

## PART 1827—PATENTS, DATA, AND COPYRIGHTS

2. Revise section 1827.406–70 to read as follows:

### 1827.406–70 Reports of work.

(a) When considered necessary for monitoring contract performance, contracting officers must require contractors to furnish reports of work performed under research and development contracts (fixed-price and cost reimbursement), interagency agreements, or in cost-reimbursement supply contracts. This purpose may be achieved by including the following general requirements, modified as needed to meet the particular requirements of the contract, in the section of the contract specifying data delivery requirements:

(1) *Monthly progress reports.* Reports should be in narrative form, brief, and informal. They should include a quantitative description of progress, an indication of any current problems that may impede performance, proposed corrective action, and a discussion of the work to be performed during the next monthly reporting period. (Normally, this requirement should not be used in contracts with nonprofit organizations.)

(2) *Quarterly progress reports.* In addition to factual data, these reports should include a separate analysis section interpreting the results obtained, recommending further action, and relating occurrences to the ultimate objectives of the contract. Sufficient diagrams, sketches, curves, photographs, and drawings should be included to convey the intended meaning.

(3) *Final report.* This report should summarize the results of the entire contract, including recommendations and conclusions based on the experience and results obtained. The final report should include tables, graphs, diagrams, curves, sketches, photographs, and drawings in sufficient detail to explain comprehensively the results achieved under the contract. The final report must comply with NPG 2200.2A, Guidelines for Documentation, Approval, and Dissemination of NASA Scientific and Technical Information.

(4) *Report Documentation Page.* The final report must include a completed Report Documentation Page, Standard Form (SF) 298 as the final page of the report.

(b) The contracting officer must consider the desirability of providing reports on the completion of significant units or phases of work, in addition to

periodic reports and reports on the completion of the contract.

(c) Submission of Final Report. In addition to the original of the final report submitted to the contracting officer, contracts containing the clause at 1852.235–70, Center for Aerospace Information—Final Scientific and Technical Reports (see 1835.070(a)), must require the concurrent submission of a reproducible copy and a printed or reproduced copy of the final report to the NASA Center for Aerospace Information (CASI).

(d) NASA Review of Final Report. When required by the contract, final reports submitted to NASA for review, shall be reviewed for technical accuracy, conformance with applicable law, policy and publication standards, and to determine the availability and distribution of NASA-funded documents containing scientific and technical information (STI) (NASA Form 1676, NASA Scientific and Technical Document Availability Authorization (DAA)). The final report must not be released outside of NASA until NASA's DAA review has been completed and the availability of the document has been determined. The document is considered available when it is accessible through CASI.

## PART 1835—RESEARCH AND DEVELOPMENT CONTRACTING

3. In section 1835.070, revise paragraph (a) to read as follows:

### 1835.070 NASA contract clauses and solicitation provision.

(a) The contracting officer must insert the clause at 1852.235–70, Center for Aerospace Information—Final Scientific and Technical Reports, in all research and development contracts, interagency agreements, and in cost-reimbursement supply contracts involving research and development work.

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## PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Revise section 1852.235–70 to read as follows:

### 1852.235–70 Center for Aerospace Information—Final Scientific and Technical Reports.

As prescribed in 1835.070(a), insert the following clause:

#### Center for Aerospace Information—Final Scientific and Technical Reports (XXX)

(a) The Contractor should register with and avail itself of the services provided by the NASA Center for Aerospace Information

(CASI) (<http://www.sti.nasa.gov>) for the conduct of research or research and development required under this contract. CASI provides a variety of services and products as a central NASA repository of research information, which may enhance contract performance. The address is set out in paragraph (d) of this clause.

(b) Should the CASI information or service requested by the Contractor be unavailable or not in the exact form necessary by the Contractor, neither CASI nor NASA is obligated to search for or change the format of the information. A failure to furnish information shall not entitle the Contractor to an equitable adjustment under the terms and conditions of this contract.

(c) In addition to the final report, as defined at 1827.406–70(a)(3), submitted to the contracting officer, a reproducible copy and a printed or reproduced copy of the final report or data shall be concurrently submitted to: Center for Aerospace Information (CASI), Attn: Document Processing Section, 7121 Standard Drive, Hanover, Maryland 21076–1320, Phone: 301–621–0390, FAX: 301–621–0134.

