

November 5, 2010

Attn: Docket No. FWS-R3-ES-2009-0009  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive, Suite 222  
Arlington, VA 22203

To Whom it May Concern:

These comments concern your proposed “not prudent” for critical habitat determination.

#### *Statutory Requirements*

The Endangered Species Act defines “critical habitat” as 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 essential to the conservation of the species and which may require special management considerations or protection; *as well as* 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. 16 U.S.C. 1532 (5). Congress instructed that only in rare instances is the Secretary justified in not designating critical habitat concurrent with a listing. H.R. Rep. No. 95-1625 at 17 (1978), reprinted in 1978 *U.S.C.C.A.N.* 9453, 9467; see also *Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir. 1985) (holding that the Secretary “may only fail to designate a critical habitat under rare circumstances”).

#### *The Proposed Rule*

The proposed rule paraphrases (75 Fed. Reg. 54561, 54575) the agency’s regulations which provide that designation of critical habitat is not prudent when the species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or such designation of critical habitat would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1)). The proposed rule next sets out the determination that both circumstances apply to the Ozark Hellbender.” 75 Fed. Reg. at 54575.

To support the determination the notice of proposed rulemaking proclaims that “[d]esignation of critical habitat requires the publication of maps and a very specific narrative description of critical habitat areas in the Federal Register. The degree of detail in those maps and boundary descriptions is far greater than the general location descriptions provided in this proposal to list the species as endangered.” 75 Fed. Reg. at 54575. The agency’s reasoning is flawed for multiple reasons.

First, the degree of mapping and narrative detail required need not direct anyone to the location of particular Hellbenders . Rather, the mapping and narrative description need only define the outer boundary of the designation. 50 C.F.R. § 424.12(c).

Second, Ozark Hellbender larvae would tend to drift with the current and be carried away from nesting sites. An appropriate critical habitat designation would address the needs of all life stages of the species, further increasing the difficulty of locating particular animals.

Third, specific areas not presently occupied by Hellbenders nevertheless may be designated as critical habitat if the agency determines that the areas are essential for the conservation of the species. 16 U.S.C. § 1532(5)(A)(ii). A critical habitat designation that would include all streams where the Ozark Hellbender has been known to exist - from the headwaters of the stream to the confluence with a larger water body – would provide appropriate protection for habitats used in all life stages and would further increase the difficulty of locating adult Ozark Hellbenders (those susceptible to unauthorized collection).

Finally, the benefits of designating critical habitat are substantial. Critical habitat designation would trigger an additional consultation requirement when an action would result in the destruction or adverse modification of critical habitat. See, e.g., *Sierra Club v. United States Fish & Wildlife Serv.*, 245 F.3d 434, 439 (5th Cir. 2001). Any federal action - on federal or non-federal lands - that would be likely to result in the destruction or adverse modification of critical habitat would require consultation with the agency, even if those actions would not jeopardize the continued existence of the species. 16 U.S.C. § 1536(a)(2); *Sierra Club*, 245 F.3d at 439-41.

For the foregoing reasons, the Fish and Wildlife Service should not find that designation of critical habitat is not prudent. Designation appears to be essential for the survival of the species.

Sincerely yours,

/s/ Bruce A. Morrison

Bruce A. Morrison  
General Counsel  
Great Rivers Environmental Law Center