Congress of the United States
Washington, DC 20515

January 9, 2014

The Honorable Daniel M. Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

Dear Director Ashe:

We write to express our concern with the scope of recently proposed critical habitat designations affecting the State of Arkansas. At more than 769 river miles, the proposed critical habitat designation for the Neosho Mucket and Rabbitsfoot Mussel (target species) has the potential to impact activities on 42% of Arkansas's surface area. Furthermore, 90% of the rivers and streams included in the designation pass through private property, leading to a disproportionate impact on productive land.

As Members of Congress, we appreciate the importance of protecting critical habitat for threatened and endangered species. At the same time, we are mindful that listings and critical habitat designations must be science-based and transparent. Also, economic justification documents provided by the U.S. Fish and Wildlife Service (FWS) should reflect the true impact on farmers, families, job creators, local governments, and communities. Given the scope of these critical habitat designations, the potential impact on Arkansas and other states, and the flawed process through which the proposal was produced, we request your prompt consideration of and response to numerous related concerns and questions.

First, we ask that you respond by addressing each of the following issues and/or questions that were raised in public comments to the FWS:

- The proposed critical habitat designations include areas that are outside the geographical areas occupied by the target species at the time of listing, without providing a science-based justification as to why inclusion of these areas are essential to the conservation of the target species. Please respond to this concern in detail and explain whether the failure to provide such a science-based justification is consistent with the requirements of the Endangered Species Act.
- The proposed critical habitat designations include areas with conditions (e.g. reduced water temperatures due to releases and spring-fed areas) that are not conducive to support population development for the target species.
- Does the FWS foresee impacts on NPDES permit holders that discharge either directly or indirectly to critical habitat areas? Please provide specific examples of potential impacts.
- Before designating critical habitat, does the FWS consider the adequacy of existing regulatory mechanisms for protection of critical habitat, such as Clean Water Act regulations, National River designations, or status as Extraordinary Resource Waters and Ecologically Sensitive Waterbodies under Arkansas Pollution Control and Ecology Commission Regulation No. 2 (providing a higher level of protection of water quality from point source

and non-point source pollution)? If so, what impact does this have on the extent of critical habitat designations? Please be specific and elaborate in detail on the impact that such existing regulatory mechanisms have on critical habitat designations for the target species in Arkansas.

- Does the economic impact analysis considered by the FWS include an evaluation of increased costs associated with increased consultations on agricultural related activities, especially conservation efforts?
- Does the FWS consider whether voluntary conservation efforts are likely to decrease as a result of increased compliance and consultation costs?
- On August 24, 2012, the Administration proposed a new rule that limits the type of economic analysis that is required for critical habitat designations. The current analysis is severely inadequate. Before finalizing critical habitat designations for the target species, will the FWS conduct a more realistic economic analysis that considers costs beyond inter-agency consultation, including but not limited to, the impact on public and private activities such as project delays to road and bridge improvements, impacts on agricultural, forestry, and grazing activities, recreational uses, access to and costs associated with water and wastewater treatment, and impacts to energy exploration and development? And will such an economic analysis be transparently available to the public for review and comment?
- The Arkansas Association of Counties has submitted an alternative economic impact analysis to the FWS. This alternative analysis estimates a much higher cost than the analysis provided by the FWS. Please provide a detailed explanation that describes and accounts for the disparity between these estimates.

Secondly, we have concerns beyond those presented in public comments. Listing of the target species and the subsequent work to designate critical habitat are, in part, a result of a closed-door settlement agreement in the recent multidistrict litigation (MDL)[1]. These negotiations were closed to stakeholders and possible intervenors, such as state wildlife agencies. Subsequently, there have been issues with transparency requests that members of Congress (including Senator Boozman) have sent asking the FWS to work with the District Court and other litigants to make documents from the negotiations available to Congressional investigators. The MDL, like other lawsuits with federal agencies, is seen by many as an example of the inappropriate "sue and settle" strategy, in which the FWS entered into closed-door negotiations with litigants and thereby restructured federal Endangered Species Act priorities, without the involvement of Congress or affected third parties. According to the FWS Endangered Species Act Work Plan, final listings and/or critical habitat designations for additional species are likely to occur in Arkansas in fiscal years 2014, 2015, 2016, and 2017. Accordingly, we have several related questions:

- In response to a question from Senator Boozman during a Senate Appropriations Committee Hearing on June 6, 2013, Attorney General Eric Holder wrote that "while the Department would typically consult with the client agency, any decision regarding what position the government will take regarding intervention or participation in settlement negotiations ultimately rests with the Justice Department." However, the Attorney General immediately continued that "the Department gives its client agencies' views considerable weight as to all significant litigation decisions." Therefore, since the Department of Justice (DOJ) gives the

[1] In re Endangered Species Act Section 4 Deadline Litigation (D.D.C. MDL Docket No. 2165).

