

Accordingly, 45 CFR part 5b is proposed to be amended as set forth below:

## PART 5b—PRIVACY ACT REGULATIONS

1. The authority citation for part 5b continues to read as follows:

**Authority:** 5 U.S.C. 301, 5 U.S.C. 552a.

2. In § 5b.11, add paragraph (b)(2)(ii)(L) to read as follows:

### § 5b.11 Exempt systems.

\* \* \* \* \*  
 (b) \* \* \*  
 (2) \* \* \*  
 (ii) \* \* \*

(L) Investigative materials compiled for law enforcement purposes for the National Practitioner Data Bank (NPDB). (See § 60.16 of this title for access and correction rights under the NPDB by subjects of the Data Bank.)

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS-R2-ES-2009-0014; 92210-1117-0000-B4]

RIN 1018-AW50

### Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for Roswell Springsnail, Koster's Springsnail, Noel's Amphipod, and Pecos Assimineae

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

**ACTION:** Proposed rule; revision and reopening of comment period.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce reopening of the public comment period on the June 22, 2010, proposal to revise designated critical habitat for the Pecos assimineae (*Assimineae pecos*), and to newly designate critical habitat for the Roswell springsnail (*Pyrgulopsis roswellensis*), Koster's springsnail (*Juturnia kosteri*), and Noel's amphipod (*Gammarus desperatus*), under the Endangered Species Act of 1973, as amended (Act). We also announce revisions to the proposed critical habitat, as it was described in the proposed rule published in the **Federal Register** on June 22, 2010 (75 FR 35375). In total, we are proposing to designate as critical

habitat 520.8 acres (210.8 hectares) for the four species. In this proposal we include as critical habitat for Noel's amphipod an additional 5.8 acres (2.3 hectares) for Chaves County, New Mexico, as a population of amphipods was recently confirmed to be Noel's amphipod at this location. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the revised proposed rule, the associated economic analysis, environmental assessment, and the amended required determinations.

**DATES:** We will consider comments received on or before March 21, 2011. Comments must be received by 11:59 p.m. Eastern Time on the closing date. Any comments that we receive after the closing date may not be fully considered in the final decision on this action.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for docket number FWS-R2-ES-2009-0014 and then follow the instructions for submitting comments.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS-R2-ES-2009-0014; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

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

**FOR FURTHER INFORMATION CONTACT:** Wally "J" Murphy, Field Supervisor, U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna Rd., NE., Albuquerque, NM 87113; telephone 505-761-4781; facsimile 505-246-2542. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Public Comments

We will accept written comments and information during this reopened comment period on our proposed designation of the proposed revisions to critical habitat for the Pecos assimineae (*Assimineae pecos*), and the proposed critical habitat for the Roswell springsnail (*Pyrgulopsis roswellensis*), Koster's springsnail (*Juturnia kosteri*), and Noel's amphipod (*Gammarus desperatus*) (four invertebrates) that was published in the **Federal Register** on June 22, 2010, (75 FR 35375), and the additional area proposed in this notice.

As a result of information sent to us in response to our June 22, 2010, proposal and request for comments, we became aware that a population of amphipods was confirmed to be Noel's amphipod along the Rio Hondo, on the South Tract of Bitter Lake National Wildlife Refuge. We are particularly interested in information on our proposed inclusion of this new habitat in our final critical habitat designation, including comments on the economic analysis and environmental assessment of the proposed designation related to this new area. We particularly seek comments concerning:

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

(2) Specific information on:  
 (a) The amount and distribution of habitat for the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assimineae;

(b) What areas occupied at the time of listing and that contain features essential to the conservation of the species we should include in the designation and why. We are particularly interested in information on the additional habitat containing the recently discovered Noel's amphipod population on the South Tract of Bitter Lake National Wildlife Refuge;

(c) Special management considerations or protections for areas that contain the features essential to the conservation of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assimineae that have been identified in this proposal, including management 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 and why.

(3) Land use management and current or planned activities in the subject areas and their possible impacts on proposed critical habitat, particularly in the area occupied by the recently discovered Noel's amphipod population on the South Tract of Bitter Lake National Wildlife Refuge.

(4) Any foreseeable economic, national security, or other relevant impacts of designating any area that may be included in the final designation. We are particularly

interested in any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(5) Whether our approach to designating critical habitat 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.

(6) Information on the extent to which the description of economic impacts in the economic analysis is complete and accurate, and information on potential economic impacts that may occur should we designate the area occupied by the recently discovered Noel's amphipod population on the South Tract of Bitter Lake National Wildlife Refuge.

(7) The likelihood of adverse social reactions to the designation of critical habitat, as discussed in the economic analysis and environmental assessment, 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.

If you submitted comments or information on the proposed rule (75 FR 35375) during the initial comment period from June 22, 2010, to August 23, 2010, please do not resubmit them. We have incorporated them into the public record as part of that comment period, and we will fully consider them in the preparation of our final determination. Our final determination concerning revised critical habitat will take into consideration all written comments and any additional information we receive during both comment periods. On the basis of public comments, we may, during the development of our final determination, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

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

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on <http://www.regulations.gov> as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top

of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, economic analysis, and environmental assessment will be available for public inspection on <http://www.regulations.gov> at Docket No. FWS-R2-ES-2009-0014, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office (**see FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule, economic analysis, and environmental assessment on the Internet at <http://www.regulations.gov> at Docket Number FWS-R2-ES-2009-0014, or by mail from the New Mexico Ecological Services Field Office (**see FOR FURTHER INFORMATION CONTACT** section).

