

to native vegetation, woody plants with strong root systems may damage the liner system; therefore woody vegetation should be removed at least annually; (3) burrowing animals including mice, rats and snakes may also damage the liner system; therefore, continued periodic checks on the site should be maintained; and, (4) erosion of the RCRA cap continues to be a concern, and the site should be periodically inspected to ensure that the full 24 inches of the RCRA cap remains intact.

Because the remedial action is expected to be protective, the remedy for the site is expected to be protective of human health and the environment. Based upon the site inspection, the sampling results, the survey results and the remedial actions are performing well. The RCRA cap system has been well maintained and now is performing its function with minimal maintenance and movement. The ground water leaving the site, when present, has been substantially below the monitoring concentration, never having exceeded 10% of any level. The site appurtenant structures, including the fencing, the signs, and the vent pipes, are in sound condition with no signs of physical deterioration. All contaminants of concern appear to be fully controlled by the RCRA cap.

5-Year Review—2001

The second five-year review is in the process of being finalized. At this time, no major deficiencies have been noted. Several minor and potential deficiencies were identified during the inspection and include: (1) On an area along the northern slope, woody shrubs are clearly evident and must be removed; (2) riprap placed at the lower end of the swale during recent repairs did not completely cover all of the geotextile and additional rock is needed; and, (3) the settlement monuments which were scheduled to be surveyed during the 10th year will be surveyed as soon as practical. The change of primacy for O&M activities may delay completion of this activity.

Because the remedial action is expected to be protective, the remedy for the site is expected to be protective of human health and the environment. Based upon the site inspection and the sampling results, the remedial actions are performing well. All contaminants of concern appear to be fully controlled by the RCRA cap.

Community Involvement

Public participation activities have been satisfied as required in CERCLA section 113(k), 42 U.S.C. 9613(k), and CERCLA section 117, 42 U.S.C. 9617. Documents in the deletion docket which

EPA relied on for recommendation of the deletion from the NPL are available to the public in the information repositories.

V. Deletion Action

The EPA, with concurrence of the State of Oklahoma, has determined that all appropriate responses under CERCLA have been completed, and that no further response actions, under CERCLA, other than O&M and five-year reviews, are necessary. Therefore, EPA is deleting the Site from the NPL.

Because EPA considers this action to be noncontroversial and routine, EPA is taking it without prior publication. This action will be effective January 28, 2002 unless EPA receives adverse comments by December 28, 2001. If adverse comments are received within the 30-day public comment period, EPA will publish a timely withdrawal of this direct final notice of deletion before the effective date of the deletion and it will not take effect. The EPA will prepare a response to comments and continue with the deletion process on the basis of the notice of intent to delete published elsewhere in this issue of the **Federal Register** and the comments already received. There will be no additional opportunity to comment.

List of Subjects in 40 CFR Part 300

Environmental protection, Air pollution control, Chemicals, Hazardous waste, Hazardous substances, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

Dated: November 8, 2001.

Gregg A. Cooke,

Regional Administrator, Region 6.

For the reasons set out in this document, 40 CFR part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for part 300 continues to read as follows:

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

Appendix B—[Amended]

2. Table 1 of Appendix B to Part 300 is amended under Oklahoma (“OK”) by removing the entry for “Compass Industries (Avery Drive), Tulsa”.

[FR Doc. 01–29469 Filed 11–27–01; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG05

Endangered and Threatened Wildlife and Plants; Final Rule To List the Vermilion Darter as Endangered

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine the vermilion darter (*Etheostoma chermocki*) to be endangered under the authority of the Endangered Species Act of 1973, as amended (Act). The current range of the vermilion darter is 11.6 kilometers (km) (7.2 miles (mi)) of the mainstem of Turkey Creek and the lower reaches of (0.8 km (0.5 mi) total) of Dry and Beaver Creeks where they intersect Turkey Creek. Turkey Creek is a tributary of the Locust Fork of the Black Warrior River, and is found in northeast Jefferson County, Alabama. Impoundments within the upper mainstem of Turkey Creek and its tributaries, along with water quality degradation, have altered the stream’s dynamics and reduced the darter’s range significantly. The surviving population is currently threatened by pollutants (*i.e.*, sediment, nutrients, pesticide and fertilizer runoff) that wash into the streams from the land surfaces. Since the vermilion darter has such a restricted range, it is also threatened by potential catastrophic events (*e.g.*, toxic chemical spill). This action extends the protection of the Act to the vermilion darter.

