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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AH44

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

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), in cooperation with the States of Tennessee and Alabama and with Conservation Fisheries, Inc., a nonprofit organization, plan to reintroduce one federally listed endangered fish, the boulder darter (*Etheostoma wapiti*), and one federally listed threatened fish, the spotfin chub (*Cyprinella* (=Hybopsis) *monacha*), into their historical habitat in Shoal Creek (a tributary to the Tennessee River), Lauderdale County, Alabama, and Lawrence County, Tennessee. Based on the evaluation of species' experts, these species currently do not exist in this reach or its tributaries. These two fish are being reintroduced under section 10(j) of the Endangered Species Act of 1973, as amended (Act), and would be classified as a nonessential experimental population (NEP).

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

These reintroductions are recovery actions and are part of a series of reintroductions and other recovery actions that the Service, Federal and State agencies, and other partners are conducting throughout the species' historical ranges. This rule provides a plan for establishing the NEP and provides for limited allowable legal taking of the boulder darter and spotfin chub within the defined NEP area. In addition, we are changing the scientific name for spotfin chub, from *Cyprinella* (=Hybopsis) *monacha* to *Erimonax monachus*, to reflect a recent change in the scientific literature, and adding a map to the regulation for a previously created NEP including one of these fishes for the purposes of clarity.

DATES: The effective date of this rule is April 8, 2005.

ADDRESSES: Comments and materials received, as well as supporting documentation used in preparation of this final rule, are available for public inspection, by appointment, during normal business hours at the Tennessee Field Office, U.S. Fish and Wildlife Service, 446 Neal Street, Cookeville, TN 38501.

You may obtain copies of the final rule from the field office address above, by calling (931) 528-6481, or from our Web site at <http://cookeville.fws.gov>.

FOR FURTHER INFORMATION CONTACT: Timothy Merritt at the above address (telephone 931/528-6481, Ext. 211, facsimile 931/528-7075, or e-mail at timothy_merritt@fws.gov).

SUPPLEMENTARY INFORMATION:

Background

1. Legislative: Under section 10(j) of the Act, the Secretary of the Department of the Interior can designate reintroduced populations established outside the species' current range, but within its historical range, as ``experimental.'' Based on the best scientific and commercial data available, we must determine whether experimental populations are ``essential,'' or ``nonessential,'' to the continued existence of the species. Regulatory restrictions are considerably reduced under a Nonessential Experimental Population (NEP) designation.

Without the ``nonessential experimental population'' designation, the Act provides that species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act prohibits the take of an endangered species. ``Take'' is defined by the Act as harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or attempt to engage in any such conduct. Service regulations (50 CFR 17.31) generally extend the prohibitions of take to threatened wildlife. Section 7 of the Act outlines the procedures for Federal interagency cooperation to conserve federally listed species and protect designated critical habitat. It mandates that all Federal agencies use their existing authorities to further the purposes of the Act by carrying out programs for the conservation of listed species. It also states that Federal agencies will, in consultation with the Service, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 of the Act does not affect activities undertaken on private land unless they are authorized, funded, or carried out by a Federal agency.

With the experimental population designation, a population designated is treated for purposes of section 9 of the Act as threatened regardless of the species' designation elsewhere in its range. Threatened designation allows us greater discretion in devising management programs and special regulations for such a population. Section 4(d) of the Act allows us to adopt whatever regulations are necessary to provide for the conservation of a threatened species. In these situations, the general regulations that extend most section 9 prohibitions to threatened species do not apply to that species, and the special 4(d) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species. Regulations issued under section 4(d) for NEPs are usually more compatible with routine

human activities in the reintroduction area.

For the purposes of section 7 of the Act, we treat an NEP as a threatened species when the NEP is located within a National Wildlife Refuge or National Park, and section 7(a)(1) and the

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consultation requirements of section 7(a)(2) of the Act apply. Section 7(a)(1) requires all Federal agencies to use their authorities to conserve listed species. Section 7(a)(2) requires that Federal agencies, in consultation with the Service, insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. When NEPs are located outside a National Wildlife Refuge or National Park, we treat the population as proposed for listing and only two provisions of section 7 would apply--section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