### Background

It is our intent to discuss in this notice only those topics relevant to the designation of one additional critical habitat unit for Noel's amphipod (*Gammarus desperatus*) in this proposed rule. For more information on the Roswell springsnail (*Pyrgulopsis roswellensis*), Koster's springsnail (*Juturnia kosteri*), Noel's amphipod, and Pecos assiminea (*Assiminea pecos*), refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46304), and to the proposed rule revising critical habitat for Pecos assiminea and proposing new critical habitat for Roswell springsnail, Koster's springsnail, and Noel's amphipod that published in the **Federal Register** on June 22, 2010 (75 FR 35375).

Noel's amphipod is a small, freshwater shrimp in the family Gammaridae that inhabits shallow, cool, well-oxygenated waters of streams, ponds, ditches, sloughs, and springs in southeast New Mexico (Holsinger 1976, p. 28; Pennak 1989, p. 478). Since publication of the June 22, 2010, proposed rule (75 FR 35375), a new population of amphipods found in spring vents along the Rio Hondo on the South Tract of Bitter Lake National Wildlife Refuge (Refuge) was confirmed genetically and morphologically to be Noel's amphipod (Berg 2010, p. 1; Lang 2010, pp. 2–3).

### Previous Federal Actions

On August 9, 2005, we listed Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea as endangered under the Act (70 FR 46304). In that rule, we also designated

critical habitat for Pecos assiminea at Diamond Y Springs Complex in Pecos County, Texas, and at East Sandia Springs in Reeves County, Texas. We excluded the Refuge from the critical habitat designation because special management for the four invertebrates was already occurring there.

On March 12, 2009, in response to a complaint filed by Forest Guardians (now WildEarth Guardians) challenging the exclusion of the Refuge from the final critical habitat designation for the four species, we reopened the comment period on the proposed designation of lands of the Bitter Lake National Wildlife Refuge as critical habitat for the four invertebrates (74 FR 10701).

On June 22, 2010, we published a proposed rule revising critical habitat for the Pecos assiminea and proposing new critical habitat for Roswell springsnail, Koster's springsnail, and Noel's amphipod (75 FR 35375). The comment period was open for 60 days and closed on August 23, 2010. Information we received during that comment period led to our consideration of a new area for critical habitat for the Noel's amphipod and, therefore, to publishing this additional notice to accept public comment on the proposed designation of the additional area.

### 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.

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 under 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, 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 insure, 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 seeks or 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) 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.

For inclusion in a critical habitat designation, the habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species and be included only if those features may require special management considerations or protection. Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life-cycle needs of the species (areas on which are found the physical and biological features laid out in the appropriate quantity and spatial arrangement for the conservation of the species).

Under the Act, 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. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species. When the best available scientific data do not

demonstrate that the conservation needs of the species require such additional areas, we will not designate critical habitat in areas outside the geographical area occupied by the species. An area currently occupied by the species but that was not occupied at the time of listing may, however, be essential to the conservation of the species and may be included in the critical habitat designation.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial 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 developed during the listing process for the species. Additional information sources may include 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, or other unpublished materials and expert opinion or personal knowledge.

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 required for recovery of the species. Areas that are important to the conservation of the species, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act. Areas that support populations are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action.

Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. 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 (HCPs), or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

#### *Primary Constituent Elements*

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied at the time of listing to designate as critical habitat, we consider the physical and biological features essential to the conservation of the species that may require special management considerations or protection. These include, but are not limited to:

- (1) Space for individual and population growth and for normal behavior;
- (2) Food, water, air, light, minerals, or other nutritional or physiological requirements;
- (3) Cover or shelter;
- (4) Sites for breeding, reproduction, or rearing (or development) of offspring; and
- (5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We consider the physical or biological features essential to the conservation of the species to be the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement for the conservation of the species. We derived the specific PCEs from studies of the habitat, ecology, and life history of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assimineae. The description of the PCEs for all four invertebrates and a full description of the essential environment as it relates to the specific PCEs are described in the June 22, 2010, published proposed designation of critical habitat for the four invertebrates (75 FR 35375). We are restating the PCEs for Noel's amphipod here, as the additional proposed critical habitat area contains only that species.

#### *Noel's Amphipod*

Based on the species' needs and our current knowledge of the life history, biology, and ecology of Noel's

amphipod and the habitat requirements for sustaining its essential life-history functions, we have determined that the primary constituent element essential to the conservation of Noel's amphipod is springs and spring-fed wetland systems that:

- (1) Have permanent, flowing, unpolluted water;
- (2) Have slow to moderate water velocities;
- (3) Have substrates including limestone cobble and aquatic vegetation;
- (4) Have stable water levels with natural diurnal (daily) and seasonal variations;
- (5) Consist of fresh to moderately saline water;
- (6) Have minimal sedimentation;
- (7) Vary in temperature between 10–20 °C (50–68 °F) with natural seasonal and diurnal variations slightly above and below that range; and
- (8) Provide abundant food, consisting of:
  - (a) Submergent vegetation and decaying organic matter;
  - (b) A surface film of algae, diatoms, bacteria, and fungi; and
  - (c) Microbial foods, such as algae and bacteria, associated with aquatic plants, algae, bacteria, and decaying organic material.

#### *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 that may require special management considerations or protection. As stated in the final listing rule (70 FR 46304, August 9, 2005), threats to the four invertebrates include reducing or eliminating water in suitable or occupied habitat through drought or pumping; introducing pollutants to levels unsuitable for the species from urban areas, agriculture, release of chemicals, and oil and gas operations; fires that reduce or eliminate available habitat; and introducing nonnative species into the invertebrates' inhabited spring systems such that suitable habitat is reduced or eliminated. Each of these threats is discussed in detail in the June 22, 2010, proposed designation of critical habitat for the four invertebrates (75 FR 35375); only those threats relevant to the newly found population and not discussed in the previous proposed rule are discussed here. Other threats (water quantity, contamination from oil and gas operations, fire, and introduced species) are also threats to this population.