EFFECTIVE DATE: December 28, 2001.

ADDRESSES: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Mississippi Field Office, U.S. Fish and Wildlife Service, 6578 Dogwood View Parkway, Jackson, Mississippi, 39213.

FOR FURTHER INFORMATION CONTACT: Mr. Daniel J. Drennen at the above address, or telephone 601/321–1127; facsimile 601/965–4340.

SUPPLEMENTARY INFORMATION:

Background

Boschung *et al.* (1992) formally described the vermilion darter (*Etheostoma chermocki* (Teleostei: Percidae)) from the Black Warrior River drainage of Alabama. This fish is a medium-sized darter reaching about 7.1 centimeters (2.8 inches) total length

(length from tip of snout to longest portion of tail fin) (Boschung *et al.* 1992, Suttkus and Bailey 1993, Mettee *et al.* 1996). The vermilion darter belongs to the subgenus *Ulocentra* ("snub-nosed darters"), which includes fish that are slightly compressed laterally and have complete lateral lines, broadly connected gill membranes, a short head, and a small pronounced mouth. The vermilion darter is distinguished by extensive vermilion (reddish-orange) pigmentation on the lower sides and especially on the belly. Males have a bright red spot on the membrane between the first spines of the spinous dorsal (upper) fin. During breeding, the males have red blotches along the side of the body just above the midline (Boschung *et al.* 1992, Suttkus and Bailey 1993, and Mettee *et al.* 1996). The female's red spots are smaller.

The Southeastern Fishes Council Technical Advisory Committee of the American Fisheries Society (Warren *et al.* 2000) listed the vermilion darter as endangered within the Tombigbee-Black Warrior river drainage. Currently, the vermilion darter is found only in the Turkey Creek drainage, a tributary of the Locust Fork of the Black Warrior River, Jefferson County, Alabama. The current range of the vermilion darter is 11.6 kilometers (km) (7.2 miles (mi)) of the mainstem of Turkey Creek and the lower reaches (0.8 km (0.5 mi) total) of Dry and Beaver Creeks where they intersect Turkey Creek. Extensive surveys in similar habitats have failed to locate this species outside its current drainage (Boschung *et al.* 1992, Blanco *et al.* 1995, Mettee 1996, Shepard *et al.* 1998, Blanco and Mayden 1999). The Turkey Creek drainage is primarily owned by private landowners; approximately 2.2 km (1.4 mi) of stream bank is owned by Jefferson County.

The historic population size of the vermilion darter within the Turkey Creek drainage is unknown. In the 1960s and 1970s, the vermilion darter was common at the Highway 79 bridge site, which roughly bisects the fish's current range, but by 1992 occurrences of the darter had become very rare at that site (Boschung *et al.* 1992; K. Marion, University of Alabama in Birmingham, pers. comm. 1998). Currently, the sparse populations of vermilion darters are isolated within certain areas of Turkey Creek, by both natural and manmade barriers, including a waterfall and several impoundments. Dispersal beyond the current range of this species is not likely (Blanco and Mayden 1997) because of these barriers and the decline in water quality by point source pollution, like industrial effluent and nonpoint-source

pollution, pollution created from larger processes and not from one concentrated point source, like excess sediment from a construction site washing into a stream after a rain. Blanco and Mayden (1999) estimated the population size of darters, assuming they are uniformly distributed throughout their range, as between 1,847 and 3,238 individuals, based on the number of vermilion darters caught per fishing attempts and the amount of time spent sampling within the Turkey Creek mainstem and the tributaries of Dry and Beaver Creeks.

