



Southwestern Willow Flycatcher Critical Habitat Proposal Questions and Answers

Arizona Ecological Services Field Office <http://www.fws.gov/southwest/es/arizona/>

July 11, 2012 **Update**

Q: What action is the Service taking?

A: On August 15, 2011, the U.S. Fish and Wildlife Service (Service) [proposed](#) to revise critical habitat for an endangered migratory bird, the southwestern willow flycatcher. The proposed revision identified 2,090 stream miles within the 100-year floodplain of waters in California, Arizona, Nevada, Utah, Colorado, and New Mexico as critical habitat. Of the total proposal, approximately 779 stream miles were initially identified as being considered for exclusion from the final critical habitat designation.

Since publishing the initial proposal, the Service has added the following locations to the list of possible exclusions—the Santa Clara River and Castaic Creek, Calif. (14.5 mi.), lower Colorado River (70 mi.), Pinal Creek, Ariz. (3.5 mi.), and Rio Grande, N.M. (46.1 mi.). Two additional segments on Cienega Creek and Empire Gulch (totaling 15.5 mi.) in Arizona are being added to the critical habitat proposal at this time. A total of 2,113 river miles of critical habitat are now proposed.

The Service also announces the availability of a draft economic analysis of the critical habitat proposal, a draft environmental assessment, and a public hearing.

Q: Why is the southwestern willow flycatcher endangered?

A: Flycatcher populations have declined significantly throughout their range because of changes to riparian ecosystems (trees and shrubs near water) including reductions in water flow, alteration of flood flows, physical modifications to watersheds and streams, and removal of riparian vegetation. These changes have occurred as a result of dams and reservoirs, groundwater pumping, channelization of streams for flood control, livestock overgrazing, agriculture developments, urbanization and other modifications.

Modification and loss of wintering habitat and “stopover” habitat used by flycatchers to replenish energy reserves during migration, and the continued use of agri-chemicals and pesticides in Latin America are also believed to be contributing to the decline of flycatchers.

The southwestern willow flycatcher was listed as endangered on the Federal List of Endangered and Threatened Wildlife on February 27, 1995.

Q: Where and when are southwestern willow flycatchers found in the United States?

A: The historical breeding habitat of the southwestern willow flycatcher included riparian areas in

California, southern Nevada, southern Utah, Arizona, New Mexico, western Texas, southwestern Colorado, and the extreme northwestern portion of Mexico.

Flycatchers migrate from Latin America to their breeding areas in North America, typically arriving in early May. Flycatchers build nests, breed, incubate and hatch eggs through June, then fledge their juveniles through mid-August. They depart for their wintering grounds by mid-September.

The flycatcher's current range is similar to its historical range, but the quality and quantity of habitat has been significantly reduced causing habitat to be less common and more isolated. Approximately 1,299 documented flycatcher territories occur from near sea-level to over 8,500 feet in elevation, but are usually found in lower elevation riparian habitats. A territory is a discrete area defended by a resident single flycatcher or pair of flycatchers during a breeding season. Throughout its range, the flycatcher's current distribution follows that of its riparian habitat; relatively small, isolated, widely dispersed locales. Flycatchers winter in Mexico, Central America, and possibly northern South America.

Q: What constitutes southwestern willow flycatcher breeding habitat?

A: The southwestern willow flycatcher breeds in patchy to dense riparian habitats along streams, reservoirs, or other wetlands. Common tree or shrub species include willow, boxelder, salt cedar, and cottonwood. Habitat characteristics vary across the subspecies' range. However, occupied sites usually consist of dense vegetation in the patch interior, or dense patches interspersed with openings, creating a mosaic that is not uniformly dense. In almost all cases, slow-moving or still water, or saturated soil is present at or near breeding sites during non-drought years.

Q: What is critical habitat?

A: Critical habitat is a term in the Endangered Species Act (ESA) that identifies geographic areas essential for the conservation of a threatened or endangered species. The ESA defines "conservation" as the actions leading towards the eventual recovery of a species to the point where it is no longer threatened or endangered.