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

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

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

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

Since the mid-1980s, Conservation Fisheries, Inc. (CFI), a nonprofit organization, with support from us, the Tennessee Wildlife Resources Agency (TWRA), U.S. Forest Service, National Park Service, Tennessee Valley Authority (TVA), and Tennessee Aquarium, has successfully translocated, propagated, and reintroduced the spotfin chub and three other federally listed fishes (smoky madtoms, yellowfin madtoms, and duskytail darters) into Abrams Creek, Great Smoky Mountains National Park, Blount County, Tennessee. These fish historically occupied Abrams Creek prior to an ichthyocide treatment in the 1950s. An NEP designation for Abrams Creek was not needed since the entire watershed occurs on National Park Service land, section 7 of the Act applies regardless of the NEP designation, and existing human activities and public use of the Creek are consistent with protection and take restrictions needed for the reintroduced populations. Natural reproduction by all four species in Abrams Creek has been documented, but the spotfin chub appears to be the least successful in this capacity (Rakes et al. 2001; Rakes and Shute 2002). We have also worked with CFI to translocate, propagate, and reintroduce these same four fish into an NEP established for a section of the Tellico River, Monroe County, Tennessee (67 FR 52420, August 12, 2002). Propagated fish of these four species were released into the Tellico River starting in 2003 and continuing in 2004. It is still too early to determine the success of these releases, but it is believed that the habitat and water quality is sufficient to ensure future success similar to the Abrams Creek reintroductions. CFI has also successfully propagated boulder darters and augmented the only known population of the species in the Elk River system in Tennessee.

Based on CFI's success and intimate knowledge of these two fishes and their habitat needs, we contracted with CFI to survey Shoal Creek in order to determine if suitable habitat exists in this creek for reintroductions, and if we could expand our ongoing fish recovery efforts to these waters (Rakes and Shute 1999). Rakes and Shute (1999) concluded that about 20 miles (32 km) of Shoal Creek above the backwaters of the Wilson Reservoir appeared to contain suitable reintroduction habitat for both fishes. The boulder darter and spotfin chub were last collected from Shoal Creek in the 1880s, and since then both were apparently extirpated from this reach. We believe the boulder darter was extirpated by the combined effects of water pollution and the impoundment of lower Shoal Creek with the construction of Wilson Dam (U.S. Fish and Wildlife Service 1989). We believe that similar factors led to the extirpation of the spotfin chub. However, as a result of implementation of the Clean Water Act by the U.S. Environmental Protection Agency (EPA) and State water and natural resources agencies, and the pollution control measures undertaken by municipalities, industries, and individuals, the creek's water quality has greatly improved and its resident fish fauna have responded positively (Charles Saylor, TVA, pers. comm. 2002; based on his bioassays).

3. Recovery Goals/Objectives: The boulder darter (*Etheostoma wapiti*) (Etnier and Williams 1989) was listed as an endangered species on September 1, 1988 (53 FR 33996). We completed a recovery plan for this species in July 1989 (U.S. Fish and Wildlife Service 1989). The downlisting (reclassification from endangered to threatened) objectives in the recovery plan are: (1) To protect and enhance the existing population in the Elk River and its tributaries, and to successfully establish a reintroduced population in Shoal Creek or other historical

habitat or discover an additional population so that at least two viable populations exist; and (2) to complete studies of the species' biological and ecological requirements and implement management strategies developed from

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these studies that have been or are likely to be successful. The delisting objectives are: (1) To protect and enhance the existing population in the Elk River and its tributaries, and to successfully establish reintroduced populations or discover additional populations so that at least three viable populations exist (the Elk River population including the tributaries must be secure from river mile (RM) 90 downstream to RM 30); (2) to complete studies of the species' biological and ecological requirements and implement successful management strategies; and (3) to ensure that no foreseeable threats exist that would likely impact the survival of any populations.

The spotfin chub (=turquoise shiner) (*Cyprinella* (=Hybopsis) *monacha*) (Cope 1868) was listed as a threatened species on September 9, 1977, with critical habitat and a special rule (42 FR 45526). The critical habitat map was corrected on September 22, 1977 (42 FR 47840). We completed a recovery plan for this species in November 1983 (U.S. Fish and Wildlife Service 1983). We also established an NEP for the spotfin chub and three other federally listed fishes for a section of the Tellico River in Monroe County, Tennessee, on August 12, 2002 (67 FR 52420). The delisting objectives in the recovery plan are: (1) To protect and enhance existing populations so that viable populations exist in the Buffalo River system, upper Little Tennessee River, Emory River system, and lower North Fork Holston River; (2) to ensure, through reintroduction and/or the discovery of two new populations, that viable populations exist in two other rivers; and (3) to ensure that no present or foreseeable threats exist that would likely impact the survival of any populations.