#### Water Contamination

Water contamination is a significant threat for Noel's amphipod in the small spring vents along the Rio Hondo on the South Tract of the Refuge. One possible source of water contamination is runoff of agricultural fertilizers and pesticides that are applied to the croplands on the South Tract of the Refuge. This tract encompasses approximately 1,400 acres (ac) (566 hectares (ha)) that are closed to public access. About 330 ac (133.5 ha) are used as agricultural cropland (Service 1998, p. 7) to provide food, habitat, and feeding areas for wintering migratory bird populations (Service 1998, p. 7). Alfalfa, corn, hegari, barley, winter wheat, sorghum, and other small grains are cultivated on this tract (Service 2010, p. 14). Although crop rotation minimizes the need for chemical fertilizers, both fertilizers and pesticides are used on this tract, and these chemicals have the potential to enter the springs inhabited by Noel's amphipod. Chemicals used on the South Tract in the past 10 years include Accent (Nicosulfuron), Banvel (Dicamba), Pounce (Permethrin), Roundup and Equivalents (Glyphosate), Pursuit DG (Imazathapyr), Rhonox (2-ethylhexyl ester of 2-methyl-4-chlorophenoxyacetic acid), Steadfast (Nicosulfuron/Rimsulfuron), Malathion 57 (Malathion), and Impact (Topramezone) (Service 2010, p. 43–44). To protect aquatic life in the Rio Hondo, the Refuge implements chemical-specific buffers within which the chemicals cannot be used. Additionally, restrictions are in place prohibiting use of chemicals on Refuges that dissolve and travel in groundwater. These restrictions and buffers serve to minimize exposure of Noel's amphipod to these chemicals. Nevertheless, there remains a potential for contamination and negative effects to Noel's amphipod and its habitat.

The Refuge is in the process of reviewing the farming program on the South Tract. A draft environmental analysis (Service 2010, pp. 1–55) evaluates the effects of several levels of farming on this tract. The current preferred alternative is to eliminate farming on the South Tract; if the draft environmental analysis is adopted, no future chemical application of fertilizers or pesticides would occur in the vicinity of Noel's amphipod populations, and this source of potential water contamination would be eliminated.

Another potential source of water contamination in Noel's amphipod habitats on the South Tract is from periodic inundation by water from the Rio Hondo. The Rio Hondo is a

perennial stream from Roswell to its confluence with the Pecos River, and its watershed extends eastward to the Sacramento Mountains. The majority of the lower Rio Hondo valley is used for extensive agricultural purposes, including ranching, commercial livestock feeding, and crop production, as well as residential land use (USACE 1974, p. 8). Stormwater runoff from areas with these land uses is one way contaminants can be transported into the Rio Hondo and into Noel's amphipod habitats. In addition, stormwater runoff from urban areas (such as from the City of Roswell) has been identified as potentially containing many materials such as solids, plastics, sediment, nutrients, metals, pathogens, salts, oils, fuels, and various chemicals, including antifreeze, detergents, pesticides, and other pollutants that can be toxic to aquatic life (Burton and Pitt 2002, pp. 6–7; Selbig 2009, p. 1).

Another way the Rio Hondo receives contaminants is by wastewater effluent discharge (USACE 1974, p. 9; Smith 2000, p. 65). At the present time, the average return flow from City of Roswell Wastewater Treatment Facility is approximately 6.2 cubic feet per second (cfs) (0.18 cubic meters per second (cms)). Effluent from the Roswell Wastewater Treatment Facility is largely used for crop irrigation from February through November or is discharged to the North Spring River, which flows 5 miles (mi) (8 kilometers (km)) before entering the Rio Hondo (Smith 2000, p. 65; USEPA 2006, p. 2), upstream of the Noel's amphipod population. In 2010, the Roswell Wastewater Treatment Facility was modified to provide a higher level of water purification that should improve the quality of the effluent discharge (J. Anderson, City of Roswell, pers. comm. December 9, 2010; USEPA 2007, p. 5). However, some nutrients, bacteria, metals, pesticides, oxygen-demanding substances, organic chemicals, surfactants, flame retardants, personal care products, steroids, hormones, and pharmaceuticals are expected to remain in the Rio Hondo (USEPA 2009, pp. 26–39).

Past analysis of water quality in the Rio Hondo has indicated some concerns. For example, sampling in the past yielded that total dissolved solids in Rio Hondo water averaged 935 mg/L, sulfates averaged 722 mg/L, and chlorides averaged 40 mg/L (USACE 1974, p. V–4) (both sulfates and chlorides are components of salt). However, more recent sampling by the New Mexico Environment Department (NMED) (2006a, p. 13) found higher total dissolved solids (average 7,321 mg/L), including more chloride (average

2,640 mg/L) and slightly more sulfate (average 776 mg/L) than reported by the USACE (1974, p. V–4). In addition, the NMED (2006b, p. 32) identified water quality parameters of nutrients, bacteria, salinity, and temperature as a concern in the upper Rio Hondo watershed. Potential sources of nutrients or bacteria are municipal wastewater treatment facility effluents, onsite waste treatment systems (septic tanks), residential areas, landscape maintenance, livestock feeding operations, rangeland grazing, atmospheric deposition, stream modification or destabilization, and urban areas and construction sites (NMED 2006b, p. 32).

