis indicates that the benefits of excluding lands from the final designation outweigh the benefits of designating those lands as critical

habitat, then the Secretary may exercise his discretion to exclude the lands from the final designation.

We are considering whether to exclude Unit 1: Pecos Tributary Unit under section 4(b)(2) of the Act from the final critical habitat designation for the Texas hornshell because of the conservation agreements discussed earlier in this document. The Service has collaborated with water users, oil and gas developers, landowners, and other partners to implement a CCA and CCAA for the Texas hornshell on State, Federal, and private lands in the Black and Delaware River watersheds. The key conservation measures in the agreements are designed to limit oil and gas development to areas outside of the Black and Delaware River floodplains, minimize erosion in order to maintain suitable substrate, and maintain minimum water flows in the rivers. Along with these measures, the partners to the agreement are evaluating alternatives to the multiple low water crossings on the Black River to reduce the potential for river contamination. Partners are considering alternate crossing locations that could include bridges designed to allow host fishes to pass through in addition to decreasing the risk of contamination events.

The Pecos Tributary Unit consists of two subunits, the Black River Subunit (9.7 mi (15.6 km)) and the Delaware River Subunit (31.1 mi (50.0 km)). A CCA and CCAA between the Service, BLM, New Mexico State Land Office, and Center of Excellence has been completed for the Black and Delaware Rivers in New Mexico and Texas. We are considering the exclusion of non-Federal lands covered by this plan that provide for the conservation of the Texas hornshell. We are requesting comments on the benefit to the Texas hornshell from the CCA/CCAA; however, at this time, we are not proposing to exclude any area within the proposed critical habitat for the Texas hornshell.

However, we specifically solicit comments on the inclusion or exclusion of the Pecos Tributary Unit.

Any other plans in development that are submitted to us will be evaluated and could result in the exclusion of additional proposed critical habitat units from the final designation.

#### *Exclusions Based on Economic Impacts*

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared an analysis of the economic impacts of the proposed critical habitat designation and related

factors. Potential land use sectors that may be affected by the Texas hornshell critical habitat designation include water diversion, impoundment repairs, bridge and highway maintenance, oil and gas development, border protection, grazing, groundwater withdrawals, and agriculture.

During the development of a final designation, we will consider any additional economic impact information received through the public comment period, and as such areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

#### *Impacts on National Security and Homeland Security*

Section 4(a)(3)(B)(i) of the Act may not cover all Department of Defense (DoD) lands or areas that pose potential national-security concerns (e.g., a DoD installation that is in the process of revising its INRMP for a newly listed species or a species previously not covered). If a particular area is not covered under section 4(a)(3)(B)(i), national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of "critical habitat." Nevertheless, when designating critical habitat under section 4(b)(2), the Service must consider impacts on national security, including homeland security, on lands or areas not covered by section 4(a)(3)(B)(i). Accordingly, we will always consider for exclusion from the designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns.

We cannot, however, automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to

the probable incremental impact that could result from the designation. If the agency provides a reasonably specific justification, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary section 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

We are not considering or proposing any lands for exclusions based on national security impacts under section 4(b)(2) of the Act in this proposed critical habitat rule. We have coordinated with the DHS and will continue to do so during the development of the final rule. U.S. Customs and Border Protection indicated that construction and maintenance of boat ramps, sediment removal, and dam construction may be affected by the designation of critical habitat for the Texas hornshell. We note that Congress has provided to the Secretary of Homeland Security a number of authorities necessary to carry out the Department's border security mission. One of those authorities is found at section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as amended ("IIRIRA"). In section 102(a) of IIRIRA, Congress provided that the Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States. In section 102(b) of IIRIRA, Congress mandated the installation of additional fencing, barriers, roads, lighting, cameras, and sensors on the southwest border. Finally, in section 102(c) of IIRIRA, Congress granted to the Secretary of Homeland Security the authority to waive all legal requirements that he determines are necessary to ensure the expeditious construction of barriers and roads authorized by section 102 of IIRIRA. On February 20, 2020, the Secretary of Homeland Security issued waivers for legal requirements covering border barrier activities directly in the vicinity of the Texas hornshell's known range (85 FR 9794).

### *Exclusions Based on Other Relevant Impacts*

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors including whether there are permitted conservation plans covering the species in the area such as habitat conservation plans, safe harbor agreements, or CCAAs, or whether there are non-permitted conservation agreements and partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at the existence of tribal conservation plans and partnerships and consider the government-to-government relationship of the United States with tribal entities. We have been in contact with the Kickapoo Traditional Tribe of Texas during the development of this proposed rule and will continue to do so during the development of final critical habitat. We also consider any social impacts that might occur because of the designation.

