

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: June 30, 2011.

**Sandra K. Knight,**

*Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[FWS-R3-ES-2011-0034; 92220-1113-0000; ABC Code: C3]

RIN 1018-AX79

#### **Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of American Burying Beetle in Southwestern Missouri**

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to reestablish the American burying beetle, a Federally listed endangered insect, into its historical habitat in Wah'kon-tah Prairie in southwestern Missouri. We propose to reestablish the American burying beetle under section 10(j) of the Endangered Species Act of 1973, as amended (Act), and to classify that reestablished population as a nonessential experimental population (NEP) within St. Clair, Cedar, Bates, and Vernon Counties, Missouri. This proposed rule provides a plan for establishing the NEP and provides for allowable legal incidental taking of the American burying beetle within the defined NEP area.

**DATES:** *Comments:* We will consider public comments that we receive on or before August 22, 2011.

*Public meeting:* We will hold a public meeting on August 11, 2011, from 6 to 8 p.m. in El Dorado Springs, Missouri (see **ADDRESSES**).

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

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments on Docket No. FWS-R3-ES-2011-0034.

*U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS-R3-ES-2010-0034; 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 that we receive 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 details).

*Copies of Documents:* The proposed rule is available on <http://www.regulations.gov> and available from our Web site at <http://www.fws.gov/midwest/endangered>. In addition, the supporting file for this proposed rule will be available for public inspection, by appointment, during normal business hours, at the Columbia, Missouri, Ecological Services Office, 101 Park DeVille Dr., Suite B, Columbia, MO 65203, telephone 573-234-2132. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 800-877-8339.

*Public meeting:* The public meeting will take place at El Dorado Springs Community Center, 135 W. Spring Street, El Dorado Springs, MO 64744.

*Copies of Documents:* The proposed rule is available on <http://www.regulations.gov> and available from our Web site at <http://www.fws.gov/midwest/endangered>. In addition, the supporting file for this proposed rule will be available for public inspection, by appointment, during normal business hours, at the Columbia, Missouri, Ecological Services Office, 101 Park DeVille Dr., Suite B, Columbia, MO 65203, telephone 573-234-2132. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Services (FIRS) at 800-877-8339.

**FOR FURTHER INFORMATION CONTACT:** Scott Hamilton, Fish and Wildlife Biologist, at the Columbia, Missouri Ecological Services Office, 101 Park DeVille Dr., Suite B, Columbia, MO 65203, telephone 573-234-2132; facsimile 573-234-2181.

#### **SUPPLEMENTARY INFORMATION:**

##### **Public Comments**

We want any final rule resulting from this proposal to be as effective as possible. Therefore, we invite Tribal and governmental agencies, the scientific community, industry, and other interested parties to submit comments or recommendations concerning any aspect of this proposed rule. Comments should be as specific as possible.

To issue a final rule to implement this proposed action, we will take into consideration all comments and any additional information we receive. Such communications may lead to a final rule

that differs from this proposal. All comments, including commenters' names and addresses, if provided to us, will become part of the supporting record.

You may submit your comments and materials concerning the proposed rule by one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section. Comments must be submitted to <http://www.regulations.gov> before 11:59 p.m. (Eastern Time) on the date specified in the **DATES** section. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked by the date specified in the **DATES** section.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your comment, 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 this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Columbia, Missouri Ecological Services Office (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

##### **Public Meeting**

We will hold a public meeting from 6 to 8 p.m. on August 11, 2011, at the El Dorado Springs Community Center in El Dorado Springs, Missouri (see **ADDRESSES**). Persons needing reasonable accommodations in order to attend and participate in a public meeting should contact the Columbia, Missouri Ecological Services Office, at the address or phone number listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible. In order to allow sufficient time to process requests, please call no later than one week before the meeting. Information regarding this proposal is available in alternative formats upon request.