Habitat for the vermilion darter is similar to that of other snub-nosed darters found in small to medium-sized clear streams with gravel riffles and moderate currents (Kuehne and Barbour 1983, Etnier and Starnes 1993). Boschung *et al.* (1992) described the stream habitat for vermilion darters as 3 to 20 meters (m) (10 to 65 feet (ft)) wide, 0.01 to more than 0.5 m (0.03 to more than 1.64 ft) in depth, with pools of moderate current alternating with riffles of moderately swift current, and low water turbidity. Blanco and Mayden (1999) found this species primarily in areas dominated by fine gravel with some coarse gravel or cobble. This species is absent in habitats with only a bedrock bottom, but has been found on bedrock with sand and gravel. Vermilion darters have been found in habitats with consistent water velocity, usually at the head and foot of riffles and downstream of the run habitat (stream zones with faster water) where the water becomes deeper and slower. They are usually absent from the riffle proper (shallow, fast-flowing water upstream of the run) and the run proper (deeper, fast-flowing water) and are found in the transition zone between a run/riffle (fast water) and pool (slow water) (Blanco and Mayden 1999). This species is generally not found in deeper pools. Vermilion darters are associated with aquatic vegetation such as *Nasturtium officinale*, *Potamogeton* spp., *Ceratophyllum* spp., and *Myriophyllum* spp. (Boschung *et al.* 1992, Blanco *et al.* 1995).

The only documented spawning habitat for vermilion darters, near the confluence of Turkey Creek and the runoff from Tapawingo Springs, consists of a mixture of fine silt on small gravel interspersed with larger gravel, cobble, small boulders, aquatic vegetation, and occasional filamentous algae (Stiles, Samford University, Birmingham, Alabama, pers. comm. 1999). Clean rock surfaces, documented at this site, are necessary for egg laying (Stiles, pers. comm. 1999). There are also small sticks and limbs on the bottom substrate and

within the water column (Stiles, pers. comm. 1999). Little is known about the life-history of the vermilion darter; however, most snubnose darters typically live 2 to 3 years and feed primarily on snails and aquatic insects (Carlander 1997).

Previous Federal Action

We have been monitoring the status of the species since the early 1990s and have funded several status surveys (Blanco *et al.* 1995, Blanco *et al.* 1996, and Blanco and Mayden 1997) and a Partners for Fish and Wildlife Project which included restoration of a portion of the bank of Turkey Creek.

We received a petition dated July 22, 1998, to emergency list the vermilion darter as endangered on July 23, 1998, from Robert Reid, Jr., of Birmingham, Alabama. On August 18, 1998, we received supplemental information on the species and a request to be copetitioner from Dr. Paul Blanchard of Samford University, Birmingham, Alabama. The petitioners stated that the vermilion darter was limited in range and imminently threatened with extinction. We found that the petition presented substantial information indicating that listing the species may be warranted, but that emergency listing was not warranted. We published a notice announcing our 90-day finding and initiation of the species' status review in the **Federal Register** on January 26, 1999 (64 FR 3913).

The Act requires that we issue a finding as to whether the petitioned action is warranted within 12 months of receipt of the petition. The 12 month-finding resulted in a proposal to list the vermilion darter as endangered which we published in the **Federal Register** on April 18, 2000 (65 FR 20792). On March 9, 2001, Biodiversity Legal Foundation and Wild Alabama filed a complaint challenging the alleged failure of the Service to list the vermilion darter as an endangered species under the Act [CV-01-G-0607-S, D.-AL]. This final rule is made in accordance with a judicially approved settlement agreement, that requires us to submit for publication in the **Federal Register** a final listing determination for the vermilion darter on or before November 19, 2001.

Summary of Comments and Recommendations

In the April 18, 2000, proposed rule (65 FR 20792) and associated notifications, we requested that all interested parties submit factual reports or information that might contribute to the development of this final rule. The comment period for the proposed rule was open from April 18 through June

19, 2000. We contacted appropriate Federal and State agencies, county governments, scientific organizations, and other interested parties and requested that they comment. We published a legal notice in *The Birmingham News* on April 22, 2000, announcing the proposal and inviting comment. We received nine comment letters through regular mail and electronic mail (e-mail). Two of these were opposed and seven were in favor of the listing. The breakdown of the comments included two from the State of Alabama, one from Jefferson County, one from a business association, one from a non-profit environmental law firm, two from environmental groups, and two from academia. The Department of Conservation and Natural Resources for the State of Alabama supported the protection of the vermilion darter under the Act. We had no requests for a public hearing.

We updated the final rule to reflect comments and information we received during the comment period. We address opposing comments and other substantive comments concerning the rule below.

Issue 1. The current levels of environmental protections being utilized in residential construction and wastewater management are more than adequate to protect the darter.

