

assessment according to the standard listed in the second column.

Threat	Standard
External corrosion .....	§ 192.925
Internal corrosion in pipelines that transport dry gas.	§ 192.927
Stress-corrosion cracking.	§ 192.929

3. The authority citation for Part 195 continues to read as follows:

**Authority:** 49 U.S.C. 5103, 60102, 60104, 60108, 60109, 60118; and 49 CFR 1.53.

4. Add § 195.588 to read as follows:

**§ 195.588 What standards apply to direct assessment?**

If you use direct assessment on an onshore pipeline to evaluate the effects of a threat in the first column or to meet any requirement of this subpart regarding that threat, you must carry out the direct assessment according to the standard listed in the second column.

Threat	Standard
External corrosion .....	§ 192.925 of this chapter.
Stress-corrosion cracking.	§ 192.929 of this chapter.

Issued in Washington, DC, on October 14, 2004.

**Stacey L. Gerard,**

*Associate Administrator for Pipeline Safety.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### RIN 1018-AH44

#### Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population for Two Fishes (Boulder Darter and Spotfin Chub) in Shoal Creek, Tennessee and Alabama

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), in cooperation with the States of Tennessee and Alabama and with Conservation Fisheries, Inc., a nonprofit organization, propose to reintroduce one federally listed endangered fish, the boulder darter (*Etheostoma wapiti*), and one federally listed threatened fish, the

spotfin chub (*Cyprinella (=Hybopsis) monacha*), into their historical habitat in Shoal Creek, Lauderdale County, Alabama, and Lawrence County, Tennessee. Based on the evaluation of species' experts, these species currently do not exist in this reach or its tributaries. These two fish are being reintroduced under section 10(j) of the Endangered Species Act of 1973, as amended (Act), and would be classified as a nonessential experimental population (NEP).

The geographic boundaries of the proposed NEP would extend from the mouth of Long Branch, Lawrence County, Tennessee (Shoal Creek mile (CM) 41.7 (66.7 kilometers (km)), downstream to the backwaters of the Wilson Reservoir at Goose Shoals, Lauderdale County, Alabama (approximately CM 14 (22 km)), and would include the lower 5 CM (8 km) of all tributaries that enter this reach.

These proposed reintroductions are recovery actions and are part of a series of reintroductions and other recovery actions that the Service, Federal and State agencies, and other partners are conducting throughout the species' historical ranges. This proposed rule provides a plan for establishing the NEP and provides for limited allowable legal taking of the boulder darter and spotfin chub within the defined NEP area.

**DATES:** We will consider comments on this proposed rule that are received by December 20, 2004. Requests for a public hearing must be made in writing and received by December 6, 2004.

**ADDRESSES:** You may submit comments and other information, identified by RIN 1018-AH44, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail or Hand Delivery: Field Supervisor, U.S. Fish and Wildlife Service, Tennessee Field Office, 446 Neal Street, Cookeville, Tennessee, 38501.

- Fax: (931) 528-7075.

- E-mail: [timothy\\_merritt@fws.gov](mailto:timothy_merritt@fws.gov).

Include "Attn: Shoal Creek NEP" in the subject line of the message.

**Instructions:** All submissions received must include the agency name and Regulatory Information Number (RIN) for this rulemaking. Please include your name and return address in the body of your message. Please see the Public Comments Solicited section below for file format and other information about electronic filing. In the event that our internet connection is not functional, please contact the Service by the alternative methods mentioned above.

The comments and materials we receive during the comment period will be available for public inspection, by appointment, during normal business hours at our Tennessee Field Office: U.S. Fish and Wildlife Service, 446 Neal Street, Cookeville, Tennessee, 38501. If you wish to request a public hearing, you may mail or hand deliver your written request to the above address.

**FOR FURTHER INFORMATION CONTACT:**

Timothy Merritt, U.S. Fish and Wildlife Service, 446 Neal Street, Cookeville, Tennessee 28801, telephone (931) 528-6481, Ext. 211, facsimile (931) 528-7075, or e-mail at [timothy\\_merritt@fws.gov](mailto:timothy_merritt@fws.gov).

**SUPPLEMENTARY INFORMATION:**

#### Background

##### 1. Legislative

Congress made significant changes to the Act in 1982 with the addition of section 10(j), which provides for the designation of specific reintroduced populations of listed species as "experimental populations." Previously, we had authority to reintroduce populations into unoccupied portions of a listed species' historical range when doing so would foster the species' conservation and recovery. However, local citizens often opposed these reintroductions because they were concerned about the placement of restrictions and prohibitions on Federal and private activities. Under section 10(j) of the Act, the Secretary of the Department of the Interior can designate reintroduced populations established outside the species' current range, but within its historical range, as "experimental." Based on the best scientific and commercial data available, we must determine whether experimental populations are "essential," or "nonessential," to the continued existence of the species. Regulatory restrictions are considerably reduced under a Nonessential Experimental Population (NEP) designation.

Without the "nonessential experimental population" designation, the Act provides that species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act prohibits the take of an endangered species. "Take" is defined by the Act as harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or attempt to engage in any such conduct. Service regulations (50 CFR 17.31) generally extend the prohibitions of take to threatened wildlife. Section 7 of the Act outlines the procedures for

Federal interagency cooperation to conserve federally listed species and protect designated critical habitat. It mandates all Federal agencies to determine how to use their existing authorities to further the purposes of the Act to aid in recovering listed species. It also states that Federal agencies will, 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.

For purposes of section 9 of the Act, a population designated as experimental is treated as threatened regardless of the species' designation elsewhere in its range. Through section 4(d) of the Act, threatened designation allows us greater 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 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 special 4(d) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species. Regulations issued under section 4(d) for NEPs are usually more compatible with routine human activities in the reintroduction area.