##### **Background**

###### *Regulatory Background*

The American burying beetle (*Nicrophorus americanus*, ABB) was listed as endangered throughout its range on July 13, 1989 (154 FR 29652), under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), without critical habitat (USFWS

2008, p. 2). The Act provides that species listed as endangered are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act, among other things, prohibits the take of endangered wildlife. "Take" is defined by the Act as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. Section 7 of the Act outlines the procedures for Federal interagency cooperation to conserve Federally listed species and protect designated critical habitat. It mandates that all Federal agencies use their existing authorities to further the purposes of the Act by carrying out programs for the conservation of listed species. It also states that Federal agencies must, in consultation with the Service, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 of the Act does not affect activities undertaken on private land unless they are authorized, funded, or carried out by a Federal agency.

Under section 10(j) of the Act, the Secretary of the Interior can designate reestablished populations outside the species' current range, but within its historical range, as "experimental." With the experimental population designation, the relevant population is treated as threatened for purposes of section 9 of the Act, regardless of the species' designation elsewhere in its range. Threatened designation allows us discretion in devising management programs and special regulations for such a population. Section 4(d) of the Act allows us to adopt whatever regulations are necessary and advisable to provide for the conservation of a threatened species. In these situations, the general regulations that extend most section 9 prohibitions to threatened species do not apply to that species, and the 10(j) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species.

Based on the best scientific and commercial data available, we must determine whether the experimental population is essential or nonessential to the continued existence of the species. The regulations (50 CFR 17.80(b)) state that an experimental population is considered essential if its loss would be likely to appreciably reduce the likelihood of survival of that species in the wild. All other populations are considered nonessential. We have determined that this proposed experimental population

would not be essential to the continued existence of the species in the wild. This determination has been made because, since the time the species was listed, wild populations of the ABB are now found in seven additional States, three of which are considered robust and suitable for donor populations (USFWS 2008, p. 14). Therefore, the Service is proposing to designate a nonessential experimental population (NEP) for the species in southwestern Missouri.

For the purposes of section 7 of the Act, we treat an NEP as a threatened species when the NEP is located within a National Wildlife Refuge or unit of the National Park Service, and Federal agency conservation requirements under section 7(a)(1) and the Federal agency consultation requirements of section 7(a)(2) of the Act apply. Section 7(a)(1) requires all Federal agencies to use their authorities to carry out programs for the conservation of listed species. Section 7(a)(2) requires that Federal agencies, in consultation with the Service, ensure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. When NEPs are located outside a National Wildlife Refuge or National Park Service unit, then, for the purposes of section 7, we treat the population as proposed for listing and only section 7(a)(1) and section 7(a)(4) apply. In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are in the form of conservation recommendations that are optional as the agencies carry out, fund, or authorize activities. Because the NEP is, by definition, not essential to the continued existence of the species, the effects of proposed actions affecting the NEP will generally not rise to the level of jeopardizing the continued existence of the species. As a result, a formal conference will likely never be required for ABBs established within the NEP area. Nonetheless, some agencies voluntarily confer with the Service on actions that may affect a proposed species. Activities that are not carried out, funded, or authorized by Federal agencies are not subject to provisions or requirements in section 7.

American burying beetles used to establish an experimental population will come from a captive-rearing facility at the St. Louis Zoo, which propagates

this species under the Federal Fish and Wildlife Permit #TE135297-0. The donor population for the Zoo is a wild population from Ft. Chaffee, Arkansas. Each spring, Ft. Chaffee Maneuver Training Center (MTC) will provide the St. Louis Zoo with up to 15 ABB pairs provided their removal is not likely to jeopardize the continued existence of the species, and appropriate permits are issued in accordance with our regulations (50 CFR 17.22) prior to their removal. If this proposal is adopted, we would ensure, through our section 10 permitting authority and the section 7 consultation process, that the use of individuals from donor populations for release is not likely to jeopardize the continued existence of the species in the wild. ABBs will be transported to St. Louis Zoo staff to augment the St. Louis Zoo's captive population, or possibly for direct reintroduction to Wah'kon-tah Prairie. The purpose of the captive population is to provide stock for reintroductions in "suitable areas" within the species' historical range, in accordance with recovery action 7.2 of the American Burying Beetle Recovery Plan (USFWS 1991, p. 52).

We have not designated critical habitat for the ABB. Section 10(j)(2)(C)(ii) of the Act states that critical habitat shall not be designated for any experimental population that is determined to be nonessential. Accordingly, we cannot designate critical habitat in areas where we establish an NEP.