Response. We took into consideration and incorporated into the rule the part of the comment concerning current wastewater treatment management practices as adequate to protect the darter. We overstated the negative influence of treated effluent on the vermilion darter in the proposed rule. We have reevaluated its influence on the survival of the species. Based on current information, we believe that current protection at the Turkey Creek Waste Water Treatment Plant (TCWWTP) is adequate and not a significant threat to the vermilion darter. At this time, there are no data to document a negative influence of the wastewater treatment plant on the vermilion darter.

However, no new information was presented concerning environmental protection at residential and industrial construction sites along Turkey Creek that would protect the vermilion darter. We do not believe that current measures are adequately protecting the vermilion darter. Specifically, sediment is the most abundant pollutant produced in the Mobile River Basin (Alabama Department of Environmental Management 1996). Potential sediment sources within the vermilion darter's habitat include essentially all activities that disturb the land surface such as

construction and urbanization. Vermilion darter habitat within Turkey Creek has been noted to be brown-orange from sediment and completely turbid after heavy to even medium rainfalls (Blanchard pers. comm. 1998, Drennen 1999 pers. obs.). Blanchard *et al.* (1998) identified five specific nonpoint-source siltation sites that are impacting or have impacted the Turkey Creek watershed, all which affect the vermilion darter's habitat. The application of current State and Federal water quality regulations have not adequately protected the vermilion darter habitat from point- and nonpoint-source pollution (see Factor A, Summary of Factors Affecting the Species).

Issue 2. The current range of the vermilion darter is not adequately defined.

Response: The description of the range of the vermilion darter in this final rule reflects the scientific literature published by species experts. There has been no information submitted to us to indicate otherwise. The vermilion darter is found only in the Turkey Creek drainage, a tributary of the Locust Fork of the Black Warrior River, Jefferson County, Alabama. The current range of the vermilion darter is 11.6 kilometers (km) (7.2 miles (mi)) of the mainstem of Turkey Creek and the lower reaches of (0.8 km (0.5 mi) total) Dry and Beaver Creeks where they intersect Turkey Creek. Extensive surveys in similar habitats have failed to locate this species outside of this drainage (Boschung *et al.* 1992, Blanco *et al.* 1995, Mettee *et al.* 1996, Shepard *et al.* 1998, Blanco and Mayden 1999).

Issue 3: The Service's failure to designate critical habitat seems inconsistent with the purported urgency of the vermilion darter's listing.

Response: We believe it is more important at this time to provide the vermilion darter with the protections the Act affords to endangered species than to delay a final listing decision while developing a critical habitat proposal. We will designate critical habitat for this species, when resources are available and consistent with our listing priorities.

Issue 4: Scientific basis for listing is not adequately documented.

Response: We disagree. We thoroughly reviewed all scientific data available on this species in preparing the proposed rule. We contacted experts and sought and reviewed historic and recent publications and unpublished reports concerning the vermilion darter and the subgenus *Ulocentra* ("snub-nosed darters"). We based our opinion on the best scientific and commercial

data available, as required by section 4(b)(1) of the Act. We have reviewed this information and any new information available since the date of the proposed rule in making this final listing decision.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we requested the expert opinions of three independent specialists regarding pertinent scientific or commercial data and assumptions relating to supportive biological and ecological information in the proposed rule. The purpose of such review is to ensure that the listing decision is based on scientifically sound data, assumptions, and analyses, including input of appropriate experts and specialists.

We requested three academicians who possess expertise on darter natural history and ecology to review the proposed rule and provide any relevant scientific data relating to taxonomy, distribution, or to the supporting biological data used in our analyses of the listing factors. All expressed their belief that the data supported protection of the vermilion darter under the Act. We have incorporated their comments into the final rule, as appropriate, and summarized their observations below.

One reviewer clarified the exact location of the reddish-orange pigmentation of the darter to the lower sides and especially on the belly. This same reviewer specified the upper population estimates of the vermilion darter (Blanco and Mayden 1999) at an estimated 3,300 individuals, based on drainage units and habitat types and being uniformly distributed within their range. In the discussion on habitats of the vermilion darters and water velocities, one reviewer commented that vermilion darters usually do not occur in fast water and are found at the head of riffles and are absent in the riffle proper (shallow, fast-flowing water downstream and adjacent to the riffle) and at the foot of the run.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, we determined that the vermilion darter should be classified as an endangered species. We followed the procedures found at section 4(a)(1) of the Act (16 U.S.C. 1531 *et seq.*) and regulations (50 CFR part 424) issued to implement the listing provisions of the Act. We may determine a species to be endangered or threatened due to one or more of the five factors described in

section 4(a)(1). These factors and their application to the vermilion darter (*Etheostoma chermocki* Boschung and Mayden 1992) are as follows:

A. *The present or threatened destruction, modification, or curtailment of its habitat or range.* The primary threats to the vermilion darter within the Turkey Creek watershed are nonpoint-source pollution and alteration of flow regimes. Restricted and localized in range, the vermilion darter is vulnerable to human-induced impacts to its habitat, such as siltation (excess sediments suspended or deposited in a stream), eutrophication (excessive nutrients present, such as nitrogen and phosphorus), and impoundments.

