revenue carloads terminating in any state in any of the 3 preceding years.

Number of Respondents: 50.

Estimated Time per Response: 75 minutes.

Frequency: 7 respondents report monthly; 43 report quarterly.

Total Burden Hours (annually including all respondents): 320 hours.

Total "*Non-hour Burden*" *Cost:* No "non-hour cost" burdens associated with this collection have been identified.

Needs and Uses: The Surface Transportation Board is, by statute, responsible for the economic regulation of common carrier rail transportation in the United States and it is authorized to collect information about rail costs and revenues under 49 U.S.C. 11144 and 11145. Under 49 CFR 1244, a railroad is required to file Waybill Sample information for all line-haul revenue waybills terminating on its lines if it did one of the following: (a) Terminated at least 4,500 revenue carloads in any of the 3 preceding years; or (b) terminated at least 5% of the revenue carloads terminating in any state in any of the 3 preceding years. The information in the Waybill Sample is used by the Board, other Federal and state agencies, and industry stakeholders to monitor traffic flows and rate trends in the industry, and to develop evidence in Board proceedings.

The expanded information gathered from this proposed rule would permit the Board to assess more accurately TIH traffic within the United States, and specifically would be beneficial in Three-Benchmark rail rate cases involving TIH traffic. In those cases, the parties would have more data to draw upon when forming their comparison groups; therefore, the parties could construct comparison groups that would be more comparable to the issue traffic. The additional information would also assist the Board in quantifying the magnitude of TIH traffic, and would help the Board more accurately measure the associated costs of handling such traffic.

Retention Period: Information in this report will be maintained on the Board's Web site for a minimum of 1 year and will be otherwise maintained permanently.

[FR Doc. 2010–2150 Filed 2–1–10; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R4–ES–2008–0071; 92220–1113–0000–C6]

RIN 1018—AW07

Endangered and Threatened Wildlife and Plants; Proposed Reclassification of the Okaloosa Darter From Endangered to Threatened and Proposed Special Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to reclassify the Okaloosa darter (*Etheostoma okaloosae*) from endangered to threatened under the authority of the Endangered Species Act of 1973, as amended (Act). The endangered designation no longer correctly reflects the current status of this fish due to a substantial improvement in the species' status. This proposed action is based on a thorough review of the best available scientific and commercial data, which indicates a substantial reduction in threats to the species, significant habitat restoration in most of the species' range, and a stable or increasing trend of darters in all darter stream systems. We also propose a special rule under section 4(d) of the Act. This special rule would allow Eglin Air Force Base to continue activities, with a reduced regulatory burden, and would provide a net benefit to the Okaloosa darter. We are seeking information, data and comments from the public on this proposal.

DATES: To ensure that we are able to consider your comments on this proposed rule, they must be received on or before April 5, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by March 19, 2010.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments to Docket No. FWS–R4–ES–2008–0071.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R4–ES–2008–0071; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Don Imm, Deputy Field Supervisor, U.S. Fish and Wildlife Service, Panama City Field Office, 1601 Balboa Ave., Panama City, FL 32405; telephone (850) 769–0552. Individuals who are hearing-impaired or speech-impaired may call the Federal Information Relay Service at (800) 877–8339 for TTY assistance 24 hours a day, 7 days a week.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

To ensure that any final action resulting from this proposed rule will be as accurate and as effective as possible, we request that you send relevant information for our consideration. The comments that will be most useful and likely to influence our decisions are those that are supported by data or peer-reviewed studies and those that include citations to, and analyses of, applicable laws and regulations. Please make your comments as specific as possible and explain the basis for them. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you reference or provide. In particular, we seek comments concerning the following:

(1) Biological, trade, or other relevant data concerning any threat (or lack thereof) to the Okaloosa darter, including whether or not climate change is a threat to the Okaloosa darter;

(2) The location of any additional populations of the Okaloosa darter;

(3) Additional information concerning the range, distribution, and population size and population trends of the Okaloosa darter;

(4) Current or planned activities within the geographic range of the Okaloosa darter that may impact or benefit the species including the proposed toll bypass road; and

(5) Activities relevant to Okaloosa darter and its habitat that are proposed for inclusion in the special rule under section 4(d) of the Act (16 U.S.C. 1531 *et seq.*).