### **Public Hearings**

We have scheduled a public informational meeting and public hearing on this proposed rule to designate critical habitat for the Texas hornshell. We will hold the public informational meeting and public hearing on the date and at the times listed above under *Public informational meeting and public hearing in DATES*. We are holding the public informational meeting and public hearing via the Zoom online video platform and via teleconference so that participants can attend remotely. For security purposes, registration is required. To listen and view the meeting and hearing via Zoom, listen to the meeting and hearing by telephone, or provide oral public comments at the public hearing by Zoom or telephone, you must register. For information on how to register, or if you encounter problems joining Zoom the day of the meeting, visit <https://www.fws.gov/southwest/>. Registrants will receive the Zoom link and the telephone number for the public informational meeting and public hearing. If applicable, interested members of the public not familiar with the Zoom platform should view the Zoom video tutorials (<https://support.zoom.us/hc/en-us/articles/206618765-Zoom-video-tutorials>) prior to the public informational meeting and public hearing.

The public hearing will provide interested parties an opportunity to present verbal testimony (formal, oral

comments) regarding this proposed rule. While the public informational meeting will be an opportunity for dialogue with the Service, the public hearing is not: It is a forum for accepting formal verbal testimony. In the event there is a large attendance, the time allotted for oral statements may be limited. Therefore, anyone wishing to make an oral statement at the public hearing for the record is encouraged to provide a prepared written copy of their statement to us through the Federal eRulemaking Portal, or U.S. mail (see **ADDRESSES**, above). There are no limits on the length of written comments submitted to us. Anyone wishing to make an oral statement at the public hearing must register before the hearing (<https://www.fws.gov/southwest/>). The use of a virtual public hearing is consistent with our regulations at 50 CFR 424.16(c)(3).

### **Required Determinations**

#### *Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

#### *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 of 1996 (SBREFA; 5 U.S.C. 801 et seq.), 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 effects 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 the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

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 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.

The Service's current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are required to evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself, and therefore, not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the Agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Consequently, it is our position that

only Federal action agencies will be directly regulated by this designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated.

Moreover, Federal agencies are not small entities. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that, if promulgated, the proposed critical habitat designation will not have a significant economic impact on a substantial number of small entities.

In summary, we have considered whether the proposed designation 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 promulgated, the proposed critical habitat designation would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

*Energy Supply, Distribution, or Use—Executive Order 13211*

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Oil and gas leases occur within the watershed of both subunits in Unit 1: Pecos Tributary Unit. We do not expect designation of critical habitat for the Texas hornshell to significantly affect the production under these leases because we anticipate most companies will participate in the voluntary conservation measures provided in the CCAA. Further, in our economic analysis, we did not find that the designation of this proposed critical habitat will significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is 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 et seq.), we make the following findings:

(1) 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. While 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, 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.

(2) We do not believe that this rule will significantly or uniquely affect small governments because small governments will be affected only to the extent that any programs having Federal funds, permits, or other authorized

activities must ensure that their actions will not adversely affect the critical habitat. Therefore, a Small Government Agency Plan is not required.

*Takings—Executive Order 12630*

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the Texas hornshell in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat 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. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for Texas hornshell does not pose significant takings implications for lands within or affected by the designation.

*Federalism—Executive Order 13132*

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we request information from, and coordinated development of this proposed critical habitat designation with, appropriate State resource agencies in New Mexico and Texas. From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the national government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas

that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While 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, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

#### *Civil Justice Reform—Executive Order 12988*

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

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

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency 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 (42 U.S.C. 4321 et seq.)*

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).] However, when the range of the species includes States within the Tenth Circuit, such as that of the Texas hornshell, under the Tenth Circuit ruling in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), we undertake a NEPA analysis for critical habitat designation. We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

#### *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), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our 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.

There are tribal lands in Texas included in this proposed designation of critical habitat. The Kickapoo Indian Reservation of Texas owns 1.3 km (0.8

mi) adjacent to the Rio Grande in the Rio Grande–Eagle Pass Reach subunit. Using the criteria found in the Criteria Used To Identify Critical Habitat section, we have determined that all of the areas proposed for designation on tribal lands are essential to the conservation of the species. We will seek government-to-government consultation with these tribes throughout the proposal and development of the final designation of Texas hornshell critical habitat.