Critical habitat provides protection from the prohibition against destruction or adverse modification from actions carried out, funded, or authorized by a federal agency and is carried out through required consultation under section 7 of the ESA. Due to legal challenges, the Service no longer relies on the regulatory definition of "destruction or adverse modification" of critical habitat. Instead, the Service relies on the statutory provisions of the ESA to complete adverse modification analysis.

Q: Does a 'critical habitat' designation mean an area is considered a wildlife refuge or sanctuary?

A: The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. A critical habitat designation identifies areas that are important to the conservation of federally listed threatened or endangered species. A critical habitat designation requires federal agencies to consult with the Service on any of their actions that may affect critical habitat in designated areas. The Service can then recommend ways to minimize any adverse effects. It imposes no requirements on state or private actions on state or private lands where no federal funding, permits or approvals are required.

Q: What has been proposed as critical habitat for the southwestern willow flycatcher?

A: The proposal currently includes 2,113 floodplain miles in California, Arizona, Nevada, Utah, Colorado, and New Mexico as critical habitat for the southwestern willow flycatcher within the 100-year floodplain or flood-prone areas. The proposal identifies stream- and lake-edge habitats that are important to conserving the species, as identified in the 2002 Southwestern Willow Flycatcher [Recovery Plan](#). The locations support large populations and the proposal addresses the importance of maintaining those nesting birds' access to other local and inter-basin populations. The proposal also identifies some areas with few or no known territories where improvement is needed to meet numerical and habitat related recovery goals.

Protecting the designated configuration of habitats will provide population stability, assure that birds can expand and colonize other locales, and promote genetic diversity. Identifying these areas as critical habitat will elicit federal agency participation in meeting the habitat requirements identified to recover the flycatcher (1,950 territories). Designating the area within broad floodplains will accommodate the shifting and flooding nature of Southwest rivers, allowing habitat to persist, grow, recycle, and regenerate.

The [2005 southwestern willow flycatcher critical habitat designation](#) remains in effect during the current rulemaking process, anticipated to be completed by December 14, 2012.

Q: How did the Service determine what areas to propose as flycatcher critical habitat?

A: The Service identified locations that are distributed to meet geographic and territory/habitat abundance goals described in the Recovery Plan.

Critical habitat is proposed as river segments to account for: riparian habitat dynamics; flycatcher nesting fidelity to an area (rather than a specific nest/habitat patch); breeding site connectivity; flycatcher within and between drainage movement; population stability, and migration habitat. The Service identified large populations (≥ 10 territories) and small populations with high connectivity (within 35 km/22 mi) that together make-up a large population.

Where large populations do not occur or when the methodology does not distinguish river segments or populations, the Service used professional expertise and a variety of factors to generate proposed river segments — including the Recovery Plan, occupancy area records and habitat features to identify potentially suitable and suitable habitat segments.

Lateral extent (width) of critical habitat: Flycatchers use riparian habitat. The zone where this vegetation occurs is typically within the 100-year floodplain. Habitat typically changes its location over time due to factors such as shifting river channels, flooding, and drought, etc. The riparian zone was primarily identified using digital data and visual interpretation of remotely sensed-data (aerial photographs and satellite imagery). The Service proposed to designate critical habitat on lands that:

- were known to be within the specific geographic area occupied by the flycatcher at the time of listing (from surveys occurring from 1991 to 1994) that contain the essential physical or biological features which may require special management; or
- are essential to the conservation of the flycatcher based on the Recovery Plan goals.

Q: What sort of information would be of value in the critical habitat evaluation and decision process?