Riverine conditions in the Rio Hondo are not suitable for Noel's amphipod; the amphipod is found only in the nearby springs. However, Noel's amphipod could be affected by river water entering the spring runs during periods of high flow by either flushing the amphipods downstream or by river water mixing with spring water and introducing contaminants or altered water chemistry to the spring habitats. The Rio Hondo has a base flow between 2 and 6 cfs (0.06 to 0.17 cms) but exceeds 10 cfs (.03 cms; a flow high enough to inundate the springs) approximately 5 to 10 times per year for short durations (USGS 2010, p. 1). Under base flow conditions, the spring runs that harbor Noel's amphipod are found along the riverbank at elevations higher than the stream, and, therefore, the water from the river does not mix with the spring outflow water. However, when Rio Hondo flows are elevated, these springs become inundated with water from the river and the amphipods may be exposed to contaminants from the Rio Hondo.

Groundwater that supplies the outflow to the springs where the amphipod occurs is an additional potential source of spring water contamination. This water is clearly distinct from the water of the nearby Rio Hondo based on very different temperatures and low dissolved oxygen measurements (Lusk 2010, p. 1). Low dissolved oxygen is typical of spring water conditions, as oxygen enters the water mainly through the atmosphere (White *et al.* 1990, p. 584), and spring water temperatures remain much more constant throughout the year due to the insulating effect of soil and rock on groundwater (Constantz 1998, p. 1610). The South Tract of the Refuge lies within the same groundwater source area as the Middle Tract, where the other Noel's amphipod populations are found and is, therefore, subject to the same threat of contamination from oil and gas activities as was discussed in

the proposed designation of critical habitat for the four invertebrates (75 FR 35375, June 22, 2010).

There has been no research on the specific effects on Noel's amphipod of contaminants such as metals, pesticides, fertilizers, nutrients, or bacteria. However, there is some evidence that freshwater amphipods in the family Gammaridae (in particular, *Gammarus*) may require higher oxygen levels and less polluted water than some other amphipods such as *Crangonyx* (*e.g.*, MacNeil *et al.* 1997, pp. 350, 356; MacNeil *et al.* 2000, p. 2). Gammarid amphipods (such as Noel's amphipod) may be considered an indicator of relatively unpolluted waters (MacNeil *et al.* 1997, p. 356; MacNeil *et al.* 2000, p. 6). Additionally, bacteria in high levels can affect amphipods directly through infections, or indirectly by depleting the dissolved oxygen in the water column through respiration or decomposition (Boyley and Brock 1973, p. 631).

#### *Criteria Used To Identify Critical Habitat*

As required by section 4(b)(1)(A) of the Act, we use the best scientific and commercial data available to determine critical habitat. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. For our June 22, 2010 proposed designation of critical habitat (75 FR 35375), we evaluated areas within the geographical area occupied at the time of listing that contain the features essential to the conservation of Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea. We considered an area to be currently occupied if Roswell springsnail, Koster's springsnail, Pecos assiminea, or Noel's amphipod were found to be present by species experts within the last 5 years and no major habitat modification has occurred that would preclude its presence. We also considered areas outside of the geographical area occupied at the time of the listing rule to designate critical habitat for the four invertebrates (75 FR 35375), and recommendations contained in State wildlife resource reports (Cole 1985, pp. 93–104; Jones and Balleau 1996, pp. 1–16; Boghici 1997, pp. 1–120; Balleau *et al.* 1999, pp. 1–42; NMDGF 1999, pp. A1–B46; NMDGF 2006, pp. 1–16; NMDGF 2007, pp. 1–20; and NMDGF 2008, pp. 1–28) and the State recovery plan (NMDGF 2005, pp. 1–80) in making this determination. We also reviewed the

available literature pertaining to habitat requirements, historic localities, and current localities for these species. This includes data submitted during section 7 consultations and regional geographic information system (GIS) coverages.

Since the June 22, 2010, proposal we identified an additional site along the Rio Hondo on the South Tract of the Refuge that is currently occupied by Noel's amphipod, but not by the other three species. We believe this site was occupied by Noel's amphipod at the time of listing because amphipods were first found at this site in 2006, one year after listing (Warrick 2006, p. 1). However, they were not taxonomically confirmed to be Noel's amphipod until 2010 (Berg 2010, p. 1; Lang 2010, p. 1). Since this spring area is isolated from other occupied areas and no reintroduction efforts have taken place, it has likely been occupied for a very long time, but appropriate surveys had not been previously conducted to verify it. We reasonably assume, therefore, that the site was occupied at the time of listing in 2005 and not discovered until 2006.

#### *Essential Areas*

In our June 22, 2010 proposed designation of additional critical habitat for the four invertebrates, we selected areas based on the best scientific data available that possess those PCEs essential to the conservation of the species that may require special management considerations or protection. We are now modifying that proposed critical habitat to add the additional site along the Rio Hondo on the South Tract of the Refuge that is currently occupied only by Noel's amphipod. By inclusion of the additional site along the Rio Hondo, we are again proposing to designate as critical habitat all sites currently occupied by at least one of the four invertebrates.

Our reason for proposing to designate all known occupied habitat for these species is that the four invertebrates are not migratory, nor is there frequent gene exchange between populations or critical habitat units. Further, the proposed critical habitat units in New Mexico and west Texas are sufficiently distant (40 to 100 mi (64 to 161 km)) from one another to rule out Pecos assiminea gene exchange. Therefore, due to the lack of frequent gene exchange, we have determined that all of the currently occupied sites of these populations are essential to the conservation of the species because they provide for the maintenance of the genetic diversity of the four invertebrates, and contain all of the

known remaining genetic diversity within each species. All of the proposed critical habitat units also have the defined PCEs and the kind, amount, and quality of habitat associated with those occurrences. The units contain the appropriate quantity and distribution of PCEs to support the life cycle stages we have determined are essential to the conservation of the species.

When determining critical habitat boundaries within this proposed rule, including the newly proposed Unit 5, we made every effort to avoid including structures such as culverts and roads, because areas with such structures lack PCEs for the four invertebrates. 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 areas. Any such structures inadvertently left inside critical habitat boundaries shown on the map 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 were finalized as proposed, a Federal action involving these areas 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 PCEs in the adjacent critical habitat.