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

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

We previously established NEPs for the spotfin chub and three other federally listed fishes in the Tellico River, Tennessee, on August 12, 2002 (67 FR 52420). Reintroductions of the spotfin chub were initiated in the Tellico River in 2002 and were continued in 2003 and 2004 along with the first reintroductions of the remaining three fish species. These reintroduced fish are being monitored. We believe the Tellico River is suitable for the establishment of viable populations of each of these four fish and anticipate success as this recovery project proceeds. Establishment of viable populations of the spotfin chub in

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

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

According to P. Rakes (CFI, pers. comm. 2005), the best sites to reintroduce these fishes into Shoal Creek are between CM 33 (53 km) and CM 14 (22 km). Therefore, we plan to reintroduce the boulder darter and spotfin chub into historical habitat of the free-flowing reach of Shoal Creek between CM 33 and CM 14. This reach contains the most suitable habitat for the reintroductions. Neither species currently exists in Shoal Creek or its tributaries.

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

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

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

is not likely to jeopardize the continued existence of the species.

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

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

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

Critical habitat has been designated for the spotfin chub (42 FR 47840, September 22, 1977); however, the designation does not include this NEP area. Critical habitat has not been designated for the boulder darter. Section 10(j)(2)(C)(ii) of the Act states that critical habitat shall not be designated for any experimental population that is determined to be nonessential. Accordingly, we cannot designate critical habitat in areas where we have already established, by regulation, a nonessential experimental population.

8. Management: The aquatic resources in the reintroduction area are managed by the ADCNR and TWRA. Multiple-use management of these waters will not change as a result of the experimental designation. Private landowners within the NEP area will still be allowed to continue all legal agricultural and recreational activities. Because of the substantial regulatory relief provided by NEP designations, we do not believe the reintroduction of boulder darter and spotfin chub will conflict with existing human activities or hinder public use of the area. The ADCNR and the TWRA have previously endorsed the boulder darter and spotfin chub reintroductions under NEP designations and are supportive of this effort. The NEP designation will not require the ADCNR and the TWRA to specifically manage for reintroduced boulder darter and spotfin chub.

The Service, State employees, and CFI, Inc., staff will manage the

reintroduction. They will closely coordinate on reintroductions, monitoring, coordination with landowners and land managers, and public awareness, among other tasks necessary to ensure successful reintroductions of species.

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

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

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

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

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

(f) Public awareness and cooperation: On August 26, 1999, we mailed letters to 80 potentially affected congressional offices, Federal and State agencies, local

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governments, and interested parties to notify them that we were considering proposing NEP status in Shoal Creek for two fish species. We received a total of four responses to the 1999 notification, all of which supported our proposed designation and reintroductions.

The EPA supported the proposal, commended the ADCNR, TWRA, and us for the proposal and its projected beneficial results, and stated that the reintroductions would assist them in meeting one of the goals of the Clean Water Act--restoring the biological integrity of the Nation's water.

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

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

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

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

Finding

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

Other Changes to the Regulations

In addition, we are making two minor technical corrections to the existing regulations regarding these species:

(1) The spotfin chub was listed with critical habitat and a special rule on September 9, 1977, under the scientific name of *Hybopsis monacha*. The current list of endangered and threatened species at 50 CFR 17.11(h), the existing experimental population on the Tellico River in Tennessee at 50 CFR 17.84(m), and the critical habitat designation at 50 CFR 17.95(e) all use the scientific name *Cyprinella* (=Hybopsis) *monacha* for the spotfin chub. However, the special rule at 50 CFR 17.44(c) uses the scientific name *Hybopsis monacha* for the spotfin chub. In the proposed rule (69 FR 61774, October 21, 2004), we proposed correcting the text for the special rule at 50 CFR 17.44(c) by changing the scientific name for the spotfin chub from *Hybopsis monacha* to *Cyprinella* (=Hybopsis) *monacha* to make this section consistent with the text of the existing regulations for the spotfin chub. During the comment period, it was brought to our attention that the scientific