For the purposes of section 7 of the Act, we treat NEPs as a threatened species when the NEP is located within a National Wildlife Refuge or National Park, and section 7(a)(1) and the consultation requirements of section 7(a)(2) of the Act apply. Section 7(a)(1) requires all Federal agencies to use their authorities to conserve listed species. Section 7(a)(2) requires that Federal agencies, in consultation with the Service, insure 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, we treat the population as proposed for listing and only two provisions of section 7 would apply—section 7(a)(1) and section 7(a)(4). 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 advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

Individuals that are used to establish an experimental population may come from a donor population, provided their removal will not create adverse impacts upon the parent population, and provided appropriate permits are issued in accordance with our regulations (50 CFR 17.22) prior to their removal. In the case of the boulder darter and spotfin chub, the donor population is a captive-bred population, which was propagated with the intention of re-establishing wild populations to achieve recovery goals. In addition, it is possible that wild adult stock could also be released into the NEP area.

## 2. Biological Information

The endangered boulder darter is an olive to gray colored fish that lacks the red spots common to most darters. It is a small fish, approximately 76 millimeters (mm) (3 inches (in)) in length. Although boulder darters were historically recorded only in the Elk River system and Shoal Creek, scientists believe, based on the historical availability of suitable habitat, that this darter once inhabited fast-water rocky habitat in the Tennessee River and its larger tributaries in Tennessee and Alabama, from the Paint Rock River in Madison County, Alabama, downstream to at least Shoal Creek in Lauderdale County, Alabama (U.S. Fish and Wildlife Service 1989). Currently, it is extirpated from Shoal Creek and exists only in the Elk River, Giles and Lincoln Counties, Tennessee, and Limestone County, Alabama, and the lower reaches of Richland Creek, an Elk River tributary, Giles County, Tennessee (U.S. Fish and Wildlife Service 1989).

The spotfin chub is also olive colored, but with sides that are largely silvery and with white lower parts. Large nuptial males have brilliant turquoise-royal blue coloring on the back, side of the head, and along the mid-lateral part of the body. It is also a small fish, approximately 92 millimeters (mm) (4 inches (in)) in length. The spotfin chub was once a widespread species and was historically known from 24 upper and middle Tennessee River system streams, including Shoal Creek. It is now extant in only four rivers/river systems—the Buffalo River at the mouth of Grinders Creek, Lewis County, Tennessee; the Little Tennessee River, Swain and Macon Counties, North Carolina; Emory River system (Obad River, Clear Creek, and Daddys Creek), Cumberland and

Morgan Counties, Tennessee; the Holston River and its tributary, North Fork Holston River, Hawkins and Sullivan Counties, Tennessee, and Scott and Washington Counties, Virginia (U.S. Fish and Wildlife Service 1983; P. Shute, TVA, pers. comm. 1998).

Since the mid-1980s, Conservation Fisheries, Inc. (CFI), a nonprofit organization, with support from us, the Tennessee Wildlife Resources Agency (TWRA), U.S. Forest Service, National Park Service, Tennessee Valley Authority (TVA), and Tennessee Aquarium, has successfully translocated, propagated, and reintroduced the spotfin chub and three other federally listed fishes (smoky madtoms, yellowfin madtoms, and duskytail darters) into Abrams Creek, Great Smoky Mountains National Park, Blount County, Tennessee. These fish historically occupied Abrams Creek prior to an ichthyocide treatment in the 1950s. An NEP designation for Abrams Creek was not needed since the entire watershed occurs on National Park Service land, section 7 of the Act applies regardless of the NEP designation, and existing human activities and public use of the Creek are consistent with protection and take restrictions needed for the reintroduced populations. Natural reproduction by all four species in Abrams Creek has been documented, but the spotfin chub appears to be the least successful in this capacity (Rakes *et al.* 2001; Rakes and Shute 2002). We have also worked with CFI to translocate, propagate, and reintroduce these same four fish into an NEP established for a section of the Tellico River, Monroe County, Tennessee (67 FR 52420, August 12, 2002). Propagated fish of these four species were released into the Tellico River starting in 2003. It is still too early to determine the success of these releases, but it is believed that the habitat and water quality is sufficient to ensure future success similar to the Abrams Creek reintroductions. CFI has also successfully propagated boulder darters and augmented the only known population of the species in the Elk River system in Tennessee.

Based on CFI's success and intimate knowledge of these two fishes and their habitat needs, we contracted with CFI to survey Shoal Creek in order to determine if suitable habitat exists in this creek for reintroductions, and if we could expand our ongoing fish recovery efforts to these waters (Rakes and Shute 1999). Rakes and Shute (1999) concluded that about 20 miles (32 km) of Shoal Creek above the backwaters of the Wilson Reservoir appeared to contain suitable reintroduction habitat

for both fishes. The boulder darter and spotfin chub were last collected from Shoal Creek in the 1880s, and since then both were apparently extirpated from this reach. We believe the boulder darter was extirpated by the combined effects of water pollution and the impoundment of lower Shoal Creek with the construction of Wilson Dam (U.S. Fish and Wildlife Service 1989). We believe that similar factors led to the extirpation of the spotfin chub for similar reasons. However, as a result of implementation of the Clean Water Act by the U.S. Environmental Protection Agency (EPA) and State water and natural resources agencies, and the pollution control measures undertaken by municipalities, industries, and individuals, the creek's water quality has greatly improved and its resident fish fauna has responded positively (Charles Saylor, TVA, pers. comm. 2002; based on his bioassays).

### 3. Recovery Goals/Objectives

The boulder darter (*Etheostoma wapiti*) (Etnier and Williams 1989) was listed as an endangered species on September 1, 1988 (53 FR 33996). We completed a recovery plan for this species in July 1989 (U.S. Fish and Wildlife Service 1989). The downlisting (reclassification from endangered to threatened) objectives in the recovery plan are: (1) To protect and enhance the existing population in the Elk River and its tributaries, and to successfully establish a reintroduced population in Shoal Creek or other historical habitat or discover an additional population so that at least two viable populations exist; and (2) to complete studies of the species' biological and ecological requirements and implement management strategies developed from these studies that have been or are likely to be successful. The delisting objectives are: (1) to protect and enhance the existing population in the Elk River and its tributaries, and to successfully establish reintroduced populations or discover additional populations so that at least three viable populations exist (the Elk River population including the tributaries must be secure from river mile (RM) 90 downstream to RM 30); (2) to complete studies of the species' biological and ecological requirements and implement successful management strategies; and (3) to ensure that no foreseeable threats exist that would likely impact the survival of any populations.