Excessive siltation renders the habitat unsuitable for feeding and reproduction of vermilion darters and associated fish species. Sediment has been shown to wear away and suffocate periphyton (organisms that live attached to objects underwater), disrupt aquatic insect communities, and negatively impact fish growth, physiology, behavior, reproduction, and survival (Waters 1995, Knight and Welch 2001). Sediment is the most abundant pollutant produced in the Mobile River Basin (Alabama Department of Environmental Management 1996). Potential sediment sources within a watershed include virtually all activities that disturb the land surface. Local land use practices, such as construction, urbanization, and silviculture, affect the amount of sedimentation and its impact to fish habitat. Turkey Creek has been noted to be brown-orange from sediment and completely turbid after heavy to even medium rainfalls (Blanchard pers. comm. 1998). Four major soil types occur within the Turkey Creek watershed (Gorgas, Leesburg, Montevallo, and Nauvoo); all are considered highly erodible due to the steep topography (R. Goode, Natural Resources Conservation Service, Birmingham, Alabama, pers. comm. 1998). Urbanization has contributed significantly to siltation within the Turkey Creek watershed. Turkey Creek watershed drains 22,149 hectares (54,731 acres) of Jefferson County, the most populous county in the State. Blanco (2001) believed that the greatest threat to the fauna of Turkey Creek was siltation from development projects. Blanchard *et al.* (1998) identified five specific nonpoint-source siltation sites that have impacted the Turkey Creek watershed, including a major road extension within 304 m (1,000 ft) of Turkey Creek and four sites affecting Beaver Creek, a major tributary to Turkey Creek (i.e., a bridge, road and

sewer line construction, and a wood pallet plant).

Nutrient loading is a major problem in Turkey Creek. Water quality data for Turkey Creek taken between September 1996 and February 1997 upstream of the TCWWTP, located within the range of the darter, showed high values for conductivity (Blanco and Mayden 1999). Similarly, water quality data for Turkey Creek taken along Turkey Creek Road, also within the darter's range, in June 1997 indicated high values for conductivity (Shepard *et al.* 1998). High conductivity values are an indicator of hardness and alkalinity and may denote water eutrophication (Hackney *et al.* 1992, Tennessee Valley Authority 1992). Domestic pollution (septic and grey water (run off)) and excessive use of fertilizers and pesticides on lawns and along roadsides result in the concentration of nutrients and toxic chemicals within watersheds such as Turkey Creek. Eutrophication promotes heavy algal growth that covers and eliminates the clean rock or gravel habitats necessary for vermilion darter feeding and spawning. Shepard *et al.* (1998) noted a thin veneer of algae, and O'Neil and Shepard (2001) documented high turbidity, both indicating eutrophic conditions (increased levels of nitrogen and phosphorus) in Turkey Creek at the town of Morris, approximately 9.6 km (6.0 mi) downstream of the range of the darter. Blanco *et al.* (1995) also noted increased levels of filamentous algae in Dry Creek and above the Turkey Creek Falls, within the range of the darter. The vermilion darter habitat along Turkey Creek Road was given a poor general index of biological integrity score (a numerical evaluation of the biological health of a stream) in 1997 because of domestic pollution (Shepard *et al.* 1998). Historically, Turkey Creek, along with other tributaries to the Locust Fork of the Warrior River, have not met dissolved oxygen standards due primarily to inadequate flows necessary to assimilate treated wastewater discharges (Shepard *et al.* 1998).