Please note that submissions merely stating support for or opposition to the action under consideration without providing supporting information, although noted, will not be considered in making a determination, as section 4(b)(1)(A) of the Act directs that a determination as to whether any species is a threatened or endangered species must be made "solely on the basis of the best scientific and commercial data available."

Prior to issuing a final rule on this proposed action, we will take into consideration all comments and any additional information we receive. Such information may lead to a final rule that differs from this proposal. All comments and recommendations, including names and addresses, will become part of the administrative record.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. Please note that comments posted to this Web site are

not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publically viewable until we post it, which might not occur until several days after submission.

If you mail or hand-deliver a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. To ensure that the electronic docket for this rulemaking is complete and all comments we receive are publicly available, we will post all hardcopy submissions on *http://www.regulations.gov.*

In addition, comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection in two ways:

(1) You can view them on *http://www.regulations.gov.* In the Search Documents box, enter, FWS–R4–ES–2008–0071, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, select the type of documents you want to view under the Document Type heading.

(2) You can make an appointment during normal business hours to view the comments and materials in person at the U.S. Fish and Wildlife Service, Panama City Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearing

Section 4(b)(5)(E) of the Act provides for one or more public hearings on this proposal, if requested. We must receive requests for public hearings, in writing, at the address shown in **FOR FURTHER INFORMATION CONTACT** section by the date shown in the **DATES** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** at least 15 days before the first hearing.

Previous Federal Action

We proposed listing the Okaloosa darter as endangered on January 15, 1973 (38 FR 1521) and listed the species as endangered under the Act on June 4, 1973 (38 FR 14678) due to its extremely limited range, habitat degradation, and apparent competition from a possibly introduced related species, the brown darter. We completed a recovery plan for the species on October 23, 1981, and a revised recovery plan on October 26, 1998.

On June 21, 2005, we provided notice in the **Federal Register** that we were initiating a 5-year status review under the Act for the Okaloosa darter (70 FR 35689). In that notice, we specifically requested information on:

(1) The status of the Okaloosa darter in areas outside the boundaries of Eglin Air Force Base (AFB), Florida;

(2) Threats to the species and its habitat, including the areas in the Turkey Creek, Swift Creek, and East Turkey Creek watersheds outside the boundaries of Eglin AFB; and

(3) Conservation measures in these same areas that may have benefited the Okaloosa darter.

The 5-year status review was completed in July 2007, and is available on our Web site at *http://www.fws.gov/southeast/5yearReviews/5yearreviews/okaloosa_darterfinal.pdf.*

Background

The Okaloosa darter, *Etheostoma okaloosae,* is a member of the family Percidae. It is a small, perch-like fish (maximum size is 49 millimeters (mm) (1.93 inches (in.)) Standard Length) that is characterized by a well-developed humeral spot, a series of five to eight rows of small spots along the sides of the body, and the first anal spine being longer than the second. General body coloration varies from red-brown to green-yellow dorsally, and lighter ventrally, although breeding males have a bright orange submarginal stripe on the first dorsal fin (Burkhead *et al.* 1992, p. 23).

The Okaloosa darter is known to occur in only six clear stream systems that drain into two Choctawhatchee Bay bayous in Walton and Okaloosa Counties in northwest Florida. They have been found only in the tributaries and main channels of Toms, Turkey, Mill, Swift, East Turkey, and Rocky Creeks. Approximately 90 percent of the 457 square kilometer (176 square mile) watershed drainage area is under the management of Eglin AFB, and we estimate that 98.7 percent of the darter's extant range is within the boundaries of Eglin AFB. The remainder of the watershed and extant range is within the urban complex of the Cities of Niceville and Valparaiso (USAF 2006, p. 3–1).