The spotfin chub (=turquoise shiner) (*Cyprinella (=Hybopsis) monacha*) (Cope 1868) was listed as a threatened species on September 9, 1977, with critical habitat and a special rule (42 FR

45526). The critical habitat map was corrected on September 22, 1977 (42 FR 47840). We completed a recovery plan for this species in November 1983 (U.S. Fish and Wildlife Service 1983). We also established an NEP for the spotfin chub and three other federally listed fishes for a section of the Tellico River in Monroe County, Tennessee, on August 12, 2002 (67 FR 52420). The delisting objectives in the recovery plan are: (1) To protect and enhance existing populations so that viable populations exist in the Buffalo River system, upper Little Tennessee River, Emory River system, and lower North Fork Holston River; (2) to ensure, through reintroduction and/or the discovery of two new populations, that viable populations exist in two other rivers; and (3) to ensure that no present or foreseeable threats exist that would likely impact the survival of any populations.

The recovery criteria for both fishes generally agree that, to reach recovery, we must: (1) Restore existing populations to viable levels, (2) reestablish multiple, viable populations in historical habitats, and (3) eliminate foreseeable threats that would likely threaten the continued existence of any viable populations. The number of secure, viable populations (existing and restored) needed to achieve recovery varies by species and depends on the extent of the species' probable historical range (i.e., species that were once widespread require a greater number of populations for recovery than species that were historically more restricted in distribution). However, the reestablishment of historical populations is a critical component to the recovery of both the boulder darter and spotfin chub.

### 4. Reintroduction Site

In May 1999 letters to us, the Commissioner of the Alabama Department of Conservation and Natural Resources (ADCNR) and the Executive Director of the TWRA requested that we consider designating NEPs for the spotfin chub and boulder darter and reintroducing both species into Shoal Creek, where they historically occurred.

We previously established NEPs for the spotfin chub and three other federally listed fishes in the Tellico River, Tennessee, on August 12, 2002 (67 FR 52420). Reintroductions of the spotfin chub were initiated in the Tellico River in 2002 and were continued in 2003 along with the first reintroductions of the remaining three fish species. These reintroduced fish are being monitored. We believe the Tellico River is suitable for the establishment of

viable populations of each of these four fish and anticipate success as this recovery project proceeds.

Establishment of viable populations of the spotfin chub in both the Tellico River under the existing regulation and in Shoal Creek if this proposed regulation is finalized will help achieve an objective in the recovery of this fish. However, it will take several years of monitoring to fully evaluate if populations of this fish (and the other fishes) have become established and remain viable in these historic river reaches.

Based on the presence of suitable habitat, the positive response of native fish species to habitat improvements in Shoal Creek, the presence of similar fish species that have similar habitat requirements to both of these fishes, the recommendations mentioned above, and the evaluation of biologists familiar with Shoal Creek, we believe that Shoal Creek, from the mouth of Long Branch to the backwaters of the Wilson Reservoir, is suitable for the reintroduction of the boulder darter and spotfin chub as NEPs.

According to P. Rakes (CFI, pers. comm. 1999), the best sites to reintroduce these fishes into Shoal Creek are between CM 33 (53 km) and CM 14 (22 km). Therefore, we propose to reintroduce the boulder darter and spotfin chub into historical habitat of the free-flowing reach of Shoal Creek between CM 33 and CM 14. This reach contains the most suitable habitat for the reintroductions. Neither species currently exists in Shoal Creek or its tributaries.

### 5. Reintroduction Procedures

The dates for these proposed reintroductions, the specific release sites, and the actual number of individuals to be released cannot be determined at this time. Individual fish that would be used for the proposed reintroductions primarily will be artificially propagated juveniles. However, it is possible that wild adult stock could also be released into the NEP area. Spotfin chub and boulder darter propagation and juvenile rearing technology are available. The parental stock of the juvenile fishes for proposed reintroduction will come from existing wild populations. In some cases, the parental stock for juvenile fish will be returned back to the same wild population. Generally, the parents are permanently held in captivity.

The permanent removal of adults from the wild for their use in reintroduction efforts may occur when one or more of the following conditions exist: (1) Sufficient adult fish are

available within a donor population to sustain the loss without jeopardizing the species; (2) the species must be removed from an area because of an imminent threat that is likely to eliminate the population or specific individuals present in an area; or (3) when the population is not reproducing. It is most likely that adults will be permanently removed because of the first condition: sufficient adult fish are available within a donor population to sustain the loss without jeopardizing the species. An enhancement of propagation or survival permit under section 10(a)(1)(A) of the Act is required. The permit will be issued before any take occurs, and we will coordinate these actions with the appropriate State natural resources agencies.

#### 6. Status of Reintroduced Population

Previous translocations, propagations, and reintroductions of spotfin chubs and boulder darters have not affected the wild populations of either species. The use of artificially propagated juveniles will reduce the potential effects on wild populations. The status of the extant populations of the boulder darter and spotfin chub is such that individuals can be removed to provide a donor source for reintroduction without creating adverse impacts upon the parent population. If any of the reintroduced populations become established and are subsequently lost, the likelihood of the species' survival in the wild would not be appreciably reduced. Therefore, we have determined that these reintroduced fish populations in Shoal Creek are not essential to the continued existence of the species. We will ensure, through our section 10 permitting authority and the section 7 consultation process, that the use of animals from any donor population for these reintroductions is not likely to jeopardize the continued existence of the species.

Reintroductions are necessary to further the recovery of these species. The NEP designation for the reintroduction alleviates landowner concerns about possible land and water use restrictions by providing a flexible management framework for protecting and recovering the boulder darter and spotfin chub, while ensuring that the daily activities of landowners are unaffected. In addition, the anticipated success of these reintroductions will enhance the conservation and recovery potential of these species by extending their present ranges into currently unoccupied historical habitat. These species are not known to exist in Shoal Creek or its tributaries at the present time.