#### *Biological Information*

The ABB is the largest member of the family *Silphidae* in North America, and the largest among a guild of species that breed and rear their young on vertebrate carcasses. Because carrion is a scarce and ephemeral resource, ABBs must traverse large areas in search of it. By necessity, they are strong flyers capable of covering several miles overnight. The farthest recorded dispersal in a year for reintroduced ABBs is 3 miles (4.8km) (McKenna-Foster *et al.* 2007, p. 9). Data from the Nantucket reintroduction show that the farthest dispersal in one season was 3 miles (4.8 km) (McKenna-Foster *et al.* 2007, p. 9). Data from Nebraska indicate that the vast majority (92 percent) of ABB were recaptured within 0.6 miles (1 km) of their initial capture within the same season (Bedick *et al.* 1999, p. 176). After ABBs find an appropriate-sized carcass, a pair of beetles cooperatively buries and prepares the carcass by removing its fur or feathers and coating it with antibacterial secretions. These activities require soil excavation, consequently soils must be conducive for excavation

and plant roots systems must not hinder excavation. Reproductive habitat activities also require soil that is appropriately moist. Both parents may remain to feed the larva with regurgitated meat until they are capable of feeding themselves. After pupation, new adults emerge within 30–45 days. ABBs are generally considered univoltine (having one brood or generation per year) in the wild, with a life span of about 12 months. They are a habitat generalist with regards to vegetation, and will eat all classes of vertebrate carcasses (USFWS 2008, pp. 8, 11).

The ABB's historical range included 35 States and three Canadian provinces in the eastern temperate areas of North America (USFWS 1991, p. 4). At the time of listing, only two ABB populations were known, one on Block Island, Rhode Island, and one in Latimer County, Oklahoma. Subsequent monitoring in other States documented additional populations in Arkansas, Nebraska, Texas, South Dakota, and Kansas (USFWS 2008, p. 16). The population on Block Island is the only naturally occurring population east of the Mississippi River. The ABB also occurs in captive-breeding populations. Currently, captive populations are maintained at the Roger Williams Park Zoo in Providence, Rhode Island; St. Louis Zoo in St. Louis, Missouri; The Wilds in Ohio; and the Cincinnati Zoo in Cincinnati, Ohio.

The reasons for the decline of the ABB during the 1900s are still unknown. Many hypotheses for the decline have been suggested, such as the widespread use of dichloro-diphenyl-trichloroethane (DDT) and other pesticides, habitat loss and fragmentation, decrease in the availability of carrion, increased use of artificial lighting, an unidentified pathogen, increase in competition from vertebrate scavengers, and an increase in competition from other carrion insects (Sikes and Raithel 2002, pp. 104–109). Confounding most of these hypotheses is the historical and continued presence of other *Nicrophorus* species. The pattern of disappearance from the center of the population to the eastern and western edges of its range is also difficult to explain.

Predation is not believed to be an important mortality factor for the ABB, although interaction with fire ants, whether through competition or predation, is thought to adversely affect ABB populations. Disease is not known to be a factor in the decline of the ABB, but knowledge of diseases of insects is in its infancy (USFWS 2008, p. 31).

Competition for carrion by scavengers is thought to be an important factor in the decline of ABB (Sikes and Raithel 2002, p. 111). Competition with ants, flies, and vertebrate scavengers, as well as other species of burying beetles, can be limiting factors for ABBs (Sikes and Raithel 2002, p. 111). Weather extremes, such as drought, wildfire, hurricanes, and ice storms may affect the viability of existing populations (USFWS 2008, p. 33).