Longleaf pine-wiregrass-red oak sandhill communities dominate the vegetation landscape in Okaloosa darter watershed basins. These areas are characterized by high sand ridges where soil nutrients are low and woodland fire is a regular occurrence. Where water seeps from these hills, acid bog communities of *Sphagnum* sp. (sphagnum moss), *Sarracenia* sp. (pitcher plants), and other plants adapted to low nutrient soils develop. In other areas, the water emerges from seepage springs directly into clear flowing streams where variation of both temperature and flow is moderated by the deep layers of sand. The streams support a mixture of *Mayaca fluviatilis* (bog moss), *Scirpus etuberculatus* (bulrush), *Orontium aquaticum* (golden club), *Sparganium americanum* (burr-weed), *Potamogeton diversifolius* (pondweed), *Eleocharis* sp. (spikerush), and other aquatic and emergent plants.

Okaloosa darters typically inhabit the margins of moderate to fast flowing streams where detritus, root mats, and vegetation are present. Historic densities averaged about two darters per meter (3.28 feet) of stream length while more recent abundance estimates show an increase to an average of 2.9 darters per meter (Jordan and Jelks 2004, p. 3; USAF 2006, p. 3–1). They have not been collected in areas where there is no current or in open sandy areas in the middle of the stream channel. The creeks with Okaloosa darters are generally shaded over most of their courses, with temperatures ranging from 20° to 22° Celsius (68° to 72° Fahrenheit) in the winter (Tate 2008, pers. comm.) to 22° to 24° Celsius (72° to 75° Fahrenheit) in the summer (Mettee and Crittenden 1977, p. 5).

Okaloosa darters feed primarily on fly larvae (*Diptera* sp.) mayfly nymphs (*Ephemeroptera* sp.), and caddis fly (*Trichoptera* sp.) larvae (Ogilvie 1980, as referenced in Burkhead *et al.* 1992, p. 26). The breeding season extends from late March through October, although it usually peaks in April. Spawning pairs have been videographed attaching one or two eggs to vegetation, and observed attaching eggs to woody debris and root mats (Collete and Yerger 1962, p. 226; Burkhead *et al.* 1994, p. 81). Ogilvie (1980, as referenced in Burkhead *et al.* 1992, p. 26) found a mean of 76 ova (unfertilized eggs) and 29 mature ova in 201 female Okaloosa darters, although these numbers may underrepresent annual fecundity as the prolonged spawning season is an indication of

fractional spawning (eggs develop and mature throughout the spawning season). Estimates of longevity range from 2 to 4 years (Burkhead *et al.* 1992, p. 27; Tate 2008, pers. comm.).

Recovery

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of threatened and endangered species unless we determine that such a plan will not promote the conservation of the species. The Act directs that, to the maximum extent practicable, we incorporate into each plan:

(1) Site-specific management actions that may be necessary to achieve the plan's goals for conservation and survival of the species;

(2) Objective, measurable criteria, which when met would result in a determination, in accordance with the provisions of section 4 of the Act, that the species be removed from the list; and

(3) Estimates of the time required and cost to carry out the plan.

However, revisions to the list (adding, removing, or reclassifying a species) must reflect determinations made in accordance with sections 4(a)(1) and 4(b) of the Act. Section 4(a)(1) requires that the Secretary determine whether a species is threatened or endangered (or not) because of one or more of five threat factors. Therefore, recovery criteria must indicate when a species is no longer threatened or endangered by any of the five factors. In other words, objective, measurable criteria, or recovery criteria, contained in recovery plans must indicate when an analysis of the five threat factors under 4(a)(1) would result in a determination that a species is no longer threatened or endangered. Section 4(b) requires the determination made under section 4(a)(1) as to whether a species is threatened or endangered because of one or more of the five factors be based on the best available science.

Thus, while recovery plans are intended to provide guidance to the Service, states, and other partners on methods of minimizing threats to listed species and on criteria that may be used to determine when recovery is achieved, they are not regulatory documents and cannot substitute for the determinations and promulgation of regulation required under section 4(a)(1). Determinations to remove a species from the list made under section 4(a)(1) must be based on the best scientific and commercial data available at the time of the determination, regardless of whether that information differs from the recovery plan.