#### 7. Location of Reintroduced Population

The NEP area, which encompasses all the sites for the proposed reintroductions, will be located in the free-flowing reach of Shoal Creek, Lauderdale County, Alabama, and Lawrence County, Tennessee, from the mouth of Long Branch downstream to the backwaters of the Wilson Reservoir. Section 10(j) of the Act requires that an experimental population be geographically separate from other wild populations of the same species. This proposed NEP area is totally isolated from existing populations of these species by large reservoirs, and neither fish species is known to occur in or move through large reservoirs. Therefore, the reservoirs will act as barriers to the species' downstream movement into the Tennessee River and its tributaries and ensure that this NEP remains geographically isolated and easily distinguishable from existing wild populations. Based on the fishes' habitat requirements, we do not expect them to become established outside the NEP. However, if any of the reintroduced boulder darters and spotfin chubs move outside the designated NEP area, then the fish would be considered to have come from the NEP area. In that case, we may propose to amend the rule and enlarge the boundaries of the NEP area to include the entire range of the expanded populations.

The designated NEP area for the spotfin chub in the Tellico River (67 FR 52420) does not overlap or interfere with this proposed NEP area for Shoal Creek in Tennessee and Alabama because they are geographically separated river reaches.

Critical habitat has been designed for the spotfin chub (42 FR 47840, September 22, 1977); however, the designation does not include the proposed NEP area. Critical habitat has not been designated for the boulder darter. 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 have already established, by regulation, a nonessential experimental population.

#### 8. Management

The aquatic resources in the proposed reintroduction area are managed by the ADCNR and TWRA. Multiple-use management of these waters will not change as a result of the experimental designation. Private landowners within the NEP area will still be allowed to

continue all legal agricultural and recreational activities. Because of the substantial regulatory relief provided by NEP designations, we do not believe the reintroduction of boulder darter and spotfin chub will conflict with existing human activities or hinder public use of the area. The ADCNR and the TWRA have previously endorsed the boulder darter and spotfin chub reintroductions under NEP designations and are supportive of this effort. The NEP designation will not require the ADCNR and the TWRA to specifically manage for reintroduced boulder darter and spotfin chub.

The Service, State employees, and CFI, Inc., staff will manage the reintroduction. They will closely coordinate on reintroductions, monitoring, coordination with landowners and land managers, and public awareness, among other tasks necessary to ensure successful reintroductions of species.

(a) *Mortality*: The Act defines "incidental take" as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity such as recreation (e.g., fishing, boating, wading, trapping or swimming), forestry, agriculture, and other activities that are in accordance with Federal, Tribal, State, and local laws and regulations. A person may take a boulder darter or spotfin chub within the experimental population area provided that the take is unintentional and was not due to negligent conduct. Such conduct will not constitute "knowing take," and we will not pursue legal action. However, when we have evidence of knowing (i.e., intentional) take of a boulder darter or spotfin chub, we will refer matters to the appropriate authorities for prosecution. We expect levels of incidental take to be low since the reintroduction is compatible with existing human use activities and practices for the area.

(b) *Special Handling*: Service employees and authorized agents acting on their behalf may handle boulder darter and spotfin chub for scientific purposes; to relocate boulder darter and spotfin chub to avoid conflict with human activities; for recovery purposes; to relocate boulder darter and spotfin chub to other reintroduction sites; to aid sick or injured boulder darter and spotfin chub; and to salvage dead boulder darter and spotfin chub.

(c) *Coordination with landowners and land managers*: The Service and cooperators identified issues and concerns associated with the proposed boulder darter and spotfin chub reintroduction before preparing this proposed rule. The proposed

reintroduction also has been discussed with potentially affected State agencies, businesses, and landowners within the proposed release area. The land along the proposed NEP site is privately owned. International Paper owns a large tract within the proposed NEP area and has expressed a strong interest in working with us to establish these fish in their stretch of the creek. Most, if not all, of the identified businesses are small businesses engaged in activities along the affected reaches of this creek. Affected State agencies, businesses, landowners, and land managers have indicated support for the reintroduction, if boulder darter and spotfin chub released in the proposed experimental population area are established as an NEP and if aquatic resource activities in the proposed experimental population area are not constrained.

(d) *Potential for conflict with human activities:* We do not believe these proposed reintroductions will conflict with existing or proposed human activities or hinder public use of the NEP area within Shoal Creek. Experimental population special rules contain all the prohibitions and exceptions regarding the taking of individual animals. These special rules are compatible with routine human activities in the reintroduction area.

(e) *Monitoring:* After the first initial stocking of these two fish, we will monitor annually their presence or absence and document any spawning behavior or young-of-the-year fish that might be present. This monitoring will be conducted primarily by snorkeling or seining and will be accomplished by contracting with the appropriate species experts. Annual reports will be produced detailing the stocking rates and monitoring activities that took place during the previous year. We will also fully evaluate these reintroduction efforts after 5 and 10 years to determine whether to continue or terminate the reintroduction efforts.

(f) *Public awareness and cooperation:* On August 26, 1999, we mailed letters to 80 potentially affected congressional offices, Federal and State agencies, local governments, and interested parties to notify them that we were considering proposing NEP status in Shoal Creek for two fish species. We received a total of four responses, all of which supported our proposed designation and reintroductions.

The EPA supported the proposal, commended the ADCNR, TWRA, and us for the proposal and its projected beneficial results, and stated that the reintroductions would assist them in meeting one of the goals of the Clean

Water Act—restoring the biological integrity of the Nation's water.

The TVA strongly supported the concept of reintroducing extirpated species, but also cautioned that past industrial discharges into Shoal Creek could potentially limit or prevent the survival of sensitive fishes in the creek.

The Tennessee Department of Environment and Conservation applauded our (TWRA, CFI, and us) efforts to restore Shoal Creek fishes. They also supported the proposed reintroductions under NEP status, because the designation will ensure that current human uses of Shoal Creek are given due consideration in recovery efforts for the species.

