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Service Proposes to List the Eastern Black Rail as Threatened Under the Endangered Species Act

The U.S. Fish and Wildlife Service and its partners are working to protect a small, secretive marsh bird that is in steep decline. Some populations of the [eastern black rail](#) along the Atlantic coast have dropped by as much as 90 percent, and with a relatively small total population remaining across the eastern United States, the Service is proposing to list the subspecies as threatened under the Endangered Species Act (ESA).

After a review of the best available scientific and commercial information, the Service determined the eastern black rail meets the definition of threatened because it is likely to become endangered in the foreseeable future throughout all or a significant portion of its range. A peer-reviewed species status assessment, produced by the Service, provides a biological risk assessment using the best available information on threats to the subspecies and evaluates its current condition. It also forecasts the eastern black rail's biological status under varying future conditions.

Partially migratory, the eastern black rail is known to appear in as many as 36 states plus multiple territories and countries in the Caribbean and Central and South America. One of four subspecies of black rail, the eastern black rail, though rare, is broadly distributed but highly localized, and lives in salt, brackish, and freshwater marshes.

The California black rail subspecies -- confined to central and southern California, western Arizona and Mexico -- is not included in this listing proposal. Two other subspecies of black rail that occur in South America are also not included in this listing proposal.

In April 2010, the Service was petitioned to list the eastern black rail under the ESA. In September 2011, the Service published a 90-day finding indicating listing may be warranted. A settlement agreement in 2013 required the Service to complete a review of the subspecies and submit a 12-month finding to the *Federal Register* by Sept. 30, 2018.

Population size and trend estimates from a 2016 independent assessment of the subspecies indicated declining populations of eastern black rail. Estimates for the Atlantic Coast, ranging from New Jersey south to the Gulf Coast of Florida, are between just 355-815 breeding pairs. Estimates from a Texas research project indicated a population of around 1,300 individuals for the upper Texas Coast – a noted stronghold for the bird prior to Hurricane Harvey in 2017. No

true population estimates exist for interior states such as Colorado, Kansas or Oklahoma, but there are small populations in Colorado and Kansas where the bird breeds in the spring and summer. With a lack of consistent monitoring and survey results for the Caribbean and Central America, there is no evidence to suggest that the eastern black rail is present in large numbers in this region, although it is likely the birds occur there.

Primary threats to the eastern black rail include habitat loss due to continued alteration and loss of wetland habitats, land management practices that result in fire suppression (or inappropriately timed fire application that may cause direct mortalities), grazing, haying and mowing, and impounding of wetlands.

In addition, projected sea level rise and associated tidal flooding, increased temperatures, decreased precipitation, increased drought and severe weather events producing flooding or changes in wildfire frequency and intensity are all likely to have significant impacts on eastern black rail populations and their habitat.

The Service is proposing a rule under the ESA's Section 4(d) that would tailor protections for the bird. These protections include prohibiting certain activities in known eastern black rail habitat during critical time periods, such as nesting and brooding seasons, and post-breeding flightless molt periods. The Service is proposing certain prohibitions on the following activities during the identified critical time periods: approved fire management, haying, mowing, and other mechanical treatments, intensive grazing (only on public lands), and other forms of direct and [incidental take](#) outlined in the *Federal Register* notice. In addition, fire management activities not using best management practices to minimize impacts to the subspecies and its habitat are prohibited at all times.

To ensure public safety and meet operational needs for existing infrastructure, the proposed rule would also exempt mowing and mechanical treatment of rights-of-way, fire breaks and transmission corridors from the ESA's "[take](#)" prohibitions.

The Service is not designating critical habitat for the eastern black rail at this time due to concerns that identifying such areas may attract birders seeking out these shy and elusive birds, placing additional stress on the subspecies. Through the public comment process, we are requesting information on the threats of taking or other human activity, including the impacts of birders to the eastern black rail and its habitat, and the extent to which critical habitat designation might increase those threats..

The Service will accept comments received or postmarked on or before December 10, 2018. Information on how to submit comments is available at www.regulations.gov by searching under docket number FWS-R4-ES-2018-0057.

