

information that will be used in making a determination whether *Cicurina cueva* should be listed as endangered. We reopened the comment period from May 23 to June 22, 2005 (70 FR 29471), as additional information from a genetic analysis and additional survey work for *Cicurina* species in southern Travis County became available near the end of the original comment period. We were also expecting a biological evaluation from the Texas Department of Transportation (TxDOT) on (SH) State Highway 45 South that will evaluate biological effects of proposed highway construction and how they will avoid or minimize any negative effects to Flint Ridge Cave. In addition, we were expecting a draft Candidate Conservation Agreement with Assurances (CCAA) and enhanced management plan for Cave X from the Regents School of Austin. These documents are in progress, and it is our understanding that they were almost complete by the June 22, 2005, deadline.

With this document, we are reopening the public comment period on the 90-day finding and initiation of status review to complete and make available the results of our peer review on the report titled, "Genetic and morphological analysis of species limits in *Cicurina* spiders (Araneae, Dictynidae) from southern Travis and northern Hays counties, with emphasis on *Cicurina cueva* Gertsch and relatives" and to receive additional information that was in progress and almost complete at the time the last comment period closed including, but not limited to, TxDOT's biological evaluation of SH 45, the Regents School's draft CCAA and enhanced management plan, information from the City of Austin, and possibly information from a number of other parties who requested an extension of the comment period. This document and the results of the peer review are available to the public by contacting the Austin Ecological Services Office (see **ADDRESSES** section above). We believe these documents may contain significant information that may affect our determination of the species' status and allowing the comment period to expire before they are available could result in hurried and incomplete comments. We deem these considerations as sufficient cause to reopen the comment period. This reopening of the comment period will not result in an extension of the court-ordered date by which the Service must make its 12-month finding.

### Public Comments Solicited

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

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

Dated: August 2, 2005.

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

*Acting Director, Fish and Wildlife Service.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### RIN 1018-AT89

### Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover

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

**ACTION:** Proposed rule; notice of availability of draft economic analysis.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of the draft economic analysis for the proposal to designate critical habitat for the Pacific coast distinct population segment of the western snowy plover (*Charadrius alexandrinus nivosus*) under the Endangered Species Act of 1973 (Act), as amended. The draft economic analysis finds that, over the next 20 years, costs associated with western snowy plover conservation activities are forecast to range from \$272.8 to \$645.3 million. In constant dollars, the draft economic analysis estimates there will be an economic impact of \$514.9 to \$1,222.7 million over the next 20 years. The greatest economic impact (approximately 90 to 95 percent of total

future impact using 3 and 7 percent discount rates) is expected to occur to recreation; other activities impacted include plover management, real estate development, military base operations, and gravel extraction. Comments previously submitted on the December 17, 2004, proposed rule (69 FR 75608) during the initial comment period need not be resubmitted as they have been incorporated into the public record and will be fully considered in preparation of the final rule.

**DATES:** Comments must be submitted directly to the Service (see **ADDRESSES** section) on or before 30 days after publication of this notice.

**ADDRESSES:** If you wish to comment on the proposed rule or draft economic analysis, you may submit your comments and materials by any one of several methods:

1. You may submit written comments and information by mail or hand-delivery to the Arcata Fish and Wildlife Office, U.S. Fish and Wildlife Service, 1655 Heindon Road, Arcata, California 95521.

2. Written comments may be sent by facsimile to 707-822-8411.

3. You may send your comments by electronic mail (e-mail) to [fw8snowyplover@fws.gov](mailto:fw8snowyplover@fws.gov). For directions on how to submit electronic filing of comments, see the "Public Comments Solicited" section below.

You may obtain copies of the draft economic analysis by mail or by visiting our Web site at <http://www.fws.gov/pacific/sacramento/default.htm>. You may review comments and materials received, and review supporting documentation used in preparation of this proposed rule, by appointment, during normal business hours, at the above address.