In the proposed rule we believed the absence of vermilion darters in Turkey Creek, below the TCWWTP effluent pipe, was the result of a combination of marginal habitat, sedimentation, and possibly chlorinated effluent. However, investigations by TCWWTP biologists attributed a past fish kill to pesticide runoff into the creek from a close housing development (Swann 2000). In addition, Howell (1998, memo to James Wood, Jefferson County Barton Laboratories) collected a vermilion darter 106 m (350 ft) downstream of the TCWWTP and noted five adults and one

juvenile vermilion darter below the weir of the effluent pipe.

Finally, the TCWWTP has been noted nationally for experiencing 5 or less exceptions to their discharge permit requirements in 1999 (Jefferson County, 2000 a). Current management has demonstrated careful monitoring of all effluent (wastewater outflows) into Turkey Creek (Drennen pers. obs. 2000) and does not appear to be a threat to the vermilion darter at this time. Specifically, chlorine sterilization of effluent was replaced with ultraviolet light sterilization. An abundance of unidentified fish species, including darters, were observed at the effluent pipe in July, 2000 (Drennen pers. obs.). Blanco (2001) was optimistic that recolonization of darters would occur in areas immediately below the effluent pipe.

There are six impoundments in Turkey and Dry Creeks (i.e., Turkey Creek Lakes, Shadow Lake, Strip-mine Lake, Innsbrook Lake, Pinson Valley High Pond, and Horse Ranch Pond) (Blanco and Mayden 1999). These impoundments serve as dispersal barriers, affect water quality by reducing water flow, altering temperature, and concentrating pollutants, and contribute to the isolation and separation of the vermilion darter populations (Blanco and Mayden 1999). Blanco and Mayden (1999) noted a 40 percent decline of vermilion darters collected between 1995 and 1998 at two sites directly affected by impoundments. Population density estimates, expressed as the number of vermilion darters caught per fishing attempts and vermilion darters caught per amount of time spent fishing, declined by approximately 42 percent and 71 percent, respectively (Blanco and Mayden 1997). However, since historical population information is unknown, Blanco and Mayden (1997) were unclear if the decline represented a long- or short-term decline.

Blanco and Mayden (1999) noted a 71 percent decline (8.2 km (5.1 mi)) in vermilion darter habitat within the species' current range. This loss of vermilion darter habitat occurred between 1995 and 1998 and appears to be associated with two impoundments, a housing development, and pond dredging along Turkey Creek and Dry Creek; and increased siltation due to road maintenance along Beaver Creek (Blanco *et al.* 1995, Blanco and Mayden 1997, Blanco and Mayden 1999).

B. *Overutilization for commercial, recreational, scientific, or educational purposes.* In general, small species of fish such as the vermilion darter, which are not utilized for either sport or bait purposes, are unknown to the general

public. However, listing the vermilion darter may make it more attractive to collectors through recognition of its rarity. Vermilion darters are found around shallow riffles and pools in specific portions of the Turkey Creek drainage. These areas are easily accessible from public roads or bridges. The darter is also sensitive to a variety of easily obtained chemicals and products. These factors would make vandalism virtually undetectable and uncontrollable. Collection for scientific and educational purposes is not currently identified as a threat, but it must be regulated based on this species' restricted range and deteriorating habitat.

C. Disease or predation. Disease or natural predators do not present any known threats to the vermilion darter. To the extent that disease or predation occurs, these factors become a more important consideration as the total population decreases in number.

D. The inadequacy of existing regulatory mechanisms. No environmental laws require persons to specifically consider the vermilion darter or ensure that a project will not jeopardize its continued existence. The vermilion darter has been designated an endangered species by Alabama and is protected under Alabama's Nongame Species Regulation 220-2-.92-.90ER, which protects the species from over-collecting. Application of current State and Federal water quality regulations have not adequately protected the vermilion darter habitat from point- and nonpoint-source pollution.

E. Other natural or manmade factors affecting its continued existence. The current range of the vermilion darter is restricted to localized sites within the mainstem of Turkey Creek and the lowermost reaches of Dry Creek and Beaver Creek, within the Turkey Creek drainage. Subsequently, genetic diversity has likely declined due to fragmentation, separation, and destruction of vermilion darter populations. Potential genetic variation and diversity within a species are essential for recovery, adaptation to environmental change, and long-term viability (capability to live, reproduce, and develop) (Noss and Cooperrider 1994, Harris 1984). The long-term viability of a species is founded on conservation of numerous interbreeding local populations throughout the range of the species (Harris 1984). Interbreeding populations of vermilion darters are becoming increasingly separated.