Dr. David Etnier, Department of Ecology and Evolutionary Biology, University of Tennessee, Knoxville, Tennessee, supported the reintroductions and concluded that he saw no compelling reason to delay them.

We will inform the general public of the importance of this reintroduction project in the overall recovery of the boulder darter and spotfin chub. The designation of the NEP for Shoal Creek and adjacent areas would provide greater flexibility in the management of the reintroduced boulder darter and spotfin chub. The NEP designation is necessary to secure needed cooperation of the States, Tribes, landowners, agencies, and other interests in the affected area.

### Finding

Based on the above information, and using the best scientific and commercial data available (in accordance with 50 CFR 17.81), the Service finds that releasing the boulder darter and spotfin chub into the Shoal Creek Experimental Population Area under a Nonessential Experimental Population designation will further the conservation of the species.

### Other Changes to the Regulations

The spotfin chub was listed with critical habitat and a special rule on September 9, 1977, under the scientific name of *Hybopsis monacha*. The current list of endangered and threatened species at 50 CFR 17.11(h), the existing experimental population on the Tellico River in Tennessee at 50 CFR 17.84(m), and the critical habitat designation at 50 CFR 17.95(e) all use the scientific name *Cyprinella* (= *Hybopsis*) *monacha* for the spotfin chub. However, the special rule at 50 CFR 17.44(c) uses the scientific name *Hybopsis monacha* for the spotfin chub. We are proposing to correct the text for the special rule at 50 CFR 17.44(c) by changing the scientific name

for the spotfin chub from *Hybopsis monacha* to *Cyprinella* (= *Hybopsis*) *monacha* to make this section consistent with the text of the existing regulations for the spotfin chub.

Also, unlike many of the existing experimental population regulations at 50 CFR 17.84, the entry for the experimental population for the Tellico River in Tennessee at 50 CFR 17.84(m) does not include a map. We are proposing to add a map for this entry to make this section consistent with the text of the existing regulations for experimental populations (see Proposed Regulation Promulgation section below).

### Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we solicit comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested parties concerning this proposed rule. If you wish to comment on this proposed rule, you may submit your comments and materials concerning this proposal by any one of several methods (see ADDRESSES).

Comments submitted electronically should be in the body of the e-mail message itself or attached as a text file (ASCII), and should not use special characters or encryption. Please also include "Attn: Shoal Creek NEP," your full name, and your return address in your e-mail message. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Respondents may request that we withhold their home address, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the Ecological Services Office in Cookeville, Tennessee (see ADDRESSES). Copies of the proposed rule are available on the Internet at <http://cookeville.fws.gov>.

## Peer Review

In conformance with our policy on peer review, published on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such review is to ensure that our NEP designation is based on scientifically sound data, assumptions, and analyses. We will send copies of this proposed rule to these peer reviewers immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed NEP.

We will consider all comments and information received during the comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

## Public Hearings

You may request a public hearing on this proposal. Requests must be made in writing at least 15 days prior to the close of the public comment period and sent to the Field Supervisor for the U.S. Fish and Wildlife Service in Tennessee (see **ADDRESSES** and **DATES** sections).

## Required Determinations

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

In accordance with the criteria in Executive Order 12866, this proposed rule to designate NEP status for the boulder darter and spotfin chub in Shoal Creek, Lauderdale County, Alabama and Lawrence County, Tennessee, is not a significant regulatory action subject to Office of Management and Budget review. This rule will not have an annual economic effect of \$100 million or more on the economy and will not have an adverse effect on any economic sector, productivity, competition, jobs, the environment, or other units of government. The area affected by this rule consists of a very limited and discrete geographic segment of lower Shoal Creek (about 28 CM (44 km)) in southwestern Tennessee and northern Alabama. Therefore, a cost-benefit and economic analysis will not be required.

We do not expect this rule to have significant impacts to existing human activities (e.g., agricultural activities, forestry, fishing, boating, wading, swimming, trapping) in the watershed. The reintroduction of these federally listed species, which will be accomplished under NEP status with its

associated regulatory relief, is not expected to impact Federal agency actions. Because of the substantial regulatory relief, we do not believe the proposed reintroduction of these species will conflict with existing or proposed human activities or hinder public use of Shoal Creek or its tributaries.

This rule will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. Federal agencies most interested in this rulemaking are primarily the EPA and TVA. Both Federal agencies support the proposal. Because of the substantial regulatory relief provided by the NEP designation, we believe the reintroduction of the boulder darter and spotfin chub in the areas described will not conflict with existing human activities or hinder public utilization of the area.

This rule will not materially affect entitlements, grants, user fees, or loan programs, or the rights and obligations of their recipients. Because there are no expected impacts or restrictions to existing human uses of Shoal Creek as a result of this rule, no entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients are expected to occur.

This rule does not raise novel legal or policy issues. Since 1984, we have promulgated section 10(j) rules for many other species in various localities. Such rules are designed to reduce the regulatory burden that would otherwise exist when reintroducing listed species to the wild.

## Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Although most of the identified entities are small businesses engaged in activities along the affected reaches of this creek, this rulemaking is not expected to have any significant impact on private activities in the affected area. The designation of an NEP in this rule will significantly reduce the regulatory requirements regarding the reintroduction of these species, will not create inconsistencies with other agencies' actions, and will not conflict with existing or proposed human activity, or Federal, State, or public use of the land or aquatic resources.

## Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act.

This rule will not have an annual effect on the economy of \$100 million or more. It will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. This rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. The intent of this special rule is to facilitate and continue the existing commercial activity while providing for the conservation of the species through reintroduction into suitable habitat.

## Unfunded Mandates Reform Act

The proposed NEP designation will not place any additional requirements on any city, county, or other local municipality. The ADCNR and TWRA, which manages Shoal Creek's aquatic resources, requested that we consider these proposed reintroductions under an NEP designation. However, they will not be required to manage for any reintroduced species. Accordingly, this proposed rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required since this rulemaking does not require any action to be taken by local or State governments or private entities. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities (*i.e.*, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.).