**FOR FURTHER INFORMATION CONTACT:** Michael Long, Field Supervisor, Arcata Fish and Wildlife Office (telephone 707-822-7201; facsimile 707-822-8411).

#### SUPPLEMENTARY INFORMATION:

##### Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning the proposed rule and the draft economic analysis. On the basis of public comment, during the development of our final determination, we may find that areas proposed are not essential, are appropriate for exclusion under section

4(b)(2) of the Act, or are not appropriate for exclusion. We particularly seek comments concerning:

(1) The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act, including whether the benefits of designation will outweigh benefits of exclusion;

(2) Specific information on the distribution of the western snowy plover, the amount and distribution of the species' habitat, and which habitat is essential to the conservation of the species, and why;

(3) Land-use designations and current or planned activities in the subject area and their possible impacts on the species or proposed critical habitat;

(4) Whether our approach to listing or critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concerns and comments;

(5) Any foreseeable economic, environmental, or other impacts resulting from the proposed designation of critical habitat or coextensively from the listing, and in particular, any impacts on small entities or families;

(6) Whether the draft economic analysis identifies all State and local costs. If not, what other costs should be included;

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

(8) Whether the draft economic analysis correctly assesses the effect on regional costs associated with the proposed designation;

(9) Whether the proposed designation will result in disproportionate economic impacts to specific areas that should be evaluated for possible exclusion from the final designation;

(10) Whether the draft economic analysis appropriately identifies all costs that could result from the designation or coextensively from the listing;

(11) Specific information that would help us further understand the effects of designation on small businesses that depend on recreation and tourism. Based on the information we receive on small business that depend on recreation and tourism, we are considering excluding areas based on disproportionate costs from the final designation per our discretion under section 4(b)(2) of the Act. We are specifically seeking comment along with additional information concerning

our final determination for these three areas; and

(12) We are also considering excluding areas from the final designation, and are requesting comments on the benefits of excluding or including in critical habitat the areas as discussed in our proposed rule.

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours.

Individual respondents may request that we withhold their home addresses from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES** section). Please submit electronic comments to [fw8snowyplover@fws.gov](mailto:fw8snowyplover@fws.gov) in ASCII file format and avoid the use of special characters or any form of encryption. Please also include "Attn: Western snowy plover" in your e-mail subject header and your name and return address in the body of your message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly by calling our Arcata Fish and Wildlife Office at phone number 707-822-7201. Please note that the e-mail address [fw8snowyplover@fws.gov](mailto:fw8snowyplover@fws.gov) will be closed out at the termination of the public comment period.

### Background

On December 17, 2004 (69 FR 75608), we proposed to designate as critical habitat a total of approximately 17,299 acres (ac) (7,001 hectares (ha)) within 35 units along the coasts of California, Oregon, and Washington. In developing this proposal, we evaluated those lands determined to contain habitat features essential to the conservation of the Pacific coast population of the western

snowy plover to ascertain if any specific areas are appropriate for exclusion from critical habitat pursuant to section 4(b)(2) of the Act. Section 4(b)(2) requires us to take into account economic and other impacts resulting from designation, and allows us to exclude areas with essential habitat features if the benefits of exclusion outweigh those of designation. Additionally, the newly amended section 4(a)(3) requires exclusion of military lands subject to an Integrated Natural Resources Management Plan (INRMP) that benefits the species. We have excluded several units based on these provisions. Additionally, we have considered, but are not proposing, several areas that were either unoccupied at the time of listing (1993) or are unoccupied now.

For a discussion of previous Federal actions regarding the Pacific coast population of the western snowy plover, please see the December 7, 1999, final rule (64 FR 68508) and December 17, 2004, proposed rule (69 FR 75608) to designate critical habitat for the Pacific coast population of the western snowy plover. The December 7, 1999, final rule was remanded and partially vacated by the United States District Court for the District of Oregon on July 2, 2003, in order for us to conduct a new analysis of economic impacts (*Coos County Board of County Commissioners et al. v. Department of the Interior et al.*, CV 02-6128, M. Hogan). The court set a deadline of December 1, 2004, for submittal of a new proposed critical habitat designation to the **Federal Register**. The court-established deadline for submittal of the final designation is September 20, 2005.