In summary, this proposed critical habitat designation includes populations of the four invertebrates and habitats that possess the physical and biological features essential to the conservation of the species. We believe the populations included in this designation, if secured, would provide for the conservation of Roswell springsnail, Koster's springsnail, Pecos assimineia, and Noel's amphipod by:

(1) Maintaining the physical and biological features essential to the conservation of the species in areas where populations of the four invertebrates are known to occur, and

(2) Maintaining the current distribution of these populations, and thus preserving genetic variation throughout the ranges of the four invertebrates and minimizing the potential effects of local extinction.

*Summary of Changes From Previously Proposed and Designated Critical Habitat*

The area identified in this proposed rule constitutes an addition to the

proposed revision of the areas we proposed for designation as critical habitat for the four invertebrates on June 22, 2010 (75 FR 35375). All areas proposed on June 22, 2010, remain proposed for designation as critical habitat. In this proposed rule, we are proposing an additional area on the South Tract of the Refuge along the Rio Hondo in which amphipod populations were recently confirmed to be Noel's amphipod (Berg 2010, p. 1). Therefore, we are proposing as critical habitat all occupied sites for Noel's amphipod, as all of these sites are essential to the conservation of the species.

**Proposed Critical Habitat Designation**

We are proposing an additional unit as critical habitat for Noel's amphipod in New Mexico. For a full description of Units 1 through 4, please see the June 22, 2010, proposed rule (75 FR 35375). The new Unit 5 we propose as additional critical habitat for Noel's amphipod, and its approximate area, is displayed in Table 3. This location is currently occupied by Noel's amphipod. In total, we are proposing to designate as critical habitat 520.8 acres (210.8 hectares) for the four species.

TABLE 1—PROPOSED CRITICAL HABITAT UNITS FOR ROSWELL SPRINGSNAIL AND KOSTER'S SPRINGSNAIL

[Area estimates reflect all land within critical habitat unit boundaries.] These units were proposed and discussed in the previous proposal to designate critical habitat for the four invertebrates on June 22, 2010 (75 FR 35375).

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)
1. Sago/Bitter Creek Complex .....	Service .....	31.9 (12.9)
2. Impoundment Complex .....	Service .....	35.9 (14.5)
	City of Roswell .....	2.8 (1.1)
Total .....	.....	70.6 (28.6)

**Note:** Area sizes may not sum due to rounding.

TABLE 2—PROPOSED REVISED CRITICAL HABITAT UNITS FOR PECOS ASSIMINEA

[Area estimates reflect all land within critical habitat unit boundaries.] These units were proposed and discussed in the previous proposal to designate critical habitat for the four invertebrates on June 22, 2010 (75 FR 35375).

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)
1. Sago/Bitter Creek Complex .....	Service .....	31.9 (12.9)
2. Impoundment Complex .....	Service .....	35.9 (14.5)
	City of Roswell .....	2.8 (1.1)
3. Diamond Y Springs Complex .....	The Nature Conservancy .....	441.4 (178.6)
4. East Sandia Spring .....	The Nature Conservancy .....	3.0 (1.2)
Total .....	.....	515.0 (208.4)

**Note:** Area sizes may not sum due to rounding.

TABLE 3—PROPOSED CRITICAL HABITAT UNITS FOR NOEL'S AMPHIPOD

[Area estimates reflect all land within critical habitat unit boundaries.] Units 1 and 2 were proposed and discussed in the previous proposal to designate critical habitat for the four invertebrates on June 22, 2010 (75 FR 35375).

Critical habitat unit	Land ownership by type	Size of unit in acres (hectares)
1. Sago/Bitter Creek Complex .....	Service .....	31.9 (12.9)
2. Impoundment Complex .....	Service .....	35.9 (14.5)
	City of Roswell .....	2.8 (1.1)
5. Rio Hondo .....	Service .....	5.8 (2.3)
Total .....	.....	76.4 (30.9)

**Note:** Area sizes may not sum due to rounding.

We present a brief description of the new unit and reasons why the proposed critical habitat unit meets the definition of critical habitat for Noel's amphipod below.

#### Unit 5: Rio Hondo

Unit 5 consists of 5.8 ac (2.3 ha) of habitat that is currently occupied by Noel's amphipod (Berg 2010, p. 1; Lang 2010, p. 1). We propose to designate this unit as critical habitat for Noel's amphipod only. It contains all of the features essential to the conservation of this species. We consider this site to be occupied by Noel's amphipod at the time of listing. Although the amphipods were first found at this site in 2006, one year after listing (Warrick 2006, p. 1), they were taxonomically confirmed to be Noel's amphipod in 2010 (Berg 2010, p. 1; Lang 2010, p. 1). Unit 5 is located on the South Tract of Bitter Lake National Wildlife Refuge, Chaves County, New Mexico. The complex of springs and seeps along the banks of approximately 0.4 mi (0.64 km) of the Rio Hondo comprises the population center of this proposed critical habitat unit. The proposed designation includes all springs and seeps along the Rio Hondo in this reach. Habitat in this unit is threatened by subsurface drilling or similar activities that contaminate surface drainage or aquifer water; nonnative fish, crayfish, snails, and vegetation; chemical fertilizers and pesticides applied to adjacent farmland; contaminants in the Rio Hondo from upstream of the amphipod populations; fire; and unauthorized activities, including dumping of pollutants or fill material into occupied sites. Therefore, the PCEs in this unit may require special management considerations or protection to minimize impacts resulting from these threats. The entire unit is owned by the Service.