name for the spotfin chub has recently been changed to *Erimonax monachus* (Nelson et al. 2004). This name change has occurred in a peer-reviewed journal and has acceptance in the scientific community. Therefore we are correcting the text for the current list of endangered and threatened species at 50 CFR 17.11(h), the existing experimental population on the Tellico River in Tennessee at 50 CFR 17.84(m), the critical habitat designation at 50 CFR 17.95(e), and the special rule at 50 CFR 17.44(c) by changing the scientific name for the spotfin chub from *Cyprinella* (=Hybopsis) *monacha* to *Erimonax monachus* (see Regulation Promulgation section below).

(2) Unlike many of the existing experimental population regulations at 50 CFR 17.84, the entries for the experimental populations for the Tellico River in Tennessee at 50 CFR 17.84(e) and (m) do not include a map. We are adding a map for these entries in order to provide clarity for the public and make this section consistent with the text of the existing regulations for other experimental populations.

Summary of Comments and Recommendations

In the October 21, 2004, proposed rule (69 FR 61774), we requested that all interested parties submit comments or information concerning the proposed NEP. We contacted appropriate Federal, State, and local agencies, county governments, elected officials, scientific organizations, and other interested parties and invited them to comment on the proposed NEP. We also provided notification of this document through e-mail, telephone calls, letters, and news releases faxed and/or mailed to affected elected officials, media outlets, local jurisdictions, and interest groups. We provided the document on the Service's Tennessee Field Office Internet site following its release.

During the public comment period, we received comments from four parties: One State agency, two universities, and one nonprofit organization. Of the four parties responding, three supported the proposed NEP and one was neutral. The Alabama Department of Conservation and Natural Resources submitted comments as peer reviewers. The State agency's comments are reflected in Peer Review Comment 1 and 2 below.

In conformance with our policy on peer review, published on July 1, 1994 (59 FR 34270), we solicited independent opinions from four knowledgeable individuals who have expertise with these species within the geographic region where the species occurs, and/or familiarity with the principles of conservation biology. We received comments from two of the four peer reviewers. These are included in the summary below and incorporated into this final rule.

We reviewed all comments received from the peer reviewers and the public for substantive issues and new information regarding the proposed NEP. Substantive comments received during the comment period have either been addressed below or incorporated directly into this final rule. The comments are grouped below as either peer review or public comments.

Peer Review Comments

(1) Comment: The proposed reintroduction is for Shoal Creek in Lauderdale County, Alabama; however, there is another Shoal Creek in Limestone County, Alabama, that is a tributary to the Elk River. Limestone County is adjacent to Lauderdale County and a recent survey by the Geological Survey of Alabama collected two boulder darters in this Shoal Creek, which was a new tributary record for this species. Because there are two creeks named ``Shoal'' in adjacent counties, it might help to differentiate between the two creeks to lessen any

potential confusion.

Response: We have clarified the description of the Shoal Creek in Lauderdale County, Alabama, that occurs within the NEP by stating that this Shoal Creek is a tributary to the Tennessee River. The Shoal Creek in Limestone County, Alabama, is a tributary to the Elk River. This, along with the county it occurs in, should adequately differentiate between the two creeks.

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(2) Comment: Section 5 of the proposed rule states that artificially propagated juveniles will most likely be reintroduced, but wild adult stock could also be used. The literature states that adult and juvenile spotfin chubs require slightly different habitats, thus reintroduction with juveniles should be done to account for those differences.

Response: It is our intent to release primarily juvenile spotfin chubs that have been raised by CFI. We have worked closely with CFI to determine the appropriate habitats for releasing these juvenile fish. If we do release any wild adult stock, we will work with CFI and the State Wildlife Agencies to ensure that the appropriate habitat is identified for their release.

(3) Comment: The newest names list for fish has been released and the scientific name of the spotfin chub has been changed to *Erimonax monachus*.

Response: We have reviewed the reference provided and concur that the scientific name of the spotfin chub has changed from *Cyprinella* (=Hybopsis) *monacha* to *Erimonax monachus*. We have made the appropriate changes in the section titled ``Other Changes to the Regulations'' (see above).