(d) The last page of the final report submitted to CASI shall be a completed Standard Form (SF) 298, Report Documentation Page. In addition to the copy of the final report, the contractor shall provide, to CASI, a copy of the letter transmitting the final report to NASA for its Document Availability Authorization (DAA) review.

(e) The contractor shall not release the final report, outside of NASA, until the DAA review has been completed by NASA and availability of the report has been determined.

(End of clause)

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### RIN 1018–AG02

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

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

**ACTION:** Proposed rule and notice of petition finding.

**SUMMARY:** We, the Fish and Wildlife Service (Service), propose to list the vermilion darter (*Etheostoma chermocki*) as endangered under the authority of the Endangered Species Act of 1973, as amended (Act). The vermilion darter is found only in 11.6 kilometers (7.2 miles) of the main-stem of Turkey Creek, and the lowermost reaches of Dry Creek and Beaver Creek,

within the Turkey Creek drainage, a tributary of the Locust Fork of the Black Warrior River, 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 proposed rule, if made final, will extend the protection of the Act to the vermilion darter. We are seeking data and comments from the public.

**DATES:** Comments from all interested parties must be received by June 19, 2000. Requests for public hearings must be received by June 2, 2000.

**ADDRESSES:** If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods. (1) You may submit written comments to the Field Supervisor, U.S. Fish and Wildlife Service, Mississippi Field Office, 6578 Dogwood View Parkway, Jackson, Mississippi 39213.

(2) You may send comments by e-mail to [daniel\\_drennen@fws.gov](mailto:daniel_drennen@fws.gov). Please submit these comments as an ASCII file and avoid the use of special characters and any form of encryption. Please also include "Attn: [RIN number]" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly at the above address or by telephone at 601/965-4900.

(3) You may hand-deliver comments to the above address. Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Mr. Daniel J. Drennen at the above address, or telephone 601/965-4900; 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 laterally compressed, 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 fins and body, 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 (Boschung *et al.* 1992, Suttkus and Baily 1993, and Mettee *et al.* 1996). The female's red spots are smaller.

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 lowermost reaches (0.8 km (0.5 mi) total) of Dry and Beaver Creeks. Extensive surveys in similar habitats have failed to locate this species outside of its current drainage (Boschung *et al.* 1992, Blanco *et al.* 1995, Mettee *et al.* 1996, Shepard *et al.* 1998, Blanco and Mayden 1999). The Turkey Creek drainage is primarily owned by private landowners, with only approximately 1.6 km (1 mi) of stream bank 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 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, populations of vermilion darters are meager and isolated within certain areas of Turkey Creek, due to natural or manmade barriers, like 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 increasing point-source pollution (pollution created from a single source, like sewage effluent) and nonpoint-source pollution (pollution created from larger processes and not from one concentrated point source, like excess sediment washing into a stream after a rain). Blanco and Mayden (1999) estimated the population size at more than 1,800 individuals,

based on the number of vermilion darters caught per fishing attempts and amount of time 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, within run habitats (stream zones with faster water), upstream at the foot of a run, and in the transition zone between a run/riffle (fast water) and pool (slow water) habitat (Blanco and Mayden 1999). This species is generally not found in deeper pool habitats. Vermilion darters are associated with aquatic vegetation such as *Potamogeton* spp., *Ceratophyllum* spp., and *Myriophyllum* spp. (Boschung *et al.* 1992). Vermilion darters are absent from habitats immediately downstream of impoundments and areas of point-source pollution (Blanco and Mayden 1999).

The only known spawning habitat for vermilion darters, at the confluence of Turkey Creek and the runoff from Tapawingo Springs (near the Highway 79 bridge), consists of a mixture of fine silt on small gravel interspersed with larger gravel, cobble, small boulders, vegetation, and occasional filamentous algae. Clean rock surfaces, as found here, are necessary for egg laying (Stiles, Samford University, Birmingham, Alabama, 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 *Ulocentra* species 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 and Blanco and

Mayden 1997). We received a petition 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 petition 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).