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

Section 4 of the Act requires that we consider economic and other relevant impacts prior to making a final decision on what areas to designate as critical habitat. We are announcing the availability of a draft economic analysis for the proposal to designate certain areas as critical habitat for the Pacific coast population of the western snowy plover. We may revise the proposal, or

its supporting documents, to incorporate or address new information received during the 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 as critical habitat, provided such exclusion will not result in the extinction of the species.

Costs related to conservation activities for the proposed western snowy plover critical habitat pursuant to sections 4, 7, and 10 of the Act are estimated to be approximately \$272.8 to \$645.3 million over the next 20 years on a present value basis. In constant dollars, the draft economic analysis estimates there will be an economic impact of \$514.9 to \$1,222.7 million expressed in constant dollars over the next 20 years. The activities affected by plover protection may include recreation, plover management, real estate development, military base operations, and gravel extraction. Over three quarters of all future costs are associated with five central and southern California units, which include the following: Monterey to Moss Landing (CA-12C), Pismo Beach/Nipomo (CA-16), Morro Bay Beach (CA-15C), Jetty Road to Aptos (CA-12A), and Silver Strand (CA-27C). For further information, see the draft economic analysis; exhibits ES-6 and ES-7 provide detailed cost information for all activities on a unit-by-unit basis.

#### Required Determinations—Amended

##### *Regulatory Planning and Review*

In accordance with Executive Order 12866, this document is a significant rule because it may raise novel legal and policy issues. However, based on our draft economic analysis, it is not anticipated that the proposed designation of critical habitat for the Pacific coast population of the western snowy plover will result in an annual effect on the economy of \$100 million or more or affect the economy in a material way. Due to the timeline for publication in the **Federal Register**, the Office of Management and Budget (OMB) has not formally reviewed the proposed rule or accompanying draft economic analysis.

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

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

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

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

To determine if the proposed designation of critical habitat for the Pacific coast population of the western snowy plover would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities (*e.g.*, recreation, residential and related development, and commercial gravel mining). We considered each industry or category individually to determine if certification is appropriate. In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by the designation of critical habitat. Designation of critical habitat only

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

If this proposed critical habitat designation is made final, Federal agencies must consult with us if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

In our draft economic analysis of this proposed designation, we evaluated the potential economic effects on small business entities and small governments resulting from conservation actions related to the listing of this species and proposed designation of its critical habitat. We evaluated small business entities in five categories: Habitat and plover management activities, beach-related recreation activities, residential and related development, activities on military lands, and commercial mining. Of these five categories, impacts of plover conservation to habitat and plover management, and activities on military lands are not anticipated to affect small entities as discussed in Appendix A of our draft economic analysis. The following summary of the information contained in Appendix A of the draft economic analysis provides the basis for our determination.

On the basis of our analysis of western snowy plover conservation measures, we determined that this proposed designation of critical habitat for the western snowy plover would result in potential economic effects to recreation. Section 4 of the draft economic analysis discusses impacts of restrictions on recreational activity at beaches containing potential critical habitat for the plover. Individual recreators may experience welfare losses as a result of foregone or diminished trips to the beach. If fewer trips are taken by recreators, then some local businesses serving these visitors may be indirectly affected. The scope of our analysis makes identification of the exact businesses that may be affected difficult. Presently, we do not believe that this proposed designation will have an effect on a substantial number of small businesses and would also not result in a significant effect to impacted small businesses; however, we are requesting additional information on the effects of this proposed designation for our determination in our final rule.