#### *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:

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) 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 **ADDRESSES**. 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 references cited in this rulemaking is available on the internet at <http://www.regulations.gov> and upon request from the Texas Coastal Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### **Authors**

The primary authors of this proposed rulemaking are the staff members of the Texas Coastal Ecological Services Field Office.

#### **List of Subjects in 50 CFR Part 17**

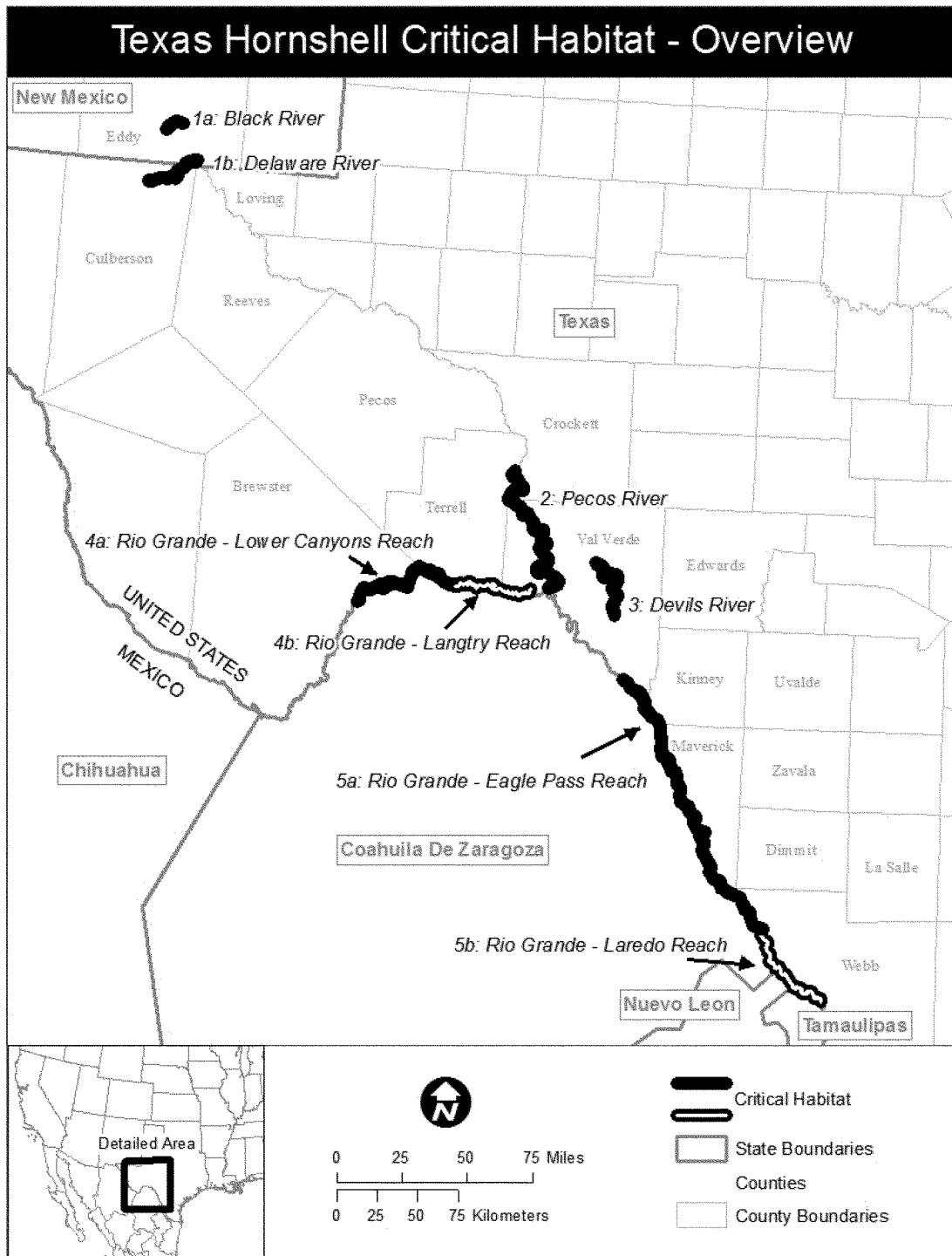
Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

#### **Proposed Regulation Promulgation**

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:







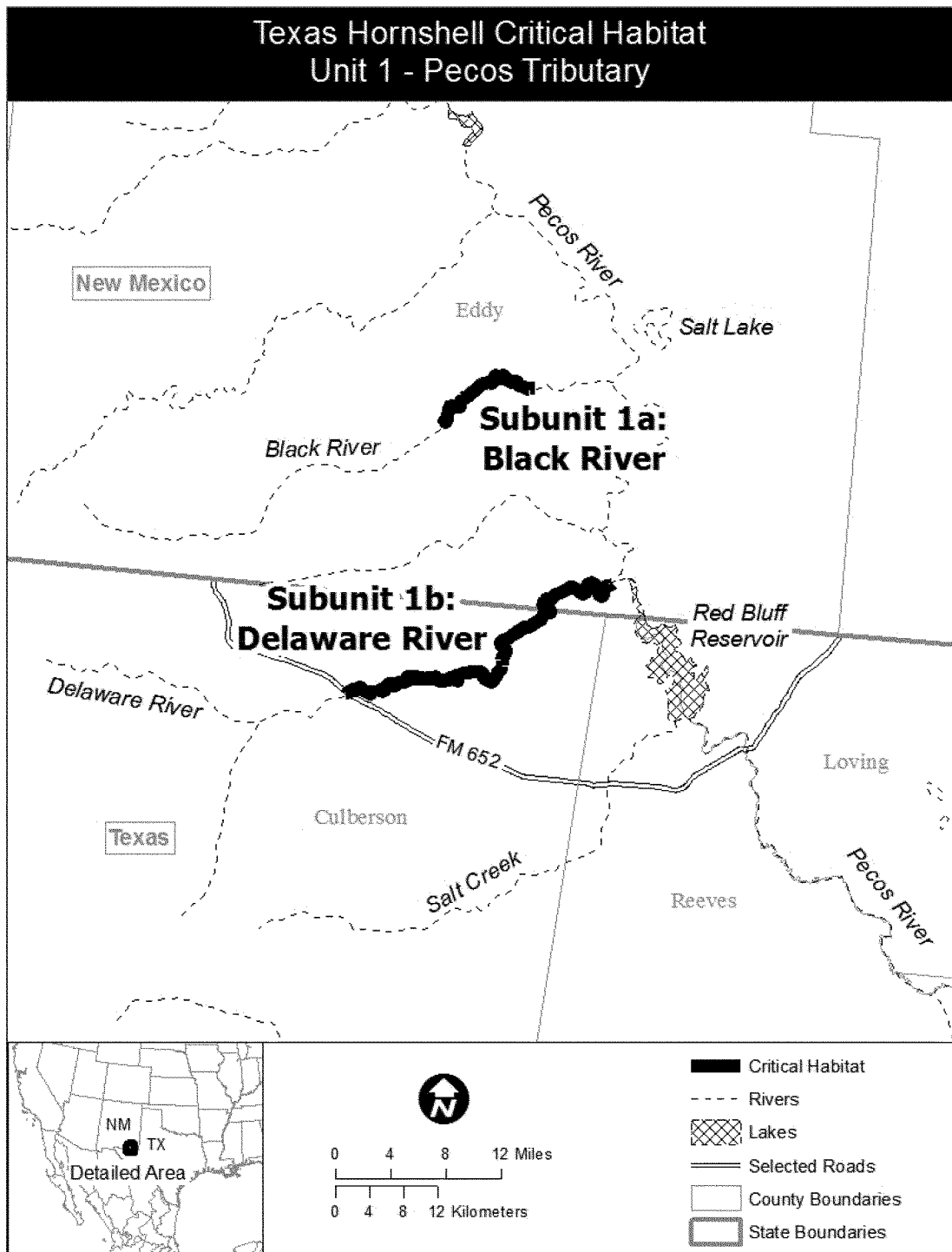
(6) Unit 1: Pecos Tributary Unit, Eddy County, New Mexico, and Culberson County, Texas.

(i) Unit 1 consists of two subunits: Subunit 1a (Black River Subunit) contains 15.6 km (9.7 mi) in Eddy

County, New Mexico, and is composed of lands in private ownership; Subunit 1b (Delaware River Subunit) contains 50.0 km (31.1 mi) in Eddy County, New Mexico, and Culberson County, Texas, and is composed of lands in Federal

(13.2 km (8.2 mi)) and private (36.8 km (22.9 mi)) ownership.