A: Any final action resulting from this proposal should be as accurate and as effective as possible. Therefore, comments or suggestions are requested concerning:

- The reasons why any areas should or should not be determined to be critical habitat as provided by section 4 of the ESA, including whether the benefits of designation will outweigh any economic or other relevant impacts resulting from the designation;
- Specific information on the distribution and abundance of southwestern willow flycatchers and its habitat, and which habitat or habitat components are essential to the conservation of this species and why;
- Land use designations and current or planned activities in or adjacent to the areas proposed and their possible impacts on proposed critical habitat;
- Any foreseeable economic or other potential impacts resulting from the proposed designation, in particular, any impacts on small entities;
- Whether any specific areas the Service is proposing for critical habitat designation should be considered for exclusion under section 4(b)(2) of the ESA, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area. For specific lands that the Service should consider for exclusion, please provide management plans, conservation easements, agreements, Habitat Conservation Plans (HCP), or other appropriate information, which describe the commitment and assurances of protection of the physical or biological features of flycatcher critical habitat; property boundaries; flycatcher status, distribution, and abundance; and management actions to protect the physical or biological features of flycatcher habitat;
- Flycatcher habitat suitability in specific areas within the Santa Ana and San Diego Management Units in southern California. Please provide information on flycatcher habitat suitability for recovery at the following areas: (1) entirety of Temescal Wash including Alberhill Creek in Riverside County; (2) entirety of Murrieta Creek in Riverside County; (3) Potrero Creek near the city of Beaumont in Riverside County; (4) Cajon Creek from Lone Pine Canyon to California State Highway 138 in San Bernardino County; and (5) Tijuana River from Dairy Mart Road to the Tijuana River Estuary in San Diego County; and
- Whether the approach to designate critical habitat could be improved or modified in any way to provide for greater public participation and understanding, or to assist in accommodating public concerns and comments.

Q: Has the Service proposed to exclude areas from the currently proposed revision of southwestern willow flycatcher critical habitat?

A: Department of Defense lands with completed, Service-approved Integrated Natural Resources Management Plans (INRMPs) have been exempted from the proposed critical habitat designation. These exemptions resulted in about 63 river miles of streams that would have otherwise been proposed for designation as critical habitat.

All other lands identified in the Service's methodology are included in the proposal. The Service has not excluded any areas in the proposal. However, areas proposed as southwestern willow flycatcher critical habitat can be excluded from the final designation if they are protected by approved Habitat Conservation Plans, tribal management, and other partnerships, or for economic or other relevant

reasons if the exclusions would not result in the extinction of the species. However, those areas must be included in the critical habitat proposal and then be considered for exclusion during the final critical habitat determination after considering all public comments and an economic analysis.

The Service has prepared a draft economic analysis of the proposed critical habitat that is now available for public review and comment. The current critical habitat proposal includes an extensive list of areas (approximately 902 stream miles) that are under consideration for exclusion from the final critical habitat designation. A brief explanation of the Service's rationale for such considerations is explained in the proposal.

For lands the Service evaluated and excluded from critical habitat under section 4(b)(2) of the ESA during the 2005 flycatcher critical habitat designation and those who wish to seek exclusion for this re-designation, please resubmit your request. Include any updated information that pertains to the commitment and assurances of protection of flycatcher habitat; the physical or biological features of flycatcher critical habitat; property boundaries; flycatcher status, distribution, and abundance; and management actions to protect flycatcher habitat.

Q: Would everything within designated critical habitat be treated as critical habitat?

A: No. The Service will not map critical habitat in sufficient detail to exclude all developed areas and other lands unlikely to contain "primary constituent elements" essential for flycatcher conservation. Within the proposed critical habitat boundaries, only lands containing some or all of the primary constituent elements will be designated as critical habitat. Existing man-made features and structures within critical habitat, such as buildings; roads; residential landscaping; residential, commercial, and industrial developments; and other features, do not contain some or all of the primary constituent elements. Therefore, these areas will not be considered critical habitat and will be specifically excluded from critical habitat by definition.

Q: What are "primary constituent elements"?

A: Primary constituent elements are the physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species. They are habitat features needed for life needs and successful reproduction of a species. These include but are not limited to:

- space for individual and population growth, and for normal behavior (migration, etc.)
- cover, food, water, and other nutritional/physiological requirements
- locations for breeding, feeding and rearing offspring

Q: What are the "primary constituent elements" of proposed flycatcher critical habitat?