#### Recovery Efforts

Restoring an endangered or threatened species to the point where it is recovered is a primary goal of our endangered species program. The ABB recovery plan was developed within 2 years of the listing of the species and reflects the best information available at that time. The recovery objectives of the 1991 plan are to (1) "reduce the immediacy of the threat of extinction \* \* \*" and (2) "improve its status so that it can be reclassified from endangered to threatened." The recovery plan did not include delisting criteria, however, criteria for the reclassification are:

(a) Three populations of *N. americanus* have been reestablished (or additional populations discovered) within each of four broad geographical areas of its historical range: The Northeast, the Southeast, the Midwest, and the Great Lakes States;

(b) Each population contains a minimum of 500 adults as estimated by capture rates per trap night and black lighting effort; and

(c) Each population is demonstrably self-sustaining for at least 5 consecutive years (or is sustainable with established long-term management programs) (USFWS 1991, pp. 31–32).

The 1991 Recovery Plan considers conducting additional reintroductions a top priority (Priority 1) (USFWS 1991, p. 63). The first reintroduction site for the ABB was Penikese Island, Massachusetts, in 1990. After ABBs were released on Penikese for 4 years, the population persisted there for about 8 years (until 2002). No ABBs were subsequently found there during modest trapping efforts from 2003 to 2006. Nantucket Island was the next ABB reintroduction site, which was initiated in 1994. Release of ABBs ended in 2006, and the population has persisted. Since 1998, there have been sporadic efforts to reintroduce a population in Ohio, but ABBs have yet to be recaptured after overwintering (USFWS 2008, p. 5).

#### Reestablishment Area

Historically, the ABB was recorded in 13 counties throughout Missouri, and

was most likely found throughout the State. The last documented ABB occurrence in the State was collected in a light-trap from Newton County (southwest Missouri) in the mid 1970s (Simpson 1991, p. 1). Monitoring for existing ABB populations has been ongoing in Missouri since 1991. A concerted monitoring effort has been conducted by the St. Louis Zoo since 2002, and monitoring began on Wah'kon-tah Prairie in 2004. During the period 2002–2009, researchers monitored 49 sites from 25 counties in Missouri for ABB (Merz 2009, p. 8). No ABBs were observed or collected in any of the sites surveyed in Missouri since the 1970s.

The proposed reintroduction site, Wah'kon-tah Prairie, is a 3,030-acre (1,226-hectares) site jointly owned and managed by the Missouri Department of Conservation (MDC) and The Nature Conservancy (TNC). It is a designated special focus area, where TNC is working to restore a greater prairie chicken (*Tympanuchus cupido*) population and native tallgrass prairie. Wah'kon-tah Prairie straddles the border of St. Clair and Cedar Counties, and is very close to Bates and Vernon Counties, all within southwestern Missouri. The area within these four counties, 2,885 square miles (7,472 square kilometers (km)), is the proposed area for the nonessential experimental population (NEP). The minimum distance from the reintroduction site to outside of the designated experimental population boundary is 17 miles (27 km); the greatest distance is 52 miles (84 km). This NEP area was selected because of the proximity to the last recorded ABB sighting in Missouri, the quantity of recent ABB monitoring, and the relative abundance of carrion (Hamilton and Merz 2010, pp. 4–5).

According to the St. Louis Zoo's American Burying Beetle Activity Summary in 2009, 12 sites within the proposed NEP area were monitored for carrion beetles (Jean *et. al.* 2009, p. 1). Five of these sites were on Wah'Kon-Tah Prairie, one of which was sampled for 66 days throughout the season. The pitfall traps within the proposed NEP area collected 46,522 individuals: Of which 86 percent were other species of the beetle family Silphidae (to which the ABB belongs); the remainder were other insects and spiders. No ABBs were found (Jean *et. al.* 2009, p. 1).

Section 10(j) of the Act requires that an experimental population be wholly separate geographically from other wild populations of the same species. Because there are no known populations of ABB in Missouri, and there are no records of ABB in the bordering

counties of eastern Kansas, this proposed NEP is geographically separate from all other known ABB populations. Based on the movement data of other ABB populations, we do not believe the reintroduced ABBs will move beyond the designated NEP area. If monitoring shows that the reintroduced ABB are moving toward a border of the NEP, we will seek to amend the NEP boundaries, after monitoring the possible new NEP areas.