For development activities, a detailed analysis of impacts to these activities is presented in Section 5 of the draft economic analysis. For this analysis, we determined that two development projects occurring within the potential

critical habitat are expected to incur costs associated with plover conservation efforts. One of these projects is funded by Humboldt County, which does not qualify as a small government, and is therefore not relevant to this small business analysis. The economic impact to the one project that qualifies as a small business is estimated to be 2.5 percent of the tax revenue. Because only one small business is estimated to be impacted by this proposal and only 2.5 percent of revenues are estimated to be incurred, we have determined that this proposed designation will not have an effect on a substantial number of small businesses.

For gravel mining activities, we have determined that five gravel mining companies exist within Unit CA-4D of the proposed designation of critical habitat. We determined that the annualized impact from plover conservation activities to these small businesses was approximately 0.5 percent of the total sales of these five mining companies. From this analysis, we have determined that this proposed designation would also not result in a significant effect to the annual sales of these small businesses impacted by this proposed designation.

Based on this data we have determined that this proposed designation would not affect a substantial number of small businesses involved in residential and related development and commercial gravel mining. Further, we have determined that this proposed designation would also not result in a significant effect to the annual sales of those small businesses impacted by this proposed designation. We also believe that this proposed designation would not affect a substantial number of small businesses involved in recreation and would not result in a significant effect to these businesses; however, we request further information on the impacts of this proposed designation to this economic sector for our final rulemaking. As such, we are certifying that this proposed designation of critical habitat would not result in a significant economic impact on a substantial number of small entities. Please refer to Appendix A of our draft economic analysis of this designation for a more detailed discussion of potential economic impacts to small business entities.

#### *Executive Order 13211*

On May 18, 2001, the President issued Executive Order (E.O.) 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when

undertaking certain actions. The proposed rule is considered a significant regulatory action under E.O. 12866 due to it potentially raising novel legal and policy issues, but it is not expected to significantly affect energy supplies, distribution, or use. Appendix A of the draft economic analysis provides a detailed discussion and analysis of this determination. The draft economic analysis determines that none of the impacts of this proposed designation are relevant to energy supply, distribution, or use. Therefore we have determined that this proposed designation is not likely to produce "a significant adverse effect" as a result of western snowy plover conservation activities. Therefore, this action is not a significant 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), the Service makes the following findings:

(a) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both "Federal intergovernmental mandates" and "Federal private sector mandates." These terms are defined in 2 U.S.C. 658(5)–(7). "Federal intergovernmental mandate" includes a regulation that "would impose an enforceable duty upon State, local, or tribal governments," with two exceptions. It excludes "a condition of federal assistance." It also excludes "a duty arising from participation in a voluntary Federal program," unless the regulation "relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority," if the provision would "increase the stringency of conditions of assistance" or "place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding" and the State, local, or tribal governments "lack authority" to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; AFDC 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. Non-Federal entities that receive Federal funding, assistance, permits, or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat. However, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above on to State governments.

(b) The economic analysis discusses potential impacts of critical habitat designation for the western snowy plover including administrative costs, water management activities, oil and gas activities, concentrated animal feeding operations, agriculture, and transportation. The analysis estimates that costs of the rule could range from \$272.8 to \$645.3 million over the next 20 years. In constant dollars, the draft economic analysis estimates there will be an economic impact of \$514.9 to \$1,222.7 million over the next 20 years. Recreational activities are expected to experience the greatest economic impacts related to western snowy plover conservation activities. Impacts on small governments are not anticipated. For example, costs to recreators would not be expected to be passed on to entities that qualify as small governments. Consequently, for the reasons discussed above, we do not believe that the designation of critical habitat for the western snowy plover will significantly or uniquely affect small government entities. As such, a Small Government Agency Plan is not required.

#### *Takings*

In accordance with Executive Order 12630 ("Government Actions and Interference with Constitutionally Protected Private Property Rights"), we have analyzed the potential takings implications of proposing critical

habitat for western snowy plover. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or

permits to go forward. In conclusion, the designation of critical habitat for the western snowy plover does not pose significant takings implications.

**Authority**

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

Dated: August 1, 2005.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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