## Takings (E.O. 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. When reintroduced populations of federally listed species are designated as NEPs, the Act's regulatory requirements regarding the reintroduced listed species within the NEP are significantly reduced. Section 10(j) of the Act can provide regulatory relief with regard to the taking of reintroduced species within an NEP area. For example, this rule allows for the taking of these reintroduced fishes when such take is incidental to an otherwise legal activity, such as recreation (e.g., fishing, boating, wading, trapping, swimming), forestry, agriculture, and other activities that are in accordance with Federal, State, and local laws and regulations. Because of the substantial regulatory relief provided by NEP designations, we do not believe the reintroduction of these

fishes will conflict with existing or proposed human activities or hinder public use of the Shoal Creek system.

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 will substantially advance a legitimate government interest (conservation and recovery of two listed fish species) and will not present a barrier to all reasonable and expected beneficial use of private property.

#### *Federalism (E.O. 13132)*

In accordance with Executive Order 13132, the rule does not have significant Federalism effects to warrant the preparation of a Federalism Assessment. This rule will not have substantial direct effects on the States, in the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. The State wildlife agencies in Alabama (ADCNR) and Tennessee (TWRA) requested that we undertake this rulemaking in order to assist the States in restoring and recovering their native aquatic fauna. Achieving the recovery goals for these species will contribute to their eventual delisting and their return to State management. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments will not change; and fiscal capacity will not be substantially directly affected. The special rule operates to maintain the existing relationship between the States and the Federal Government and is being undertaken at the request of State agencies (ADCNR and TWRA). We have cooperated with the ADCNR and TWRA in the preparation of this proposed rule. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment pursuant to 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 proposed rule does not unduly burden the judicial system and that it meets the requirements of sections (3)(a) and (3)(b)(2) of the Order.

#### *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. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid control number. This proposed rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

#### *National Environmental Policy Act*

We have determined that the issuance of this proposed rule is categorically excluded under our National Environmental Policy Act procedures (516 DM 6, Appendix 1.4 B (6)).

#### *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 Manual Chapter 512 DM 2, we have evaluated possible effects on federally recognized Indian tribes and have determined that there are no effects.

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

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. 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. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

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

Executive Order 12866 requires each agency to write regulations that are easy to understand. We invite your comments on how to make this rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the rule clearly stated? (2) Does the rule contain technical language or jargon that interferes with its clarity? (3) Does the format of the rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Would the rule be easier to understand if it were divided into more (but shorter) sections? (5) Is the description of the rule in the **SUPPLEMENTARY INFORMATION** section of

the preamble helpful in understanding the rule? (6) What else could we do to make the rule easier to understand?

Send your comments concerning how we could make this rule easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW., Washington, DC 20240. You may also e-mail your comments to: [Exsec@ios.doi.gov](mailto:Exsec@ios.doi.gov).

#### **Literature Cited**

- Rakes, P. L., P. W. Shute, and J. R. Shute. 1998. Captive propagation and population monitoring of rare Southeastern fishes. Final Report for 1997. Field Season and Quarterly Report for Fiscal Year 1998, prepared for Tennessee Wildlife Resources Agency, Contract No. FA-4-10792-5-00. 32 pp.
- Rakes, P. L., and J. R. Shute. 1999. Results of assays of portions of the French Broad River, Sevier and Knox Counties, Tennessee, and Shoal Creek, Lawrence and Wayne Counties, Tennessee and Lauderdale Counties, Alabama, for suitable habitat to support reintroduction of rare fishes. Unpublished report prepared by Conservation Fisheries, Inc., Knoxville, Tennessee, for the U.S. Fish and Wildlife Service, Asheville, North Carolina. 26 pp.
- Rakes, P.L., P.W. Shute, and J.R. Shute. 2001. Captive propagation and population monitoring of rare southeastern fishes: 2000. Unpublished Report to Tennessee Wildlife Resources Agency, Contract No. FA-99-13085-00.
- Rakes, P.L. and J.R. Shute. 2002. Captive propagation and population monitoring of rare southeastern fishes: 2001. Unpublished Report to Tennessee Wildlife Resources Agency, Contract No. FA-99-13085-00.
- U.S. Fish and Wildlife Service. 1983. Spotfin Chub Recovery Plan. Atlanta, GA. 46 pp.
- \_\_\_\_\_. 1989. Boulder Darter Recovery Plan. Atlanta, GA. 15 pp.

#### **Author**

The principal author of this proposed rule is Timothy Merritt (*see ADDRESSES* section).

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

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

#### **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 existing entries in the List of Endangered and Threatened Wildlife

under FISHERIES for “Chub, spotfin,” and “Darter, boulder,” 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						
FISHES							
Chub, spotfin (=turquoise shiner).	<i>Cyprinella (=Hybopsis) monacha.</i>	U.S.A. (AL, GA, NC, TN, VA).	Entire, except where listed as an experimental population..	T .....	28, 732	17.95(e)	17.44(c)
Do .....	.....do .....	.....do .....	Tellico River, from the backwaters of the Tellico Reservoir (about Tellico River mile 19 (30 km)) upstream to Tellico River mile 33 (53 km), in Monroe County, TN.	XN .....	732	NA	17.84(m)
Do .....	.....do .....	.....do .....	Shoal Creek (from Shoal Creek mile 41.7 (66.7 km)) at the mouth of Long Branch, Lawrence County, TN, downstream to the backwaters of Wilson Reservoir (Shoal Creek mile 14 (22 km)) at Goose Shoals, Lauderdale County, AL, including the lower 5 miles (8 km) of all tributaries that enter this reach.	.....	.....	NA	17.84(n)
Darter, boulder .....	<i>Etheostoma wapiti</i> .....	U.S.A. (AL, TN) .....	Entire, except where listed as an experimental population.	E .....	322	NA	NA
Do .....	.....do .....	.....do .....	Shoal Creek (from Shoal Creek mile 41.7 (66.7 km)) at the mouth of Long Branch, Lawrence County, TN, downstream to the backwaters of Wilson Reservoir (Shoal Creek mile 14 (22 km)) at Goose Shoals, Lauderdale County, AL, including the lower 5 miles (8 km) of all tributaries that enter this reach.	XN .....	.....	NA	17.84(n)

#### § 17.44 [Amended]

3. Amend § 17.44(c) by removing the words “spotfin chub (*Hybopsis monacha*)” and adding, in their place, the words “spotfin chub (*Cyprinella (=Hybopsis) monacha*)”.