#### *Release Procedures*

Captive-bred beetles from St. Louis Zoo, wild beetles from Ft. Chaffee, or both will be brought to the release site in late spring by representatives of the St. Louis Zoo or the Service. ABBs will be paired 24 hours in advance of release. These beetles will be marked by clipping the elytra (the modified forewings that encase the thin hind wings used in flight) to distinguish between captive-bred and wild beetles, and between the release transects. For the release, a soil plug is dug and removed, and paired ABBs are provisioned with a 120–200 gram (4–7 ounce) carcass and placed into the hole. The soil plug is then placed back over the hole and a wire screen stapled over the area to keep out scavenging animals and birds. These holes will be dug in several lines, or transects. The number of transects will be determined by the number of beetles available, and apportioned in equal numbers (Hamilton and Merz 2010, p. 7). The ABB Reintroduction Plan contains additional information on the release procedures and monitoring protocols (see **FOR FURTHER INFORMATION CONTACT** for copies of this document or go to <http://www.regulations.gov> at Docket No. FWS–R3–ES–2011–03034).

#### *Status of Proposed Population*

If this proposal is adopted, we would ensure, through our section 10 permitting authority and the section 7 consultation process, that the use of ABBs from the donor population at Ft. Chaffee, Arkansas, for releases into Wah'kon-tah Prairie is not likely to jeopardize the continued existence of the species in the wild. These donor populations are closely monitored by the Service, and over-collection would not be permitted. Establishing additional ABB populations within the species' historical range is an important step in recovery (USFWS 1991, p. 52).

The special rule that accompanies this section 10(j) rule is designed to broadly exempt from the section 9 take prohibitions any take of ABBs that is accidental and incidental to otherwise lawful activities. We provide this

exemption because we believe that such incidental take of members of the NEP associated with otherwise lawful activities is necessary and advisable for the conservation of the species, as activities that currently occur or are anticipated in the NEP area, such as haying, grazing, and occasional burning of pastures, are generally compatible with ABB recovery.

This designation is justified because no adverse effects to extant wild or captive ABB populations will result from release of progeny from the captive flock. We also expect that the reintroduction effort into Missouri will result in the successful establishment of a self-sustaining population, which will contribute to the recovery of the species.

#### *Management*

Management issues related to the ABB NEP that have been considered include:

(a) *Mortality*: The regulations implementing the Act define "incidental take" as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity (50 CFR 17.3), such as agricultural activities and other rural development, and other activities that are in accordance with Federal, Tribal, State, and local laws and regulations. If this 10(j) rule is finalized, incidental take of the ABB within the NEP area would not be prohibited, provided that the take is unintentional and is in accordance with the special rule that is a part of this 10(j) rule. However, if there is evidence of intentional take of an ABB within the NEP that is not authorized by the special rule, we would refer the matter to the appropriate law enforcement entities for investigation.

(b) *Special handling*: In accordance with 50 CFR 17.21(c)(3), any employee or agent of the Service, any other Federal land management agency, or State personnel, designated for such purposes, may in the course of their official duties, handle ABBs to aid sick or injured ABBs, or to salvage dead ABBs. However, non-Service personnel and their agents would need to acquire permits from the Service for these activities.

(c) *Coordination with landowners and land managers*: Through informal meetings, the Service and cooperators have identified issues and concerns associated with the proposed ABB population establishment. The proposed population establishment was discussed with potentially affected State agencies and private landowners. Affected State agencies, landowners, and land managers have either indicated support for, or no opposition to, the proposed population establishment, provided an

NEP is designated and a special rule is promulgated to exempt incidental take from the section 9 take prohibitions.

(d) *Monitoring*: If this proposal is finalized and the reintroduction takes place, we would implement several monitoring strategies. Surveys conducted prior to releasing the ABBs will assess the over-wintering population from the prior year's release. During reintroduction, carcasses will be exhumed 10–12 days after burial to determine breeding success and the number of third instar (a developmental stage in insects representing their third molt) larvae present. This should provide a close estimate of the number of offspring produced in that first generation.