(4) Comment: The Etnier and Williams 1989 description of the boulder darter was cited, but does not appear in the Literature Cited section.

Response: This citation has been added to the Literature Cited section.

(5) Comment: Boulder darters may be able to use reservoirs for dispersal purposes, and success of this introduction might make it easier for them to reach the mouth of the Flint River or perhaps some other fairly large Tennessee River tributaries in Alabama.

Response: We believe that the reservoirs will act as barriers to the species' downstream movement into the Tennessee River and its tributaries and will ensure that this NEP remains geographically isolated and easily distinguishable from existing known wild populations in the Elk River watershed. However, we also state that if any of the reintroduced boulder darters or spotfin chubs move outside the designated NEP area, then the fish would be considered to have come from the NEP area. In that case, we may propose to amend the rule and enlarge the boundaries of the NEP area to include the entire range of the expanded populations.

Public Comments

(6) Comment: Environmental Defense fully supports the proposal to establish new experimental populations of the boulder darter and the spotfin chub.

Response: We appreciate Environmental Defense's support of this important recovery effort to restore these fish back into this portion of their historical range.

(7) Comment: No source population for brood stock or wild adult stock is identified in the proposed rule for the spotfin chub.

Response: The Service has not identified the source population for the spotfin chub because no decision has been made at this time on which source population should be used. A final decision will be made in concert with our State partners once we have reviewed the best available scientific information.

(8) Comment: No protocol is outlined to determine if progeny from brood stock reflects the genetic diversity present in the source population.

Response: CFI states that it takes as many adults from the source population as the Federal and State agencies believe is appropriate to remove without harming the source population and within limits of practicality. CFI also states that it ensures that as many adults as possible are involved in reproduction. This sometimes involves cycling different males in and out of production. CFI emphasizes the importance of these reintroductions being long-term projects where new parental stock is brought into production every year or two from the original source population. We believe that this method maximizes our potential to have offspring that have similar genetic diversity to the source population and increases the recovery chances for these species within the limited amount of funding that Federal and State agencies have available to them.

Effective Date

We are making this rule effective upon publication. In accordance with the Administrative Procedure Act, we find good cause as required by 5 U.S.C. 553(d)(3) to make this rule effective immediately upon publication in the Federal Register. We currently have two year classes of propagated boulder darters available for release. The juvenile class of boulder darters will be ready to spawn this spring for the first time. In order for this group of boulder darters to have the maximum amount of time to accomplish their first spawn, these fish need to be placed into Shoal Creek in April. The earlier in April these fish can be released, the more likely they are to spawn this spring. The older class of boulder darters are at the end of their spawning lives and must be placed into Shoal Creek by early May in order to ensure that they will have a chance to successfully spawn one last time in the wild. The 30-day delay would be contrary to the public interest because it would result in a loss of spawning for the first-time juvenile class and the last-time older class, and this would result in natural spawning not occurring in Shoal Creek until the spring of 2006.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

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

We do not expect this rule to have significant impacts to existing human activities (e.g., agricultural activities, forestry, fishing,

boating, wading, swimming, trapping) in the watershed. The reintroduction of these federally listed species, which will be accomplished under NEP status with its associated regulatory relief, is not expected to impact Federal agency actions. Because of the substantial regulatory relief, we do not believe the proposed reintroduction of these species will conflict with existing or proposed human activities or hinder public use of Shoal Creek or its tributaries.

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

This rule will not materially affect entitlements, grants, user fees, or loan

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programs, or the rights and obligations of their recipients. Because there are no expected impacts or restrictions to existing human uses of Shoal Creek as a result of this rule, no entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients are expected to occur.

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

Regulatory Flexibility Act

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

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule will not have an annual effect on the economy of \$100 million or more. It will not cause a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions. This rule does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. The intent of this special rule is to facilitate and continue the existing commercial activity while providing for the conservation of the species through reintroduction into suitable

habitat.

Unfunded Mandates Reform Act

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

Takings (E.O. 12630)

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

A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule will substantially advance a legitimate government interest (conservation and recovery of two listed fish species) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

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

maintain the existing relationship between the States and the Federal Government and is being undertaken at the request of State agencies (ADCNR and TWRA). We have cooperated with the ADCNR and TWRA in the preparation of this rule. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment pursuant to the provisions of Executive Order 13132.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and that it meets the requirements of sections (3)(a) and (3)(b)(2) of the Order.