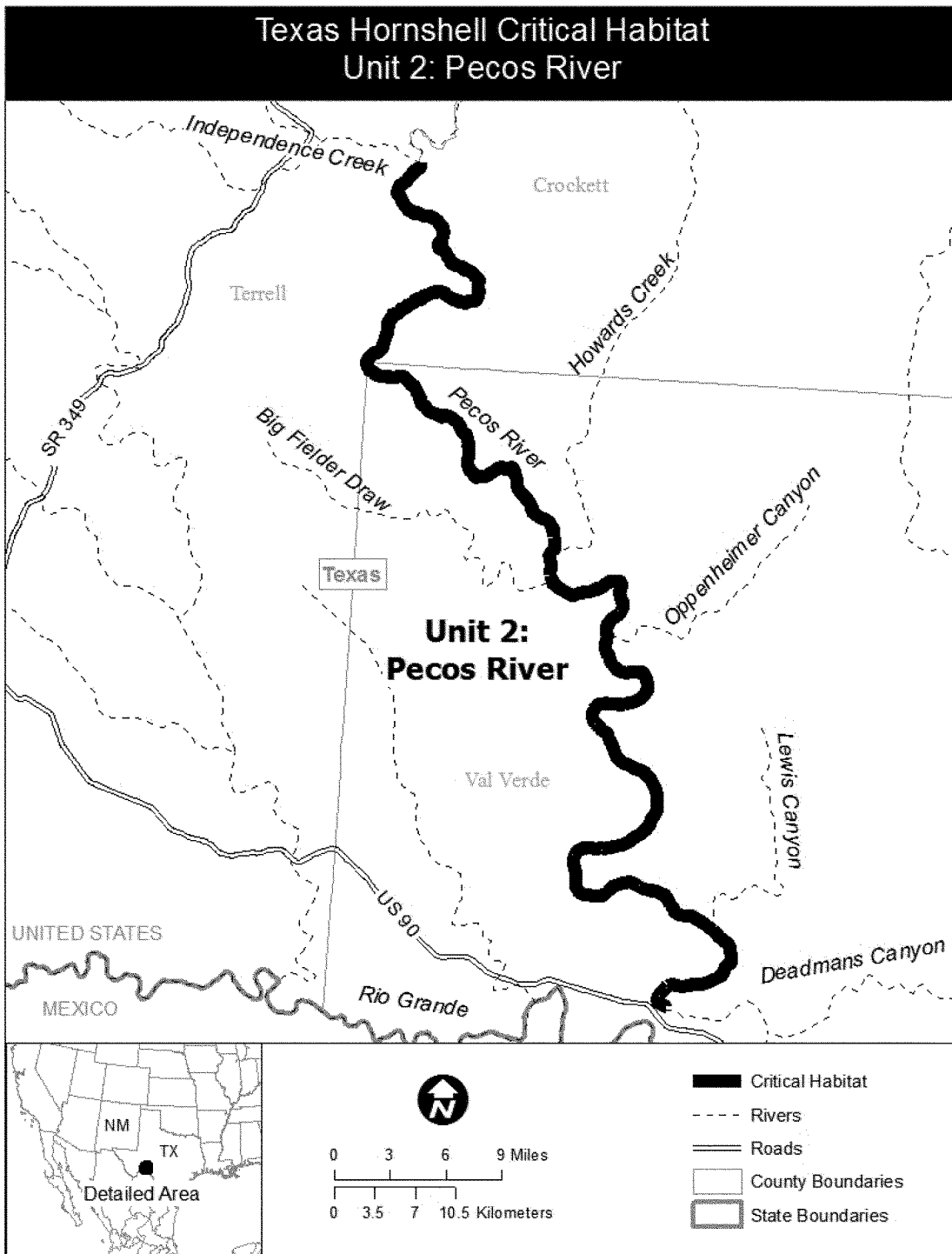
(ii) Map of Unit 1, Pecos Tributary Unit, Eddy County, New Mexico, and Culberson County, Texas, follows:



(7) Unit 2: Pecos River Unit, Val Verde and Terrell Counties, Texas.  
 (i) Unit 2 consists of 137.9 km (85.7 mi) in Val Verde and Terrell Counties, Texas, and is composed of lands in

Federal (2.7 km (1.7 mi)), non-governmental organization (7.6 km (4.7 mi)), and private (127.6 km (79.3 mi)) ownership.