A: The areas proposed for designation as critical habitat are designed to provide sufficient riparian habitat for breeding, non-breeding, territorial, dispersing and migrating southwestern willow flycatchers and to flycatchers throughout their range, and provide those habitat components essential for conservation of the subspecies. They include:

- **Trees and shrubs** that include, but are not limited to, willow species and boxelder;

- **Dense riparian vegetation** with thickets of trees and shrubs ranging in height from 6 to 98 feet tall in middle and lower elevation riparian forests, and with lower-stature thickets (6 to 13 feet tall) found at higher elevation riparian;
- Dense riparian **understory** foliage at least from the ground level up to approximately 13 feet;
- Sites for nesting that contain a dense tree and/or shrub **canopy** (i.e., a tree or shrub canopy with densities ranging from 50 percent to 100 percent);
- Dense patches of riparian forests that are interspersed with small openings of open water or marsh or shorter/sparser vegetation, that creates a **mosaic**; and
- A variety of **insect** prey populations (wasps, bees, flies, beetles, butterflies and moths, etc.).

Q: Why and how were areas within the 100-year floodplain chosen to demark critical habitat?

A: Flycatcher breeding habitat (as noted above) is usually contained within the 100-year floodplain (including reservoir draw-down areas).

The boundary or “lateral extent” of the areas proposed for designation all fall within the 100-year floodplain, but are frequently limited to flood-prone areas less expansive than the 100-year floodplain. The Federal Emergency Management Agency (FEMA) designates and maps the 100-year floodplain boundaries for many larger rivers in the vicinity of urban and suburban areas. However, not all of 100-year floodplains throughout the proposed critical habitat areas have been mapped by FEMA.

As a result, the Service has, for this proposed rule, mapped the lateral extent or riparian zones by one of two methods; the areas were either captured from existing digital sources or created through expert visual interpretation of aerial photographs and satellite imagery. These maps will be available at <http://www.fws.gov/southwest/es/arizona/> and <http://www.regulations.gov/>.

Q: How will the proposed critical habitat compare to the Southwestern Willow Flycatcher Recovery Team’s recommendations for habitat conservation?

A: The Service recognizes that the Recovery Team’s efforts and the adopted [Recovery Plan](#) represent a treatment of the best, most current biological information and a projected plan for the recovery of the subspecies. However, the plan makes no critical habitat recommendations. The science, threats, issues, importance of “metapopulation” stability, and affected entities that are identified in the Recovery Plan have been incorporated into the critical habitat proposal.

Q: Hasn't the southwestern willow flycatcher always had a sparse distribution?

A: The flycatcher has always been sparsely distributed in the Southwest due to the sparse distribution of riparian (streamside) habitat in this predominantly arid region. However, sparse distribution and rarity are not equivalent. Although flycatcher habitat is rare, nesting pairs have occurred in high densities where suitable habitat is present.

Q: Would the southwestern willow flycatcher only be protected in designated critical habitat areas?

A: No. All other protections afforded by the ESA apply both on and off designated critical habitat. Listed species, both inside and outside critical habitat, are protected from 'take,' which includes harming (e.g., shooting, killing, trapping, collecting) and harassing individual animals. However,

incidental taking that may result from, but is not the purpose of, otherwise legal activities may be allowed with a permit available from the Service.

Q: When will a critical habitat designation become effective?

A: The 2005 southwestern willow flycatcher critical habitat designation remains in effect during the current rulemaking process, anticipated to be completed later this year. Any new critical habitat designation (not included in the existing 2005 designation) that would trigger ESA section 7 review of federal activities would become effective 30 days following the Service's final determination, scheduled under court order for December 2012. However, section 7 also requires "conferences" on federal actions that are likely to result in the destruction or adverse modification or destruction of proposed critical habitat. The Service's conference opinions may provide recommendations to reduce impacts to critical habitat. Most agencies accept the recommendations made in the conference opinions, as most conference opinions can be converted to biological opinions once critical habitat is finalized, thereby saving consultation and project delays that could occur when a final rule becomes effective.

Q: How would a critical habitat designation affect my private land?