During the period from June through August, each reintroduction site will be surveyed for at least three nights in duration. In addition to sampling at the release site(s), surrounding areas will be sampled in four directions, approximately 1 mile (1.6 km) away, for at least three consecutive nights. Monitoring at the release sites and 1 mile (1.6 km) distant should detect the majority of the released beetles. Monitoring using pitfall trap surveys in the subsequent early summer and fall following release will provide an estimate of breeding pair productivity by collecting young adults following emergence. This will also allow for an estimate of overwinter survival of progeny. Beetles captured in the late summer and fall will be paired, provisioned with a carcass, and held until all pairs can be reintroduced back to the original release sites. We intend to reintroduce at least 50 pair each year for 5 years, or until data suggest a viable population of more than 1,000 individuals has been established. At year five, the cooperators will evaluate the project's successes and failures and make adjustments to the ABB reintroduction project, if necessary.

(e) *Public awareness and cooperation*: Public outreach for the ABB reintroduction project will be conducted in the spring of 2011, concurrent with the public comment period for the proposed rule. The State conservation department has conducted preliminary discussions with landowners in the NEP area, and the majority of the responses were positive. As part of the proposal process, we plan to conduct a public meeting in El Dorado Springs, Missouri, which is close to the reintroduction site. Additionally, we will distribute press releases to local media, announce the meeting and proposed rule in local newspapers, and post information on the Service's Web site (<http://www.fws.gov/midwest/endangered>) and

a Web site hosted by the St. Louis Zoo (<http://www.stlzoo.org/wildcareinstitute/centerforamericanburyingbe/americanburyingbeetlerecov.htm>).

Fact sheets on the species and the proposed project were distributed to the local conservation department office and to some of the landowners neighboring the NEP area. Those materials will be distributed more widely upon publication of this proposal.

#### Peer Review

In accordance with our policy on peer review, published on July 1, 1994 (59 FR 34270), we will provide copies of this proposed rule to three or more appropriate and independent specialists in order to solicit comments on the scientific data and assumptions relating to the supportive biological and ecological information for this proposed NEP designation. The purpose of such review is to ensure that the proposed NEP designation is based on the best scientific information available. We will invite these peer reviewers to comment during the public comment period and will consider their comments and information on this proposed rule during preparation of a final determination.

#### Required Determinations

##### *Regulatory Planning and Review (E.O. 12866)*

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

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

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

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

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

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

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal 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 (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

The area that would be affected if this proposed rule is adopted includes the release areas at Wah'kon-tah Prairie and adjacent areas into which ABBs may disperse, which over time could include significant portions of the NEP. Because of the regulatory flexibility for Federal agency actions provided by the NEP designation and the exemption for incidental take in the special rule, we do not expect this rule to have significant effects on any activities within Federal, State, or private lands within the NEP. In regard to section 7(a)(2), the population is treated as proposed for listing, and Federal action agencies are not required to consult on their activities. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a proposed species. However, because the NEP is, by definition, not essential to the survival of the species, conferring will likely never be required for the ABB populations within the NEP area. Furthermore, the results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities. In addition, section 7(a)(1) requires Federal agencies to use their authorities to carry out programs to further the conservation of listed species, which would apply on any lands within the NEP area. As a result, and in accordance with these regulations, some modifications to proposed Federal actions within the NEP area may occur to benefit the ABB, but we do not expect projects to be halted or substantially modified as a result of these regulations.

If adopted, this proposal would broadly authorize incidental take of the

ABB within the NEP area. The regulations implementing the Act define "incidental take" as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity such as, agricultural activities and other rural development, camping, hiking, hunting, vehicle use of roads and highways, and other activities in the NEP area that are in accordance with Federal, Tribal, State, and local laws and regulations. Intentional take for purposes other than authorized data collection or recovery purposes would not be permitted. Intentional take for research or recovery purposes would require a section 10(a)(1)(A) recovery permit under the Act.

The principal activities on private property near the NEP area are agriculture, rural development, and recreation. We believe the presence of the ABB would not affect the use of lands for these purposes because there would be no new or additional economic or regulatory restrictions imposed upon States, non-Federal entities, or members of the public due to the presence of the ABB, and Federal agencies would only have to comply with sections 7(a)(1) and 7(a)(4) of the Act in these areas. Therefore, this rulemaking is not expected to have any significant adverse impacts to activities on private lands within the NEP area.