(ii) Map of Unit 2, Pecos River Unit, Val Verde and Terrell Counties, Texas, follows:



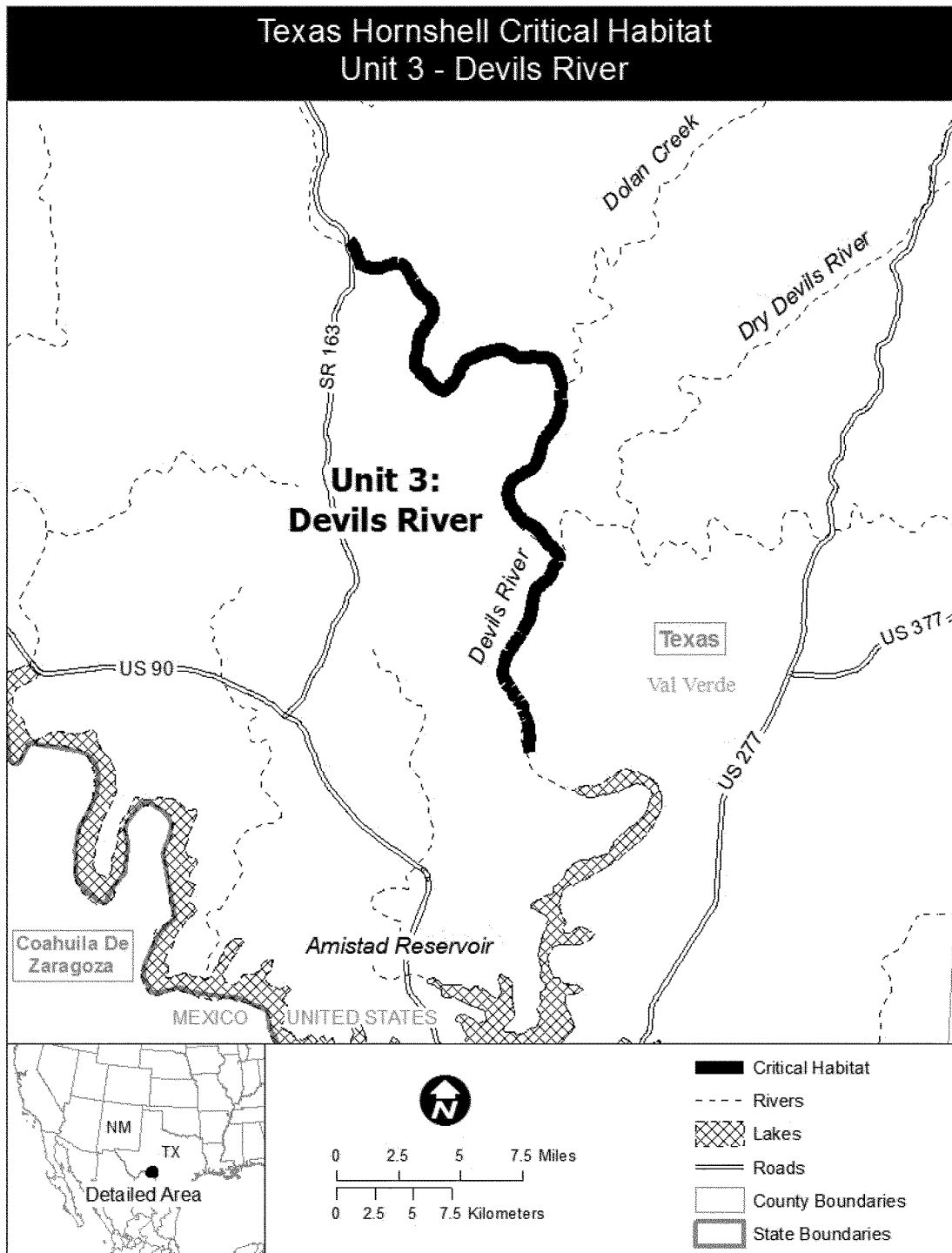
(8) Unit 3: Devils River Unit, Val Verde County, Texas.

(i) Unit 3 consists of 53.1 km (33.0 mi) in Val Verde County, Texas, and is

composed of lands in Federal (2.6 km (1.6 mi)), State (1.6 km (1.0 mi)), non-governmental organization (16.7 km

(10.4 mi)), and private (32.2 km (20.0 mi)) ownership.

(ii) Map of Unit 3, Devils River Unit, Val Verde County, Texas, follows:



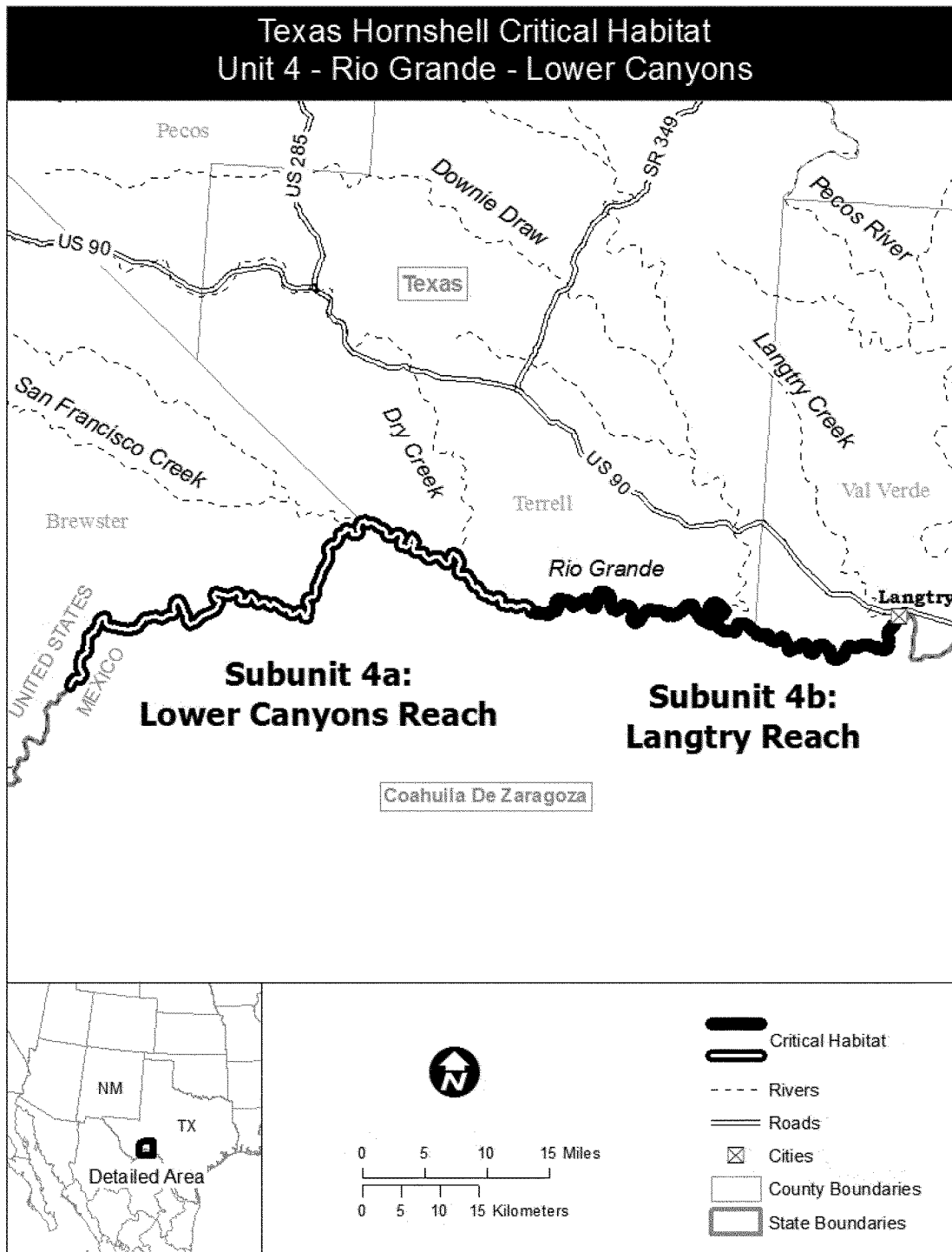
(9) Unit 4: Rio Grande—Lower Canyons Unit, Terrell, Brewster, and Val Verde Counties, Texas.

(i) Unit 4 consists of two subunits: Subunit 4a (Lower Canyons Reach Subunit) contains 107.3 km (66.7 mi) in

Terrell and Brewster Counties, Texas, and is composed of lands in State (7.1 km (4.4 mi)), and Federal (100.3 km (62.3 mi)) ownership; Subunit 4b (Langtry Reach Subunit) contains 74.8 km (46.5 mi) in Brewster and Val Verde

Counties, Texas, and is composed of lands in Federal (69.8 km (43.4 mi)) and private (5.0 km (3.1 mi)) ownership.