Paperwork Reduction Act

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) require that Federal agencies obtain approval from OMB before collecting information from the public. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid control number. This rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

National Environmental Policy Act

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

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations

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with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior Manual Chapter 512 DM 2, we have evaluated possible effects on federally recognized Indian tribes and have determined that there are no effects.

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

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Literature Cited

Etnier, D.A., and J.D. Williams. 1989. *Etheostoma* (Nothonotus) *wapiti* (Osteichthyes: Percidae), a new darter from the southern bend of the Tennessee River system in Alabama and Tennessee. *Proceedings of the Biological Society of Washington* 102:987-1000

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Rakes, P.L., and J.R. Shute. 1999. Results of assays of portions of the French Broad River, Sevier and Knox Counties, Tennessee, and Shoal Creek, Lawrence and Wayne Counties, Tennessee and Lauderdale Counties, Alabama, for suitable habitat to support reintroduction of rare fishes. Unpublished report prepared by Conservation Fisheries, Inc., Knoxville, Tennessee, for the U.S. Fish and Wildlife Service, Asheville, North Carolina. 26 pp.

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U.S. Fish and Wildlife Service. 1983. Spotfin Chub Recovery Plan. Atlanta, GA. 46 pp.----- 1989. Boulder Darter Recovery Plan. Atlanta, GA. 15 pp.

Author

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

List of Subjects in 50 CFR Part 17

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

Final Regulation Promulgation

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

PART 17--[AMENDED]

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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.

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2. Amend Sec. 17.11(h) by revising the existing entries in the List of Endangered and Threatened Wildlife under FISHES for ``Chub, spotfin,`` and ``Darter, boulder,`` to read as follows:

Sec. 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

----- Species -----			
Common name		Scientific name	Historic range

Fishes			* * * * *
			* * * * *
Chub, spotfin..... (=turquoise shiner).....	Erimonax monachus...	U.S.A. (AL, GA, NC, TN, VA).	Enti lis exp pop Tell the the Res Tel 19 ups Riv km) Cou

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Sec. 17.44 [Amended]

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3. Amend Sec. 17.44(c) introductory text by removing the words
``spotfin chub (*Hybopsis monacha*)'' and adding, in their place, the
words ``spotfin chub (*Erimonax monachus*)''.

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4. Amend Sec. 17.84 by adding new paragraphs (e)(6), revising the
introductory text to paragraph (m), and adding new paragraphs (m)(5)
and (o) including maps to read as follows:

Sec. 17.84 Special rules--vertebrates.

* * * * *

(e) * * *

(6) Note: Map of the NEP area for the yellowfin madtom in the
Tellico River, Tennessee, appears immediately following paragraph
(m)(5) of this section.

* * * * *

(m) Sptofin chub (=turquoise shiner) (*Erimonax monachus*), duskytail
darter (*Etheostoma percnurum*), smoky madtom (*Noturus baileyi*).

* * * * *

(5) Note: Map of the NEP area for spotfin chub, duskytail
darter, smoky madtom, and and yellowfin madtom (see paragraph (e) of
this section) in Tennessee follows:

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[GRAPHIC] [TIFF OMITTED] TR08AP05.002

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(o) Spotfin chub (=turquoise shiner) (*Erimonax monachus*), boulder
darter (*Etheostoma wapiti*).

(1) Where are populations of these fishes designated as

nonessential experimental populations (NEP)?

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

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

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

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

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

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

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

(iii) You may not possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever any of the identified fishes, or parts thereof, that are taken or possessed in violation of paragraph (o)(3) of this section or in violation of the applicable State fish and wildlife laws or regulations or the Act.

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

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

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

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[GRAPHIC] [TIFF OMITTED] TR08AP05.003

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5. Amend Sec. 17.95(e) by removing the words ``SPOTFIN CHUB (Cyprinella (=Hybopsis) monacha)'' and adding, in their place, the words ``SPOTFIN CHUB (Erimonax monachus)''.

Dated: April 1, 2005.

Craig Manson,
Assistant Secretary for Fish and Wildlife and Parks.
[FR Doc. 05-7086 Filed 4-7-05; 8:45 am]

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