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

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

(a) If adopted, this proposal will not "significantly or uniquely" affect small governments. We have determined and certify under the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed NEP designation will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate of \$100 million or greater in any year (*i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act). This proposed NEP designation for the ABB would not impose any additional management or protection requirements on the States or other entities.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. When populations of Federally listed species are designated as NEPs, the Act's regulatory requirements regarding those populations are significantly reduced. This reduction of regulatory burden allows landowners to continue using their lands in ways that may adversely impact the ABB, but are otherwise lawful. For example, this proposed rule would not prohibit the taking of ABBs in the NEP area when such take is incidental to an otherwise legal activity, such as agricultural activities and other rural development, camping, hiking, hunting, vehicle use of roads and highways, and other activities that are in accordance with Federal, State, Tribal, and local laws and regulations. Because of the substantial regulatory relief provided by the NEP designations, we do not believe the reestablishment of this species will conflict with existing or proposed human activities or hinder public use of lands within the NEP.

A takings implication assessment is not required because this rule (1) Will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule would substantially advance a legitimate government interest (conservation and recovery of a listed species) and would not present a barrier to all reasonable and expected beneficial use of private property.

*Federalism (E.O. 13132)*

In accordance with Executive Order 13132, we have considered whether this proposed rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In keeping with Department of the Interior policy, we requested information from and coordinated development of this proposed rule with the affected resource agencies in Missouri. Achieving the recovery goals for this species would contribute to its eventual delisting and its return to State management. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments would not change; and fiscal capacity would not be

substantially directly affected. The special rule operates to maintain the existing relationship between the State and the Federal Government and is being undertaken in coordination with the State of Missouri. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment under the provisions of Executive Order 13132.

*Civil Justice Reform (E.O. 12988)*

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule would not unduly burden the judicial system and would meet the requirements of sections (3)(a) and (3)(b)(2) of the Order.

*Government-to-Government Relationship With Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, 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. We have determined that there are no Tribal lands affected by this rule.

*Paperwork Reduction Act*

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. This proposed rule does not contain any new information collections that require approval. OMB has approved our collection of information associated with reporting the taking of experimental populations (50 CFR 17.84) and assigned control number 1018-0095. We may not collect or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

*National Environmental Policy Act*

The reintroduction of native species into suitable habitat within their historical or established range is categorically excluded from NEPA documentation requirements consistent with 40 CFR 1508.4, 516 DM 2.3A, 516 DM 2 Appendix 1, and 516 DM 8 Appendix 1.4.

*Energy Supply, Distribution or Use (E.O. 13211)*

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Because this action is not a significant energy action, no Statement of Energy Effects is required.

*Clarity of This Regulation (E.O. 12866)*

We are required by E.O. 12866, E.O. 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 comment should be as specific as possible. For example, you should tell us the numbers of the sections and paragraphs that are unclearly written, which sections or sentences are too long, or the sections where you feel lists and tables would be useful.

**References Cited**

A complete list of all references cited in this proposed rule is available at <http://www.regulations.gov> at Docket No. FWS-R3-ES-2011-0034.

**Authors**

The primary authors of this proposed rule are staff members of the Service's Columbia, Missouri, Ecological Services Field Office (see **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

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

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

**Proposed Regulation Promulgation**

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

**PART 17—[AMENDED]**

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. Amend § 17.11(h) by revising the entry for “Beetle, American Burying”

under “INSECTS” in the List of Endangered and Threatened Wildlife to read as follows:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*

(h) \* \* \*

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	*
INSECTS							
Beetle, American Burying.	<i>Nicrophorus americanus</i> .	U.S.A. (eastern States south to FL, west to SD and TX), eastern Canada.	Entire, except where listed as an experimental population.	E	351	.....	NA
Beetle, American Burying.	<i>Nicrophorus americanus</i> .	U.S.A. (eastern States south to FL, west to SD and TX), eastern Canada.	In southwestern Missouri, the counties of Cedar, St. Clair, Bates, and Vernon.	XN	.....	NA	17.85(c)
*	*	*	*	*	*	*	*

3. Amend § 17.85 by adding paragraph (c) to read as follows:

**§ 17.85 Special rules—*invertebrates*.**

\* \* \* \* \*

(c) American Burying Beetle (*Nicrophorus americanus*).