#### Exemptions

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

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: “The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan 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 areas we are proposing to designate as critical habitat for the four invertebrates; therefore, we are not exempting any areas from designation.

#### Exclusions

##### *Application of 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.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If, based on this analysis, we make this determination, then we can exclude the area only if such exclusion would not result in the extinction of the species.

When considering the benefits of inclusion for an area, we consider the additional regulatory benefits that area would receive from the protection from adverse modification or destruction 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 than may apply to 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; the continuation, strengthening, or encouragement of partnerships; implementation of a management plan that provides equal to or more conservation than a critical habitat designation would provide; or some combination of these.

After evaluating the benefits of inclusion and the benefits of exclusion, we carefully weigh the two sides to determine whether the benefits of

exclusion outweigh those of inclusion. If we determine that they do, we then determine whether exclusion would result in extinction. If exclusion of an area from critical habitat will result in extinction, we will not exclude it from the 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 are preparing an analysis of the economic impacts of the proposed critical habitat designation and related factors.

A draft analysis of the economic effects of the proposed critical habitat designation was prepared and with this proposed rule is made available for public review. The economic analysis considers the economic impacts of conservation measures taken prior to and subsequent to the final listing and designation of critical habitat for the four invertebrates. Baseline impacts are typically defined as all management efforts that have occurred since the time of listing. We listed the four invertebrates in August 2005 (70 FR 46304). Incremental costs are those that are attributable to critical habitat designation alone. Total baseline costs associated with this proposed critical habitat designation are estimated to be \$1,150,000 to \$1,560,000 over the next 30 years, and incremental costs are estimated to be \$6,420 to \$68,000.

Copies of the economic analysis are available for downloading from the Internet at <http://www.regulations.gov> at Docket No. FWS-R2-ES-2009-0014 or by contacting the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the four invertebrates are not owned or managed by the DOD. We are aware that there are DOD lands in the vicinity of the Refuge, but our proposed designation does not include these lands, and we anticipate no impact to national security. Therefore, we have not proposed any areas for exclusion based on impacts on national security.

#### 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 the landowners have developed any habitat conservation plans (HCPs) or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that there are currently no HCPs for the four invertebrates, and the proposed designation does not include any tribal lands or trust resources. We anticipate no impact to tribal lands, partnerships, or HCPs from this proposed critical habitat designation. There are no areas proposed for exclusion from this proposed designation based on other relevant impacts.

The Refuge has developed and completed a Comprehensive Conservation Plan that provides the framework for protection and management of all trust resources, including federally listed species and sensitive natural habitats. These lands are protected areas for wildlife and are currently managed for the conservation of wildlife, including endangered and threatened species, and specifically the four invertebrates, including Noel's amphipod. A description of the management being provided by the Refuge for the conservation of the four invertebrates within areas proposed for designation as critical habitat is provided in the previous proposed rule to designate critical habitat for the four invertebrates (75 FR 35375, June 22, 2010).

#### Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we sought the expert opinions of three appropriate and independent specialists to review the proposed critical habitat during the public comment period for the previous proposed rule to designate critical habitat for the four invertebrates (75 FR 35375). The purpose of peer review was to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. One substantial comment received from

peer reviewers was to add the additional area as critical habitat for Noel's amphipod, which led to this proposal of an additional critical habitat unit for the species.

#### Required Determinations

##### *Regulatory Planning and Review—Executive Order 12866*

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

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

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

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

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

##### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 (5 U.S.C. 801 *et seq.*), whenever an agency must 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 (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.

In the draft economic analysis of the proposed revised critical habitat designation, we evaluated the potential economic effects on small business entities resulting from conservation actions related to the listing of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea (baseline costs), and the additional potential economic effects resulting from the proposed



designation of their critical habitat (incremental costs). This analysis estimated prospective economic impacts due to the implementation of conservation efforts for the four invertebrates in five categories: (a) Modifications to oil and gas activities; (b) habitat management; (c) conservation of agricultural groundwater withdrawals; (d) control of residential septic systems; and (e) controls on confined animal feeding operations. We determined from our analysis that there will be minimal additional economic impacts to small entities resulting from the proposed designation of critical habitat, because almost all of the project modification and conservation costs identified in the economic analysis represent baseline costs that would be realized in the absence of critical habitat. There are several factors that eliminate the potential for incremental costs among small entities, including:

- Conservation measures implemented by New Mexico's oil and gas firms comply with BLM's Bitter Lake Habitat Restoration Zone requirements. Likewise, modifications pursued by oil and gas developers on private land near The Nature Conservancy units are already implemented for the benefit of various listed species in the immediate area.
- All of the proposed critical habitat is occupied. Therefore, ongoing project modifications and conservation measures requested through consultation with the Service under Section 7 of the Act are expected to be similar to those already required to satisfy the jeopardy standard.
- Most of the proposed critical habitat is already managed for conservation purposes. The small portion of proposed critical habitat owned by the City of Roswell has already been designated as critical habitat for the Pecos sunflower (*Helianthus paradoxus*) and, as a wetland, it is unsuitable for development.
- Habitat management costs are attributable to existing conservation agreements and are, therefore, classified as baseline costs.
- Most consultations under section 7 of the Act would be pursued in the absence of critical habitat. To the extent that incremental costs are introduced, they are borne by public agencies rather than private entities.

The draft economic analysis estimates the annual incremental costs associated with the designation of critical habitat for the invertebrates to be very modest, at approximately \$6,420. All of these costs would derive from the added effort associated with considering adverse

modification in the context of section 7 consultations.

We will consider the information in our final economic analysis, and in any public comments we receive, in determining whether this designation would result in a significant economic effect on a substantial number of small entities, and announce our determination in our final rule. Based on the above reasoning and currently available information, it appears that this rule may not result in a significant economic impact on a substantial number of small entities. If we determine that is the case, then we will certify that the designation of critical habitat for the four invertebrates will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis will not be required.