For more information visit: <https://www.fws.gov/southeast/wildlife/birds/eastern-black-rail/>

The mission of the U.S. Fish and Wildlife Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. For more information on our work and the people who make it happen, visit

www.fws.gov. Connect with our Facebook page at www.facebook.com/usfwssoutheast, follow our tweets at www.twitter.com/usfwssoutheast, watch our YouTube Channel at <http://www.youtube.com/usfws> and download photos from our Flickr page at <http://www.flickr.com/photos/usfwssoutheast>.

U.S. Fish and Wildlife Service

Proposed Listing for the Eastern Black Rail

Frequently Asked Questions

1. What action is the U.S. Fish and Wildlife Service taking?

A: The Service is proposing to protect the eastern black rail, a small secretive marsh bird native to the United States, as a threatened species under the Endangered Species Act (ESA). Partially migratory, the eastern black rail is known in as many as 36 states, plus multiple territories and countries in the Caribbean and Central and South America. It is one of four subspecies of black rail, which live in salt, brackish, and freshwater marshes. The California black rail subspecies, confined to central and southern California, western Arizona and Mexico, is not included in this proposal. Two other subspecies of black rail that occur in South America are likewise not included in this listing proposal.

2. Why is the Service proposing to list the bird as threatened? Why not propose it as endangered?

A: The ESA describes two categories of species of plants and animals that need protection: threatened and endangered. An endangered animal or plant is one that is in danger of extinction throughout all or a significant portion of its range; a threatened animal or plant is one that is likely to become endangered in the foreseeable future throughout all or a significant portion of its range.

After careful examination of the eastern black rail's past, present and future conditions, the Service determined the bird meets the definition of threatened under the ESA. Some populations of the eastern black rail along the Atlantic coast have dropped by as much as 90 percent, and the subspecies' ability to respond to threats and stressors in its environment has been compromised.

We did not propose to list the rail as endangered because the current condition of the subspecies still provides resiliency, redundancy and representation such that it is not currently at risk of extinction now.

3. What does the Service mean by "foreseeable future"?

A: Based on projections from population models, the Service is able to assess the threats facing the eastern black rail and the species' response to them 25-50 years out.

4. How did the Service arrive at this finding?

A: The Service conducted a thorough review of the subspecies via a Species Status Assessment (SSA). The SSA, produced with input from many partners and which underwent independent peer and partner review, confirmed that the eastern black rail is in decline and will continue to decline unless the Service and its partners collaborate to conserve the subspecies and work to restore populations. This report provides a biological risk assessment using the best available information on threats to the subspecies and evaluates its current condition. It also forecasts the eastern black rail's future status under varying scenarios and will form the foundational basis for the subspecies' recovery plan, should it become listed.

5. Where does the eastern black rail live?

A: The eastern black rail occurs in the United States east of the Rocky Mountains. Partially migratory, it appears in as many as 36 states, plus multiple territories and countries in the Caribbean and Central America. It also appears in Brazil in South America.

6. What threats were identified for the eastern black rail?

A: The eastern black rail faces threats from multiple factors such as habitat loss due to continued alteration and loss of wetland habitats, land management practices that result in fire suppression (or inappropriately timed fire application that may cause direct mortalities), grazing at high densities, haying and mowing during the breeding season, and incompatible impoundment management. Other threats include increased sea level rise and associated tidal flooding, increased temperatures, decreased precipitation, increased drought, and severe weather events producing flooding or changes in wildfire frequency and intensity – all stressors that are likely to have significant impacts on eastern black rail populations and their habitat. Detailed information on the threats identified is outlined in the *Federal Register* notice and the SSA report.

7. How will the eastern black rail benefit from being listed under the ESA?

A: *Recognition:* Species listed as threatened or endangered under the ESA benefit from conservation measures that include recognition of threats to the species, implementation of recovery actions, and federal protection from harmful practices. Recognition under the ESA results in public awareness and conservation by federal, state, tribal and local agencies, as well as private organizations and individuals.

Regulation: Under the ESA, federal agencies must ensure actions they approve, fund or carry out do not jeopardize the continued existence of a listed species or destroy its critical habitat. In addition, under the ESA, threatened and endangered species cannot be killed, hunted, collected, injured or otherwise subjected to harm (referred to as “take” under the act). Protected species cannot be purchased or sold in interstate or foreign commerce without a federal permit.