Section 4(b)(3)(B) of the Act requires that, for any petition to revise the Lists of Endangered and Threatened Wildlife and Plants that contains substantial scientific and commercial information, we make a finding within 12 months of the date of the receipt of the petition, on whether the action requested is (a) not warranted, (b) warranted, or (c) warranted but precluded from immediate proposal by other pending proposals of higher priority. This proposed rule constitutes our 12-month finding on the petitioned action.

The processing of this proposed rule conforms with our Listing Priority Guidance published in the **Federal Register** on October 22, 1999 (64 FR 57114). The guidance clarifies the order in which we will process rulemakings. Highest priority is processing emergency listing rules for any species determined to face a significant and imminent risk to its well-being (Priority 1). Second priority (Priority 2) is processing final determinations on proposed additions to the lists of endangered and threatened wildlife and plants. Third priority is processing new proposals to add species to the lists. The processing of administrative petition findings (petitions filed under section 4 of the Act) is the fourth priority. The processing of this proposed rule is a Priority 3 action.

#### Summary of Factors Affecting the Species

The procedures for adding species to the Federal Lists are found in section 4 of the Act (16 U.S.C. 1531 *et seq.*) and the accompanying regulations (50 CFR part 424). A species may be determined to be an endangered or a threatened species 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) 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, such as nitrogen and phosphorus, present), 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/or suffocate periphyton (organisms that live attached to objects underwater), disrupt aquatic insect communities, and negatively impact fish growth, survival, and reproduction (Waters 1995). 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. The amount and impact of sedimentation on the vermilion darter's habitat may be locally correlated with the land use practices such as construction, urbanization, and silviculture. 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), and all are considered highly erodible due to the steep topography (R. Goode, Natural Resources Conservation Service, Birmingham, Alabama, pers. comm. 1988). Urbanization has contributed significantly to siltation within the Turkey Creek watershed. The approximately 91-square kilometer (sq km) (35-square mile (sq mi)) Turkey Creek watershed drains 22,149 hectares (54,731 acres) of Jefferson County, the most populous county in the State. Blanchard *et al.* (1998) identified five specific nonpoint-source siltation sites that are currently impacting the Turkey Creek watershed, including a major road extension within 0.3 km (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). A proposed expansion of

the Jefferson County landfill, if implemented, would likely contribute to increased sedimentation of Turkey Creek.

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 Turkey Creek Waste Water Treatment Plant (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) 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 clean rock or gravel habitats necessary for vermilion darter feeding and spawning. Shepard *et al.* (1998) noted a thin veneer of algae, indicating eutrophic conditions (increased levels of nitrogen and phosphorus) in Turkey Creek at the town of Morris, 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).

The Alabama Department of Environmental Management has reported seven violations for the TCWWTP between April 1995 and March 1998 (Blanchard *in litt.* 1998). These violations were for daily maximum fecal coliform values of almost 2 to 4 times more than permit limits. With local human population growing in the area, the TCWWTP is expected to be at full capacity soon, discharging 11,355 cubic meters per day (3,000,000 gallons per day) (Blanchard, pers. comm. 1999). A fish kill in Turkey Creek in 1997 may have been caused by raw sewage released into the creek following a sewage line break and repair (Moss 1997). Blanco and Mayden (1999) attributed the absence of darters immediately downstream of the TCWWTP to chlorine in treated wastewater overflows. However,

chlorine sterilization of effluent (wastewater outflows) was recently replaced with ultraviolet light sterilization.

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 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 of vermilion darter habitat within the species' 11.6-km (7.2-mi) range in the Turkey Creek drainage between 1995 and 1998. Approximately 8.2 km (5.1 mi) of the lost vermilion darter habitat was associated with the TCWWTP; 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 in shallow riffles and pools in restricted portions of Turkey Creek. 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 overcollecting. 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; while to the west (downstream), there are

numerous commercial, residential, and reclaimed strip-mining 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 propose this rule. Based on this evaluation, the preferred 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 meager 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 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 essential to the conservation of the species and that may require special management considerations or protection; and specific areas outside the geographical area occupied by a species at the time it is listed in accordance with the provisions of section 4 of the Act, 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.