4. Amend § 17.84 by adding new paragraphs (m)(5) and (n), including maps, to read as follows:

#### § 17.84 Special rules—vertebrates.

\* \* \* \* \*

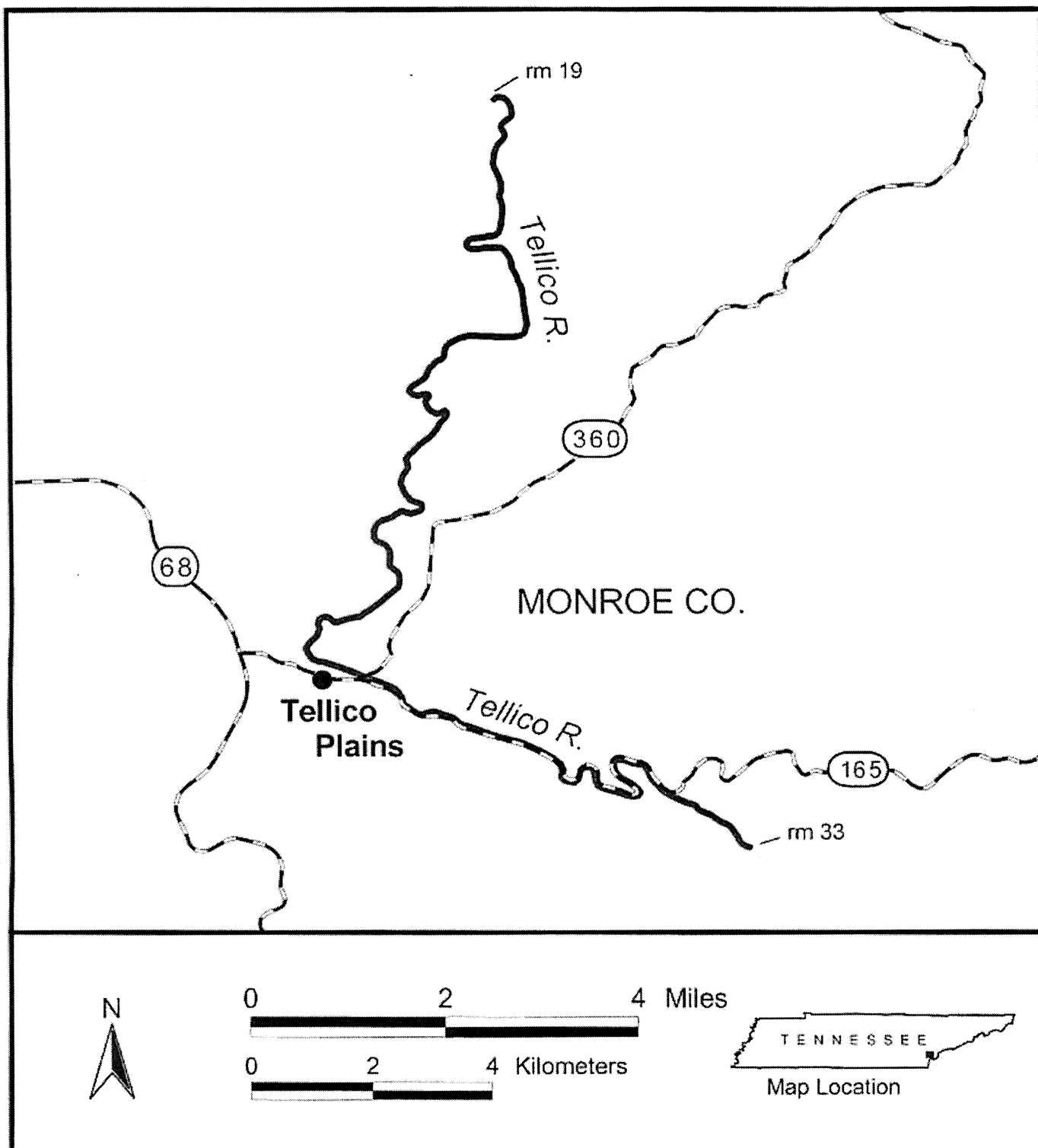
(m) \* \* \*

**(5) Note:** Map of the NEP area for spotfin chub, duskytail darter, and smoky madtom in Tennessee follows:

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# Portion of the Tellico River Covered by the Spotfin Chub, Duskytail Darter, Smoky Madtom and Yellowfin Madtom Nonessential Experimental Population Designation



(n) Spotfin chub (= turquoise shiner) (*Cyprinella* (= *Hybopsis*) *monacha*), boulder darter (*Etheostoma wapiti*).

(1) *Where are populations of these fishes designated as nonessential experimental populations (NEP)?*

(i) The NEP area for the boulder darter and the spotfin chub is within the species' historic ranges and is defined as follows: Shoal Creek (from Shoal Creek mile 41.7 (66.7 km)) at the mouth of Long Branch, Lawrence County, TN, downstream to the backwaters of Wilson Reservoir (Shoal Creek mile 14 (22 km)) at Goose Shoals, Lauderdale County, AL, including the lower 5 miles (8 km) of all tributaries that enter this reach.

(ii) None of the fishes named in paragraph (n) of this section are currently known to exist in Shoal Creek or its tributaries. Based on the habitat requirements of these fishes, we do not expect them to become established outside the NEP area. However, if any individuals of either of the species move upstream or downstream or into tributaries outside the designated NEP area, we would presume that they came from the reintroduced populations. We would then amend paragraph (n)(1)(i) of this section and enlarge the boundaries

of the NEP to include the entire range of the expanded population.