The limited distribution of the vermilion darter makes populations vulnerable to extirpation (elimination)

from catastrophic events such as an accidental toxic chemical spill, heavy pesticide or contaminant runoff, increased siltation, vandalism, or changes in flow regimes. A major highway (State Highway 79) divides the watershed. Eastward (upstream), the watershed is experiencing rapid residential and business growth; to the west (downstream), there are numerous commercial, residential, and reclaimed strip-mining sites.

Jefferson County has proposed an acquisition plan to preserve 254 ha (630 ac) of the Turkey Creek watershed between Alabama Highway 79 and Disposal Plant Road (Jefferson County 2000b). This will assist in protecting the water quality of 2.9 km (1.8 mi) of the creek. Penny Springs has been acquired and current negotiations to acquire Tapawingo Springs and other surrounding lands by the Cahaba Land Trust will protect water quality of Turkey Creek at the darter's known spawning sites.

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by the vermilion darter in determining to make this rule final. Based on this evaluation, the most appropriate action is to list the vermilion darter as endangered. The Act defines an endangered species as one that is in danger of extinction throughout all, or a significant portion, of its range. A threatened species is one that is likely to become endangered in the foreseeable future throughout all or a significant portion of its range. Endangered status is appropriate for the vermilion darter due to its occurrence as isolated small populations within a very limited range, segmented by barriers (i.e., impoundments). The escalation of nonpoint-source pollution from siltation and eutrophication within the species' habitat further threatens this species' survival. Isolated population segments are also subject to declining genetic diversity, reducing their chances for long-term viability. The possibility for catastrophic events (e.g., discharges, toxic chemical spills) also poses a threat to the survival of the vermilion darter.

Critical Habitat

Critical habitat is defined in section 3, paragraph (5)(A) of the Act as: (i) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical

area occupied by a species at the time it is listed, upon a determination by the Secretary that such areas are essential for the conservation of the species. "Conservation" means the use of all methods and procedures needed to bring the species to the point at which listing under the Act is no longer necessary.

Section 4(a)(3) of the Act and our implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time the species is determined to be endangered or threatened. Our regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent when one or both of the following situations exist—(i) the species is threatened by taking or other human activity, and the identification of critical habitat can be expected to increase the degree of threat to the species, or (ii) such designation of critical habitat would not be beneficial to the species.

In the last few years, a series of court decisions have overturned Service determinations regarding a variety of species (e.g., *Natural Resources Defense Council v. U.S. Department of the Interior* 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Hawaii 1998)). Based on the standards applied in those judicial opinions, we believe that the designation of critical habitat for this species would be prudent.

Due to the small number of populations, the vermilion darter is vulnerable to unrestricted collection, vandalism, or other disturbance. We are concerned that these threats might be exacerbated by the publication of critical habitat maps and further dissemination of locational information. However, we have examined the evidence available and have not found specific evidence of taking, vandalism, collection, or trade of this species or any similarly situated species. Consequently, consistent with applicable regulations (50 CFR 424.12(a)(1)(i)) and recent case law, we do not expect that the identification of critical habitat will increase the degree of threat to this species of taking or other human activity.

In the absence of a finding that identification of critical habitat would increase threats to a species, if any benefits would result from the designation of critical habitat, then a prudent finding is warranted.

In the proposed rule, where we also determined critical habitat to be prudent, we stated that we would make a final critical habitat determination with the final listing determination for

the vermilion darter. However, our budget for listing activities is currently insufficient to allow us to immediately complete all of the listing actions required by the Act. Listing the vermilion darter without designation of critical habitat will allow us to concentrate our limited resources on other listing actions that must be addressed, while allowing us to invoke protections needed for the conservation of this species without further delay. This is consistent with section 4(b)(6)(C)(i) of the Act, which states that final listing decisions may be issued without critical habitat designation when it is essential that such determinations be promptly published. We will prepare a critical habitat designation in the future at such time when our available resources and priorities allow.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required of Federal agencies and the prohibitions against taking and harm are discussed, in part, below.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) requires Federal agencies to confer informally with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. If a species is subsequently listed, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us.