FWS's views considerable weight as to all significant litigation decisions, did the FWS express any views to the DOJ during the MDL regarding the inclusion of intervenors or other possible participants (such as state wildlife agencies from Arkansas or other states) in settlement negotiations? If so, please explain in detail, and provide copies of any related records of communication between the FWS and DOJ. If not, why not?

- Many of these "sue and settle" scenarios lead to significant litigation costs, with the taxpayers paying plaintiffs' attorney fees. Millions of taxpayer dollars are paid to plaintiffs' attorneys without transparent access to related information. In 2012, the Government Accountability Office (GAO) found that "Most … Interior agencies did not have readily available information on attorney fee claims and payments made under [the Equal Access to Justice Act] and other fee-shifting statutes for fiscal years 2000 through 2010. As a result, there was no way to readily determine who made claims, the total amount each department paid or awarded in attorney fees, who received the payments, or the statutes under which the cases were brought for the claims over the 11-year period."[2] With regard to the MDL, please provide a detailed description of the amounts that the federal government paid or awarded in attorney fees, including a description of who received the payments. Also, please provide a description of actions the FWS has taken to address inadequacies identified by GAO in the Report GAO-12-417R.
- Given the far-reaching consequences of these "sue and settle" scenarios, will the FWS work with DOJ to reject this tactic going forward and attempt to include interested intervenors, such as state wildlife management agencies, local governments, and affected private citizens, in similar settlement negotiations? If so, please explain specific steps that will be taken to ensure that such openness and transparency will be pursued in cooperation with DOJ? If not, why not?
- The settlement agreement requires the FWS to make listing determinations on hundreds of species over the course of several years. Why did the FWS decide to make the determination on these target species early in the process of carrying out the negotiated listing determinations, rather than waiting later in the process? Was the State of Arkansas consulted with respect to the timing of the determination for the target species?

We request your review and response to a few final questions that may not have been directly addressed in public comments and that do not pertain to the "sue and settle" scenario issue:

- Please provide and explain the specific criteria, including but not limited to water quality characteristics, that must be present for a stream or river to be designated as critical habitat for the target species. Please be specific, and address issues such as the extent of areal patches which the FWS assumes are necessary to support each life phase of the target species, as well as critical threshold values for flow, sediment, and other characteristics that would provide critical habitat. If the FWS cannot provide a detailed science-based explanation of these criteria, please say so and provide a more detailed explanation for the basis of the current critical habitat designation proposal in lieu of a science-based justification.

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[2] U.S. Government Accountability Office, *Limited Data Available on USDA and Interior Attorney Fee Claims and Payments*, GAO-12-417R, April 12, 2012.

- How will the FWS address potential competing management goals? For example, ***if*** the EPA's efforts to achieve certain water quality characteristics within critical habitat areas are in some way counterproductive to attempts to achieve target species recovery (such as by reducing the populations of non-endangered, non-threatened host fish species) how would such competing environmental quality goals be managed?

While the Rabbitsfoot Mussel designation is proposed in 13 states, approximately half of the critical habitat lies within Arkansas. The proposed designation appears to be excessively broad, lacking a firm scientific basis, and community leaders and individuals alike have warned us of the wide economic impact this designation will have on Arkansans. Furthermore, we have not received an accurate cost-benefit analysis from the FWS that describes the realistic costs that would likely result from this critical habitat designation.

Due to the scope of the proposed critical habitat designations, the potential impact on Arkansas and other states, as well as the flawed process through which the proposal was formulated, we urge a reconsideration of and reduction in the size of the proposed critical habitat designations for the target species. Also, we urge the FWS to carefully consider the critical feedback it has received from our citizens and both the Governor and Attorney General of Arkansas.

Thank you for your prompt attention to these concerns. We look forward to working with you to reform and improve the critical habitat designation process, while we urge you to revise the scope of the Neosho Mucket and Rabbitsfoot Mussel critical habitat designation. Please do not hesitate to contact us with any questions or concerns, or if we can be helpful to you.

Sincerely,

Mark Pryor,
U.S. Senator

John Boozman,
U.S. Senator

Rick Crawford,
Member of Congress

Tim Griffin,
Member of Congress

Steve Womack,
Member of Congress

Tom Cotton,
Member of Congress