Recovery: The ESA also requires the Service to develop and implement recovery plans for the conservation of threatened and endangered species. Recovery plans outline actions that are needed to improve the species’ status so it no longer requires protection under the ESA. The Service develops and implements these plans in partnership with species experts; other federal, state and local agencies; tribes; non-governmental organizations; academia; and other stakeholders. Although the eastern black rail is only proposed for listing at this time, we invite those who are interested in participating in the subspecies’ recovery efforts to contact us.

8. Is the Service proposing critical habitat for the eastern black rail?

A: The Service is not designating critical habitat for the eastern black rail at this time due to concerns that identifying such areas may attract birders seeking out these shy and elusive birds, placing additional stress on the subspecies. Through the public comment process, we are requesting information on the threats of taking or other human activity, including the impacts of birders to the eastern black rail and its habitat, and the extent to which critical habitat designation might increase those threats.

In addition, identification and publication of critical habitat may increase the likelihood of inadvertent or purposeful habitat destruction. Trespassing has been documented on private lands and in areas on public lands specifically closed to the public to protect nesting eastern black rails. Trespassing may not only disturb the bird but can result in trampling of the bird's habitat, as well as eggs and nests. State resource managers and researchers are concerned that releasing locations of eastern black rail detections may increase human disturbance and harassment to the subspecies. Trespassing on private land is also a concern, as it likely results in increased harassment to the rails and to the private landowners who are providing habitat to the rails.

9. Since the bird occurs internationally, what does this mean for the countries where it occurs?

A: The ESA requires the Service to list species as endangered or threatened regardless of which country the species lives in. Benefits to the species include prohibitions on certain activities including import, export, take, commercial activity, interstate commerce and foreign commerce. By regulating activities, the United States ensures people under the jurisdiction of the United States do not contribute to the further decline of listed species. Although the ESA's prohibitions regarding listed species apply only to people subject to the jurisdiction of the United States, the ESA can generate conservation benefits such as increased awareness of listed species, research efforts to address conservation needs, or funding for conservation of the species in its range countries. The ESA also provides for limited financial assistance to develop and manage programs to conserve listed species in foreign countries, encourages conservation programs for such species, and allows for assistance for programs, such as personnel and training.

10. What is the 4(d) rule that is being proposed for the species and why is it being proposed?

A: The Service is committed to using the inherent flexibilities in the ESA to reduce the regulatory burden on private citizens and businesses without decreasing necessary protections for our most at risk species. In addition to proposing threatened species status for the eastern black rail, the Service is also proposing a special rule under Section 4(d) of the ESA that would tailor protections for the bird. If finalized, this 4(d) rule would exempt certain activities from the take prohibitions of the ESA.

The Service is proposing to exempt mowing and mechanical treatment activities in wetlands that are maintenance requirements to ensure safety and operational needs for existing infrastructure. Existing infrastructure may include existing fire breaks, roads, transmission corridor rights-of-way, and fence lines.

The Service is proposing to prohibit the following activities in known eastern black rail habitat during critical periods for the subspecies (e.g. nesting, brooding, flightless molt periods): fire management activities, haying, mowing, and other mechanical treatment activities, intensive grazing activities, and other forms of direct and incidental take that are outlined in the *Federal Register* notice. The grazing prohibition applies only to public lands. In addition, fire management activities not using best management practices that minimize impacts to the subspecies and its habitat are prohibited at all times.

11. In December 2017 the Service redefined “take” under the Migratory Bird Treaty Act (MBTA). What does this new definition mean for the eastern black rail?

A: The Dec. 22, 2017, Solicitor’s Opinion M-37050, concludes that “consistent with the text, history, and purpose of the MBTA, the statute’s prohibitions on pursuing, hunting, taking, capturing, killing, or attempting to do the same apply only to affirmative actions that have as their purpose the taking or killing of migratory birds, their nests, or their eggs.” Therefore, take of an eastern black rail, its chicks, or its eggs that is incidental to another lawful activity does not violate the MBTA. This would include mistaking black rails for other rails or marsh birds while hunting, as long as all other applicable hunting rules and regulations are followed.

12. Are there protected lands providing habitat for the species? If so, where are those lands and who owns them?

A: Yes. There are protected conservation areas throughout the range of eastern black rail. These conservation areas are a mix of state, federal, county, city, and non-governmental/private ownership. There are also numerous national wildlife refuges that play an important role in the conservation of the eastern black rail, including Quivira National Wildlife Refuge in Kansas and San Bernard and Brazoria refuges in Texas.