A: Requirements for consultation on critical habitat do not apply to entirely private actions on private lands. Critical habitat designations only apply to federal lands or federally funded or permitted activities on private lands. Activities on private or state lands that are funded, permitted or carried out by a federal agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, or a section 402 permit under the Clean Water Act from the Environmental Protection Agency, will be subject to the section 7 consultation process with the Service if those actions may affect critical habitat or a listed species.

Through this consultation, the Service would advise agencies whether the permitted actions would likely jeopardize the continued existence of the species or adversely modify critical habitat. Federal actions not affecting critical habitat or otherwise affecting flycatchers or their habitat (e.g., suitable habitat outside of critical habitat), and actions on non-federal lands that are not federally funded, permitted or carried out, will not require section 7 consultation.

Q: What can a landowner do to enhance habitat for the flycatcher?

A: The Service is able to provide technical and financial assistance to landowners who want to improve or restore habitat on their property through the Partners for Fish and Wildlife Program and other private stewardship grant programs.

Q: When an area is designated as critical habitat, are all human activities in the area prohibited?

A: No. The only activities prohibited in these areas are federal actions that are likely to result in destruction or adverse modification of the critical habitat for the flycatcher.

Q: Will livestock grazing be affected by critical habitat designation?

A: Formal consultation under the ESA is required only when federally-permitted grazing may adversely affect critical habitat. Federal land management agencies are required to evaluate the effect grazing has on federally managed critical habitat areas. The flycatcher can exist in grazed areas, but

does best in areas where the species' habitat suitability is maintained in good condition and cowbird populations are kept in check.

Q: Why is the Service initiating the designation of critical habitat for the flycatcher again?

A: The critical habitat is being revised following a settlement agreement stemming from legal challenges to the 2005 critical habitat designation. The Court granted the Service's request to leave the 2005 critical habitat designation in effect during the current rulemaking process. The Service is scheduled to prepare a revised final rule by December 14, 2012.

Q: What does the public comment period accomplish?

A: The current public comment period is how the Service receives formal public, industry and conservation group input into the critical habitat designation process. Also during this time, the Service seeks scientific peer review of its proposal and rationale for critical habitat designations. The Service is also seeking comments on the draft environmental assessment and draft economic analysis of the critical habitat as proposed. All comments will be incorporated into or addressed in the final designation and supporting environmental assessment and economic analysis.

Q: What economic consideration will be given before critical habitat is designated?

A: The Service is required to take into consideration the economic impact, and any other relevant impact, of designating particular areas as critical habitat. The Service may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species. The draft economic analysis of the proposed critical habitat is now available for public review.

Q: What were the conclusions in the draft economic analysis?

A: Potential costs solely from the proposed designation are estimated to range from \$11 million to \$19 million over twenty years. Transportation activities (road and bridge construction and maintenance) may experience the largest impacts. The complete draft economic analysis (including an executive summary) is available at www.fws.gov/southwest/es/arizona.

Q: How will information and comments be accepted by the Service?

A: Comments on the proposed rule, revision, draft economic analysis, and draft environmental assessment will be accepted through September 10, 2012, and can be submitted electronically via the Federal eRulemaking Portal at: <http://www.regulations.gov>, or can be mailed or hand delivered to Public Comments Processing, Attn: FWS-R2-ES-2011-0053; Division of Policy and Directives Management; U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203. Comments submitted during the initial comment period have been entered into the administrative record and need not be resubmitted during this comment period.

The Service will hold a public hearing on the proposal, draft economic analysis, and draft environmental assessment, on August 16, 2012, at the Apache Gold Convention Center (Geronimo Room), located five miles east of Globe, Ariz. on Highway 70. An informational session will be held

from 3:00 p.m. to 4:30 p.m. followed by a public hearing from 6:30 to 8:00 p.m. for receiving oral comments.

The 1997 and 2005 critical habitat rules, final recovery plan, the current proposal, maps of the proposed critical habitat, and other flycatcher information, are available on the Internet at <http://www.fws.gov/southwest/es/arizona/Southwes.htm> or by contacting the Field Supervisor.