(iii) We do not intend to change the NEP designations to "essential experimental," "threatened," or "endangered" within the NEP area. Additionally, we will not designate critical habitat for these NEPs, as provided by 16 U.S.C. 1539(j)(2)(C)(ii).

(2) *What take is allowed in the NEP area?* Take of these species that is accidental and incidental to an otherwise legal activity, such as recreation (e.g., fishing, boating, wading, trapping or swimming), forestry, agriculture, and other activities that are in accordance with Federal, State, and local laws and regulations, is allowed.

(3) *What take of these species is not allowed in the NEP area?*

(i) Except as expressly allowed in paragraph (n)(2) of this section, all the provisions of § 17.31(a) and (b) apply to the fishes identified in paragraph (n)(1) of this section.

(ii) Any manner of take not described under paragraph (n)(2) of this section is prohibited in the NEP area. We may refer unauthorized take of these species to the appropriate authorities for prosecution.

(iii) You may not possess, sell, deliver, carry, transport, ship, import, or

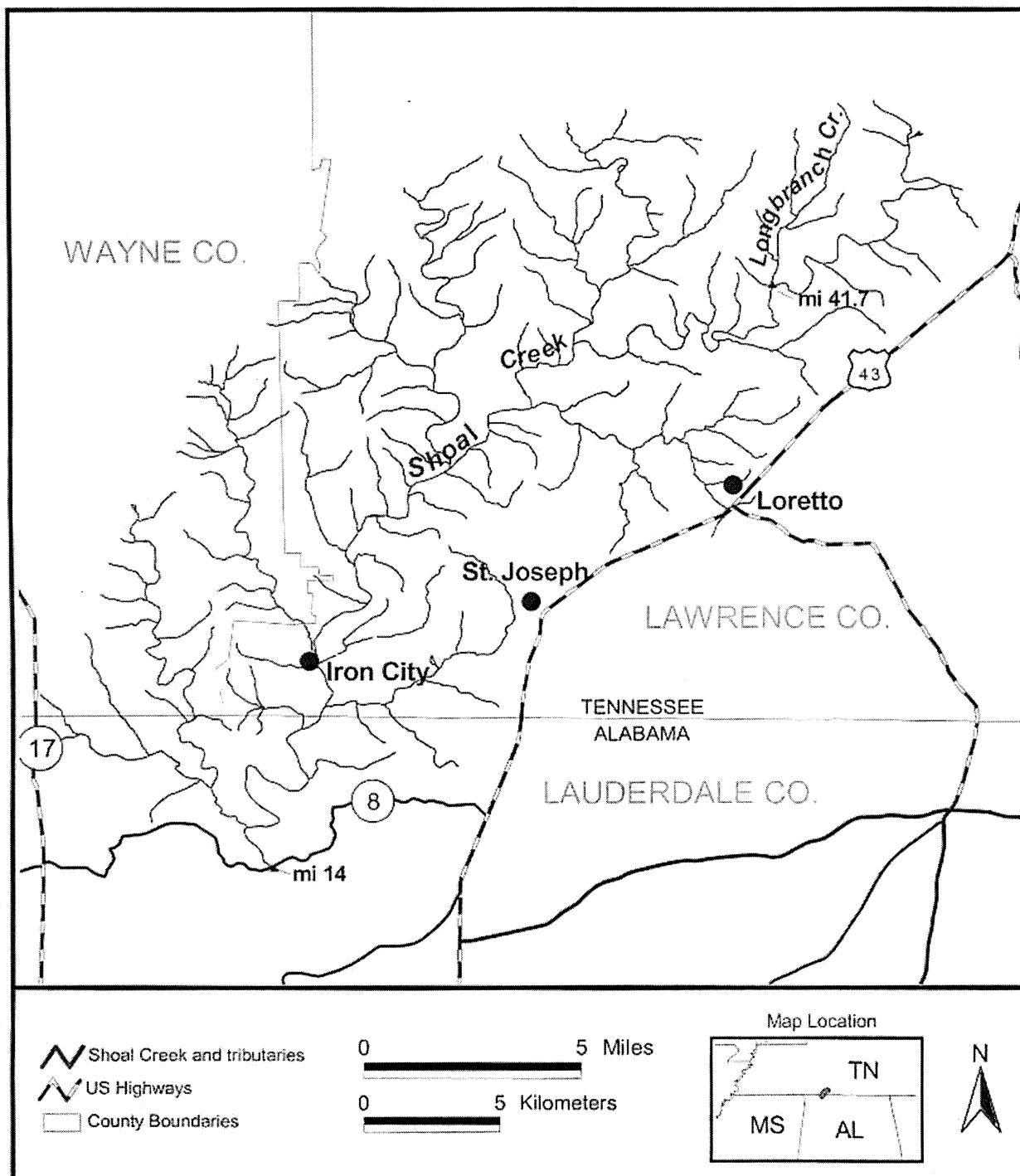
export by any means whatsoever any of the identified fishes, or parts thereof, that are taken or possessed in violation of paragraph (n)(3) of this section or in violation of the applicable State fish and wildlife laws or regulations or the Act.

(iv) You may not attempt to commit, solicit another to commit, or cause to be committed any offense defined in paragraph (n)(3) of this section.

(4) *How will the effectiveness of these reintroductions be monitored?* After the initial stocking of these two fish, we will monitor annually their presence or absence and document any spawning behavior or young-of-the-year fish that might be present. This monitoring will be conducted primarily by snorkeling or seining and will be accomplished by contracting with the appropriate species experts. We will produce annual reports detailing the stocking rates and monitoring activities that took place during the previous year. We will also fully evaluate these reintroduction efforts after 5 and 10 years to determine whether to continue or terminate the reintroduction efforts.

(5) **Note:** Map of the NEP area for spotfin chub and boulder darter in Tennessee and Alabama follows:

## Portion of Shoal Creek Watershed Covered by the Spotfin Chub and Boulder Darter Nonessential Experimental Population Designation



Dated: September 20, 2004.

**Craig Manson,**

*Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. 04-23587 Filed 10-20-04; 8:45 am]

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