13. Are there any recommended conservation measures?

A: The eastern black rail will benefit from continued surveys, monitoring and research. Protecting habitats where the subspecies is known to occur and providing adequate buffer for those areas will also be beneficial for the subspecies. As threats from predation, flooding and other environmental changes narrow the available habitat for the subspecies, safeguarding the habitats known to harbor populations of the eastern black rail are of increased importance.

14. What conservation efforts are currently being undertaken for the eastern black rail?

A: The Service has had tremendous support from many partners. The Atlantic Eastern Black Rail Working Group, initiated by The College of William and Mary’s Center for Conservation Biology, has been working to coordinate eastern black rail surveys and develop an assessment of the subspecies. Comprised of state and federal agencies, universities, and nonprofit staff, the purpose of the working group is to exchange ideas, focus research, and develop approaches to eastern black rail conservation. Lead coordination of the Atlantic Flyway branch of the Black Rail Working Group is now transitioning to the Atlantic Coast Joint Venture (ACJV).

The ACJV, focusing efforts on coastal marsh habitat, has adopted three flagship species to direct conservation action. One of those flagship species is the eastern black rail. As part of this initiative, the ACJV Black Rail Working Group has drafted population goals for the eastern black rail and is developing goals for habitat protection within the Atlantic Flyway. In addition, the ACJV is coordinating the development of a Saltmarsh Conservation Business Plan and a Black Rail Conservation Action Plan. The business plan will identify stressors to Atlantic Coast tidal marshes and the efforts needed to conserve these habitats to maintain wildlife populations. The conservation action plan will outline goals and strategies for conservation of the eastern black rail in its habitats along the Atlantic Coast.

The Gulf Coast Joint Venture (GCJV) has listed the eastern black rail as a priority species since 2007. The subspecies has been given consideration during review of North American Wetland

Conservation grant applications – as are all priority species. Eastern black rails are believed to benefit from a plethora of coastal marsh habitat delivery efforts of GCJV partners, including North American Wetland Conservation Act projects, Coastal Wetland Planning Protection and Restoration Act projects, the Service’s Coastal Program projects, and management actions on state and federal refuges and wildlife management areas.

The Texas Black Rail Working Group was initiated by Texas Parks and Wildlife Department in partnership with the Texas Comptroller’s Office in November 2016. The main purpose of the group is to provide a forum for collaboration between researchers and stakeholders, share information about what is known about the species, identify information needs, and support conservation actions. The group has held several meetings regarding the eastern black rail with more planned in the fall of 2018.

15. What can I do to help conserve the eastern black rail?

A: People can help bolster the black rail’s habitat and population status in several ways:

1. The eastern black rail benefits from programs to preserve and enhance wetlands. Buying [Federal Duck Stamps, which cost \\$25 each](#), can help protect these important habitats. Funds raised from the sale of Federal Duck Stamps go toward the acquisition or lease of habitat for the National Wildlife Refuge System. Duck Stamps – while required by waterfowl hunters as an annual license – are also voluntarily purchased by birders, outdoor enthusiasts and fans of national wildlife refuges who understand the value of preserving some of the most diverse and important wildlife habitats in our nation. Stamp sales raise nearly \$40 million each year.
2. Encourage additional survey work for the subspecies and undertake efforts to protect habitat where it is found.
3. Support groups that are providing a forum for collaboration between researchers and stakeholders and share information about the subspecies, identify information needs, and support conservation actions.

16. How can the public submit information on the proposal?

A: Written comments and information concerning the proposed listing rule will be accepted until 11:59 p.m. Eastern time on December 10, 2018 and may be submitted by one of the following methods:

Electronically – Go to the Federal eRulemaking Portal, <http://www.regulations.gov>. In the Search box, enter FWS–R4–ES–2018–0057. You may submit a comment by clicking on “Comment Now!”.

By hard copy – Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R4–ES–2018–0057; U.S. Fish & Wildlife Headquarters, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041-3803. The Service will post all comments on <http://www.regulations.gov>. This generally means the agency will post any personal information provided through the process. The Service is not able to accept e-mails or faxes on this proposal.