(ii) Map of Unit 4, Rio Grande—Lower Canyons Unit, Terrell, Brewster, and Val Verde Counties, Texas, follows:



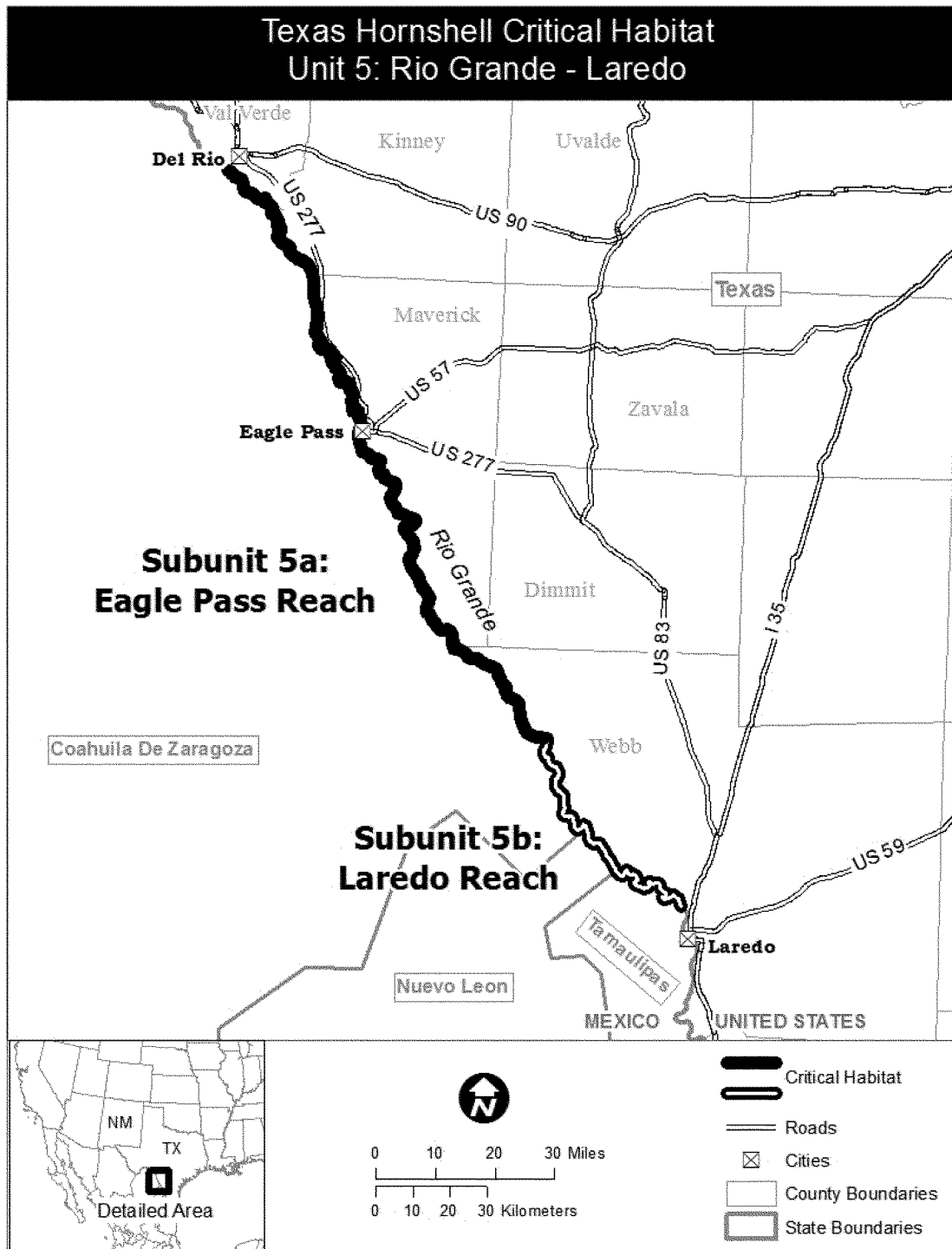
(10) Unit 5: Rio Grande—Laredo Unit, Kinney, Maverick, and Webb Counties, Texas.

(i) Unit 5 consists of two subunits: Subunit 5a (Eagle Pass Reach Subunit) contains 223.2 km (138.7 mi) in Kinney

and Maverick Counties, Texas, and is composed of lands in city (0.8 km (0.5 mi)), Tribal (1.3 km (0.8 mi)), and private (221.1 km (137.4 mi)) ownership; Subunit 5b (Laredo Reach Subunit) contains 84.0 km (52.2 mi) in Webb

County, Texas, and is composed of lands in city (0.5 km (0.3 mi)) and private (83.5 km (51.9 mi)) ownership.

(ii) Map of Unit 5, Rio Grande—Laredo Unit, Kinney, Maverick, and Webb Counties, Texas, follows:



\* \* \* \* \*

**Martha Williams,**  
*Principal Deputy Director, Exercising the  
 Delegated Authority of the Director, U.S. Fish  
 and Wildlife Service.*

[FR Doc. 2021-11966 Filed 6-9-21; 8:45 am]

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