#### *Unfunded Mandates Reform Act*

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

(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. The public lands we are proposing to designate as critical habitat are owned by the City of Roswell and the Service. Small governments, such as the City of Roswell, 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. As discussed above, the areas owned by the City of Roswell which are being proposed for designation as critical habitat for the four invertebrates have already been designated as critical habitat for the Pecos sunflower and are unsuitable for development. Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we complete our final economic analysis, and review and revise this assessment as appropriate.

#### *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 Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assiminea in a takings implications assessment. 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 allow actions that do require Federal funding or permits to go forward. The takings implications assessment concludes that this designation of critical habitat for the four invertebrates 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 requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in New Mexico and Texas. 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 and 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 local governments in long-range planning (rather than having them 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 E.O. 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 propose designating critical habitat in accordance with the provisions of the Act. This proposed

rule uses standard property descriptions and identifies the physical and biological features within the designated areas to assist the public in understanding the habitat needs of the Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assimineia.

#### *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 as defined by the National Environmental Policy Act (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 Roswell springsnail, Koster's springsnail, Noel's amphipod, and Pecos assimineia, 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 will undertake an analysis for critical habitat designation and notify the public of the availability of the environmental assessment for this proposal when it is finished. A draft environmental assessment is now available for public review along with the publication of this proposal. You may obtain a copy of the environmental assessment online at <http://www.regulations.gov> at Docket No. FWS-R2-ES-2009-0014, by mail from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### *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 the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

#### *Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we 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.

We have determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation of, and no tribal lands that are essential for the conservation of, the Roswell springsnail, Koster's springsnail, Pecos assimineia, and Noel's amphipod. Therefore, we have not proposed designation of critical habitat for the four invertebrates on tribal lands.

#### *Energy Supply, Distribution, or Use*

E.O. 13211 requires agencies to prepare Statements of Energy Effects

when undertaking certain actions. We do not expect this rule to significantly affect energy supplies, distribution, or use due to the small amount of habitat we are proposing for designation and the fact that the habitat is primarily on a National Wildlife Refuge. Therefore, we have made a preliminary determination that this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we complete our final economic analysis, and review and revise this assessment as appropriate.

#### References Cited

A complete list of references cited is available on the Internet at <http://www.regulations.gov> at Docket No. FWS-R2-ES-2009-0014 and upon request from the New Mexico Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

#### Authors

The primary authors of this package are the staff members of the New Mexico 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 further amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as proposed to be amended at 75 FR 35375 (June 22, 2010), as follows:

#### **PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.95, Critical habitat for “Noel’s amphipod (*Gammarus desperatus*)”, which was proposed to be added to paragraph (h) on June 22, 2010, at 75 FR 35375, is further amended by adding a paragraph (7) to read as follows:

#### **§ 17.95 Critical habitat—fish and wildlife.**

\* \* \* \* \*

(h) *Crustaceans.*

\* \* \* \* \*

Noel’s amphipod (*Gammarus desperatus*).