(1) *Where is the American burying beetle designated as a nonessential experimental population (NEP)?*

(i) The NEP area for the American burying beetle is within the species’ historical range and is defined as follows: the Missouri Counties of Cedar, St. Clair, Bates, and Vernon.

(ii) The American burying beetle is not known to currently exist in Cedar, St. Clair, Bates, or Vernon Counties in Missouri. Based on its habitat requirements and movement patterns, we do not expect this species to become established outside this NEP area. However, if individuals of this

population move outside the designated NEP area, we would presume that they came from the reintroduced population. We would then amend this regulation to enlarge the boundaries of the NEP area to include the entire range of the expanded population.

(iii) We will not change the NEP designations to “essential experimental,” “threatened,” or “endangered” within the NEP area without a public rulemaking. Additionally, we will not designate critical habitat for this NEP, as provided by 16 U.S.C. 1539(j)(2)(C)(ii).

(2) *What activities are not allowed in the NEP area?*

(i) You may not possess, sell, deliver, carry, transport, ship, import, or export by any means, American burying beetles, or parts thereof, that are taken or possessed in violation of paragraph (c)(3) of this section or in violation of

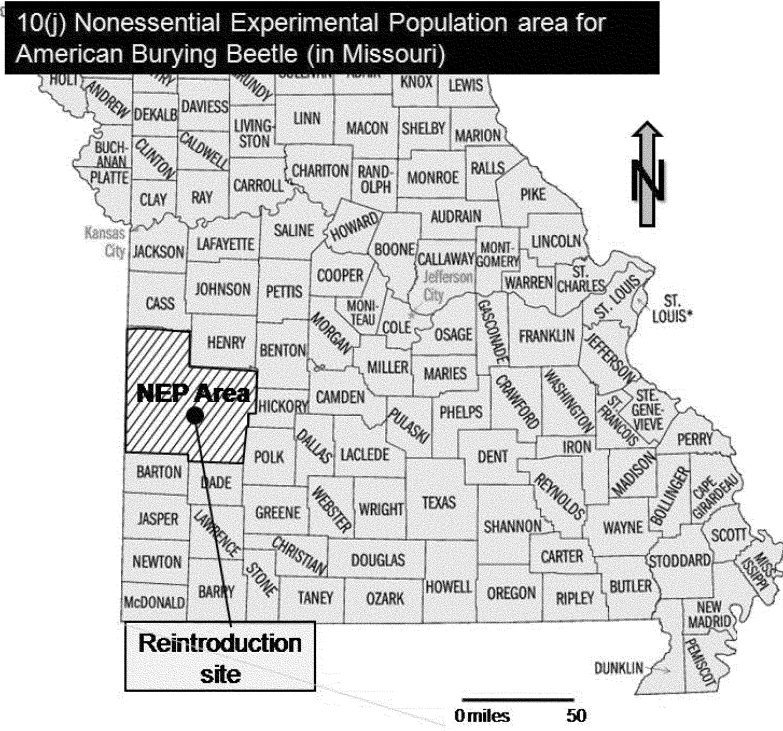
the applicable State fish and wildlife laws or regulations or the Act.

(ii) You may not attempt to commit, solicit another to commit, or cause to be committed any offense defined in paragraph (c)(2)(i) of this section.

(3) *What take is allowed in the NEP area?* Take of this species that is accidental and incidental to an otherwise legal activity, such as agriculture, forestry and wildlife management, land development, recreation, and other activities, is allowed.

(4) *How will the effectiveness of these reintroductions be monitored?* We will prepare periodic progress reports and fully evaluate these reintroduction efforts after 5 years to determine whether to continue or terminate the reintroduction efforts.

(5) **Note:** Map of the NEP area for the American burying beetle follows:



\* \* \* \* \*

Dated: July 11, 2011.  
**Gregory E. Siekaniec,**  
*Acting Director, Fish and Wildlife Service.*  
[FR Doc. 2011-18561 Filed 7-21-11; 8:45 am]  
**BILLING CODE 4310-55-P**