Critical habitat designation directly affects only Federal agency actions through consultation under section 7(a)(2) of the Act. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

Section 4(a)(3) of the Act, as amended, and 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—(1) the species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (2) such designation of critical habitat would not be beneficial to the species.

We propose that critical habitat is prudent for the vermilion darter. In the last few years, a series of court decisions have overturned Service determinations regarding a variety of species that designation of critical habitat would not be prudent (*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 remain 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 critical habitat would increase threats to a species, if any benefits would result from critical habitat designation, then a prudent finding is warranted. In the case of this species, designation of critical habitat may provide some benefits. The primary regulatory effect of critical habitat is the section 7 requirement that Federal agencies refrain from taking any action that destroys or adversely modifies critical habitat. While a critical habitat designation for habitat currently occupied by this species would not be likely to change the section 7 consultation outcome because an action

that destroys or adversely modifies such critical habitat would also be likely to result in jeopardy to the species, in some instances, section 7 consultation might be triggered only if critical habitat is designated. Examples could include unoccupied habitat or occupied habitat that may become unoccupied in the future. Some educational or informational benefits may result from designating critical habitat. Therefore, we find that critical habitat is prudent for the vermilion darter.

As explained in detail in the Final Listing Priority Guidance for FY2000 (64 FR 57114), our listing budget is currently insufficient to allow us to immediately complete all of the listing actions required by the Act. We anticipate in FY 2000 and beyond giving higher priority to critical habitat designation, including designations deferred pursuant to the Final Listing Priority Guidance for FY2000, such as the designation for this species, than we have in recent fiscal years. We plan to employ a priority system for deciding which outstanding critical habitat designations should be addressed first. We will focus our efforts on those designations that will provide the most conservation benefit, taking into consideration the efficacy of critical habitat designation in addressing the threats to the species, and the magnitude and immediacy of those threats. Deferral of the critical habitat designation for this species will allow us to concentrate our limited resources on higher priority critical habitat and other listing actions, while allowing us to put in place protections needed for the conservation of the vermilion darter without further delay. We will make the final critical habitat determination with the final listing determination for the vermilion darter. If this final critical habitat determination is that critical habitat designation is prudent, we will develop a proposal to designate critical habitat for this species as soon as feasible, considering our workload priorities.

#### 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, as amended, 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 any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act 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) 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.

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 agencies 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.

If the species is listed, we believe the following would not be likely 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 a violation of section 9 of the Act, if the vermilion darter was listed, 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 should the vermilion darter become 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, and/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 404/679-7313; facsimile 404/679-7081).

#### Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat (or lack thereof) to this species;

(2) The location of any additional populations of this species and the reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;

(3) Additional information concerning the range, distribution, and population size of this species; and

(4) Current or planned activities in the subject area and their possible impacts on this species.

We will take into consideration any comments and additional information received on this species when making a final determination regarding this proposal. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There also may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. 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.

In accordance with interagency policy published on July 1, 1994 (59 FR 34270), upon publication of this proposed rule in the **Federal Register**, we will solicit expert reviews by at least three specialists regarding pertinent scientific or commercial data and assumptions relating to the taxonomic, biological, and ecological information for the vermilion darter. The purpose of such a review is to ensure that listing decisions are based on scientifically sound data, assumptions, and analyses, including the input of appropriate experts. We will summarize the opinions of these reviewers in the final decision document. The final determination may differ from this proposal based upon the information we receive.

You may request a public hearing on this proposal. Your request for a hearing must be made in writing and filed within 45 days of the date of publication of this proposal in the **Federal Register**. Address your requests to the Field Supervisor (see **ADDRESSES** section).

#### Executive Order 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 the following: (1) Are the requirements of the rule clear? (2) Is the discussion of the rule in the Supplementary Information section of the preamble helpful to understanding

the rule? (3) What else could we do to make the rule easier to understand?

**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 Act. 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) (601/965-4900).

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

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, 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 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:

**§ 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	.....	NA	NA
*	*	*	*	*	*		*

Dated: April 5, 2000.  
**Jamie Rappaport Clark,**  
 Director, Fish and Wildlife Service.  
 [FR Doc. 00-9672 Filed 4-17-00; 8:45 am]  
**BILLING CODE 4310-55-P**