Federal activities that could occur and impact the vermilion darter include, but are not limited to, the carrying out or the issuance of permits for reservoir construction, stream alteration, discharges, wastewater facility development, water withdrawal projects, pesticide registration, mining, and road and bridge construction. Activities affecting water quality may also impact the vermilion darter and are subject to the U.S. Army Corps of Engineers' and the U.S. Environmental Protection Agency's regulations and permit requirements under the authority of the Clean Water Act and the National Pollutant Discharge Elimination System (NPDES). It has been our experience, however, that nearly all section 7 consultations have been resolved so that species are protected and project objectives are met.

Listing the vermilion darter provides for the development and implementation of a recovery plan for the species. This plan will bring together Federal, State, and regional agency efforts for conservation of the species. A recovery plan will establish a framework for agencies to coordinate their recovery efforts. It will also describe the site-specific management actions necessary to achieve conservation and survival of the species.

Section 9 of the Act and its implementing regulations, found at 50 CFR 17.21, set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt any such conduct), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any endangered wildlife species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to our agents and agents of State conservation agencies.

Our policy, published in the **Federal Register** on July 1, 1994 (59 FR 34272), is to identify, to the maximum extent practicable, those activities that would or would not constitute a violation of section 9 of the Act if this species is listed. The intent of this policy is to increase public awareness as to the effects of the listing on future and ongoing activities within a species' range.

We believe, based on the best available information, that the following

activities are unlikely to result in a violation of section 9:

(1) Existing discharges into waters supporting this species, which require Federal authorization or permits (e.g., activities subject to sections 402, 404, and 405 of the Clean Water Act and discharges regulated under the NPDES), provided such discharges are in compliance with an incidental take statement and any reasonable and prudent measures issued pursuant to a consultation conducted in accordance with section 7 of the Act;

(2) Normal agricultural and silvicultural practices, including pesticide and herbicide use, that are carried out in accordance with any existing regulations, permit and label requirements, and best management practices;

(3) Development and construction activities designed and implemented pursuant to State and local water quality regulations and implemented using best management practices;

(4) Existing recreational activities such as swimming, wading, canoeing, and fishing; and

(5) Lawful commercial and sport fishing.

Activities that we believe could potentially result in the take of the vermilion darter, include, but are not limited to:

(1) The unauthorized collection or capture of this species;

(2) Unauthorized destruction or alteration of the species' habitat (e.g., unpermitted instream dredging, channelization, and discharge of fill material);

(3) Violation of any discharge or water withdrawal permit having an effect on vermilion darter habitat;

(4) Illegal discharge or dumping of toxic chemicals or other pollutants into waters supporting the vermilion darter; and

(5) Use of pesticides and herbicides in violation of label restrictions within the species' watershed.

We will review other activities not identified above on a case-by-case basis to determine if a violation of section 9 of the Act may be likely to result from such activity when the vermilion darter is listed. We do not consider these lists to be exhaustive and provide them as information to the public.

Questions regarding whether specific activities may constitute a violation of section 9 should be directed to the Field Supervisor of our Mississippi Field Office (see **ADDRESSES** section).

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife species under certain circumstances.

Regulations governing permits are at 50 CFR 17.22 and 17.23. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, for incidental take in connection with otherwise lawful activities, or economic hardship. Requests for copies of the regulations and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services Division, 1875 Century Blvd., Atlanta, GA, 30345 (telephone 404/679-4176; facsimile 404/679-7081).

National Environmental Policy Act

We have determined that an environmental assessment and environmental impact statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. We published a notice outlining our reasons for this determination in the

Federal Register on October 25, 1983 (48 FR 49244).

Paperwork Reduction Act

This rule does not contain any new collections of information other than those already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance number 1018-0094. 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. For additional information concerning permit and associated requirements for endangered species, see 50 CFR 17.22.

References Cited

A complete list of all references cited in this document, as well as others, is available upon request from the Field Supervisor (see **ADDRESSES** section).

Author

The primary author of this document is Daniel J. Drennen (see **ADDRESSES** section) (601/321-1127).

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

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 section 17.11(h) by adding the following to the List of Endangered and Threatened Wildlife, in alphabetical order under FISHES, 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							
* Darter vermilion	* <i>Etheostoma chermocki</i> .	* U.S.A. (AL)	* Entire	* E	* 715	NA	* NA
*	*	*	*	*	*		*

Dated: November 15, 2001.
Marshall P. Jones Jr.,
Acting Director, Fish and Wildlife Service.
 [FR Doc. 01-29329 Filed 11-27-01; 8:45 am]
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