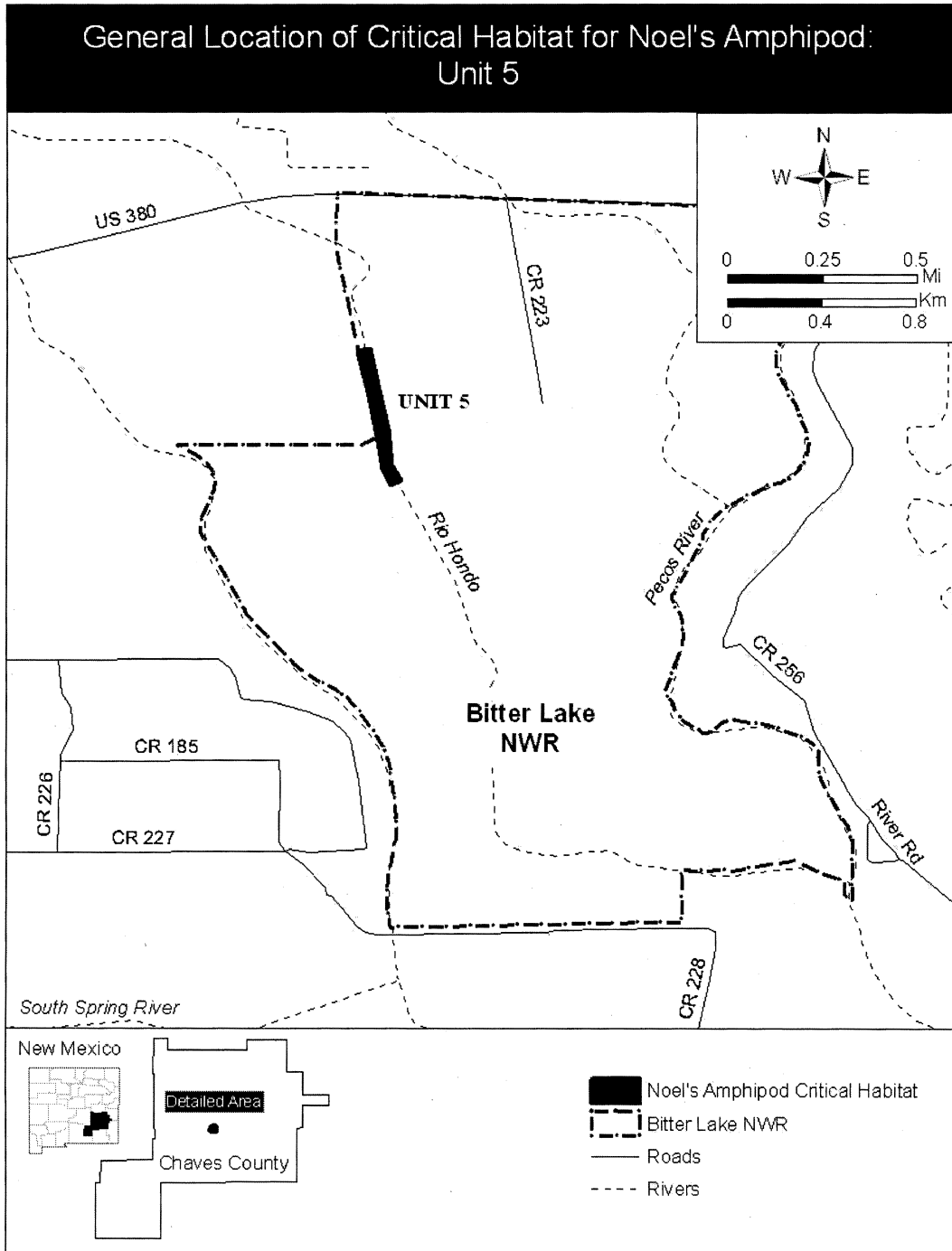
\* \* \* \* \*

(7) Unit 5: Rio Hondo, Chaves County, New Mexico.

(i) [Reserved for textual description of unit.]

(ii) Map of Unit 5 for Noel’s amphipod follows:

**BILLING CODE 4310–55–P**



\* \* \* \* \*

Dated: February 10, 2011.

**Thomas L. Strickland,**

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2011-3673 Filed 2-16-11; 8:45 am]

BILLING CODE 4310-55-C

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 17****[Docket No. FWS-R1-ES-2010-0096; MO 92210-0-0008]****Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Sand Verbena Moth as Endangered or Threatened****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Notice of petition finding and initiation of status review.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, announce a 90-day finding on a petition to list the sand verbena moth, *Copablepharon fuscum*, as endangered or threatened under the Endangered Species Act of 1973, as amended. Based on our review, we find the petition presents substantial information indicating that listing the sand verbena moth may be warranted. Therefore, with the publication of this notice, we are initiating a review of the status of the species to determine if listing the sand verbena moth as endangered or threatened is warranted. To ensure that this status review is comprehensive, we are requesting scientific and commercial data and other information regarding this species. Based on the status review, we will issue a 12-month finding on the petition, which will address whether the petitioned action is warranted, as provided in section 4(b)(3)(B) of the Act.

**DATES:** To allow us adequate time to conduct this review, we request that we receive information on or before April 18, 2011. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on this date. After April 18, 2011, you must submit information directly to the Washington Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section below). Please note that we might not be able to address or incorporate information that we receive after the above requested date.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. In the box that reads "Enter Keyword or ID," enter the Docket number for this finding, which is FWS-R1-ES-2010-0096. Check the box that reads "Open for Comment/ Submission," and then click the Search button. You should then see an icon that reads "Submit a Comment." Please ensure that you have found the correct document before submitting your comment.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R1-ES-2010-0096; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all information we receive on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Request for Information section below for more details).

**FOR FURTHER INFORMATION CONTACT:** Ken S. Berg, Manager, Washington Fish and Wildlife Office, 510 Desmond Drive, Lacey, WA 98503; by telephone (360) 753-9440; or by facsimile (360) 534-9331. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Request for Information**

When we make a finding that a petition presents substantial information indicating that listing a species may be warranted, we are required to promptly review the status of the species (status review). For the status review to be complete and based on the best available scientific and commercial information, we request information on the sand verbena moth from governmental agencies, Native American Tribes, the scientific community, industry, and any other interested parties. We seek information on:

- (1) The species' biology, range, and population trends, including:
  - (a) Habitat requirements for feeding, breeding, and sheltering;
  - (b) Genetics and taxonomy;
  - (c) Historical and current range, including distribution patterns;
  - (d) Historical and current population levels, and current and projected trends; and
  - (e) Past and ongoing conservation measures for the species, its habitat, or both.
- (2) The factors that are the basis for making a listing determination for a

species under section 4(a) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), which are:

- (a) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (b) Overutilization for commercial, recreational, scientific, or educational purposes;
- (c) Disease or predation;
- (d) The inadequacy of existing regulatory mechanisms; or
- (e) Other natural or manmade factors affecting its continued existence.

(3) Information on yellow sand verbena (*Abronia latifolia*), the host plant for the sand verbena moth, such as patch size and distribution, including distribution of known or potential sand verbena moth habitats; information on ongoing or future activities in potential sand verbena moth habitat; information on yellow sand verbena population trends; and information on other native or nonnative plant distributions, particularly nonnative beachgrass (*Ammophila* spp.), in the range of the yellow sand verbena, especially where the sand verbena moth occurs.

If, after the status review, we determine that listing the sand verbena moth is warranted, we will propose critical habitat (see definition in section 3(5)(A) of the Act), under section 4 of the Act, to the maximum extent prudent and determinable at the time we propose to list the species. Therefore, within the geographical range currently occupied by the sand verbena moth, we request data and information on:

- (1) What may constitute "physical or biological features essential to the conservation of the species";
- (2) Where such physical or biological features are currently found; and
- (3) Whether any of these features may require special management considerations or protection.

In addition, we request data and information on whether there are any specific areas outside the geographical area occupied by the species that may be considered essential to the conservation of the species. Please provide specific comments and information as to what, if any, critical habitat you think we should propose for designation if the species is proposed for listing, and explain why such habitat meets the requirements of section 4 of the Act.

Please include sufficient information with your submission (such as scientific journal articles or other publications) to allow us to verify any scientific or commercial information you include.

Submissions merely stating support for or opposition to the action under