In the course of implementing conservation actions for a species, new information is often gained that requires recovery efforts to be modified accordingly. There are many paths to accomplishing recovery of a species, and recovery may be achieved without all criteria being fully met. For example, one or more criteria may have been exceeded while other criteria may not have been accomplished, yet the Service may judge that, overall, the threats have been minimized sufficiently, and the species is robust enough, to reclassify the species from endangered to threatened or perhaps delist the species. In other cases, recovery opportunities may have been recognized that were not known at the time the recovery plan was finalized. These opportunities may be used instead of methods identified in the recovery plan.

Likewise, information on the species may be learned that was not known at the time the recovery plan was finalized. The new information may change the extent that criteria need to be met for recognizing recovery of the species. Overall, recovery of species is a dynamic process requiring adaptive management, planning, implementing, and evaluating the degree of recovery of a species that may, or may not, fully follow the guidance provided in a recovery plan.

Thus, while the recovery plan provides important guidance on the direction and strategy for recovery, and indicates when a rulemaking process may be initiated, the determination to remove a species from the Federal List of Endangered and Threatened Species is ultimately based on an analysis of whether a species is no longer threatened or endangered. The following discussion provides a brief review of recovery planning for the Okaloosa darter as well as an analysis of the recovery criteria and goals as they relate to evaluating the status of the species.

The recovery plan for the Okaloosa darter was approved on October 23, 1981 (Service 1981, 18 pp.) and revised on October 26, 1998 (Service 1998, 42 pp.). The recovery plan identifies a recovery objective of downlisting, and eventually delisting, the Okaloosa darter by enabling wild populations capable of coping with natural habitat fluctuations to persist indefinitely in the six stream systems they inhabit by restoring and protecting stream habitat, water quality, and water quantity. The Okaloosa darter may be considered for reclassification from endangered to threatened (downlisted) when:

(1) Instream flows and historical habitat of stream systems have been protected through management plans, conservation agreements, easements or acquisitions or both;

(2) Eglin AFB has and is implementing an effective habitat restoration program to control erosion from roads, clay pits, and open ranges;

(3) The Okaloosa darter population is stable or increasing and comprised of two plus age-classes in all six stream systems for 5 consecutive years;

(4) The range of the Okaloosa darter has not decreased at all historical monitoring sites; and

(5) No foreseeable threats exist that would impact the survival of the species.

For more information on the recovery plan for the Okaloosa darter, a copy of the plan is posted on our Web site at *http://ecos.fws.gov/docs/recovery_plan/970407.pdf.*

Each of the above criteria for downlisting the Okaloosa darter to threatened has been met, as described below. Additionally, the level of protection currently afforded to the species and its habitat and the current status of threats are outlined in the Summary of Factors Affecting the Species section below.

Downlisting Criterion (1): Instream Flows and Historical Habitat of Stream Systems Have Been Protected Through Management Plans, Conservation Agreements, Easements or Acquisitions or Both

Water quality, water quantity and stream habitat have been adequately protected or restored for the Okaloosa darter. The Okaloosa darter's extant range occurs almost exclusively (98.7 percent) within the boundaries of Eglin AFB. This affords the species considerable protections from development and large-scale habitat disturbances. Eglin AFB is implementing an effective habitat restoration program to control erosion from roads, borrow pits (areas where materials like sand or gravel are removed for use at another location), and cleared test ranges. Since 1995, Eglin AFB has restored 317 sites covering 196.2 hectares (ha) (484.8 acres (ac)) that were eroding into Okaloosa darter streams. All 38 borrow pits within Okaloosa darter drainages are now stabilized (59.3 ha; 146.5 ac) (USAF 2005, p. 3–18). The other 279 sites (136.9 ha; 338.3 ac) included in the total area are characterized as non-point sources (pollution created from larger processes and not from one concentrated point source, like excess sediment from a construction site washing into a stream after a rain) of stream sedimentation. Eglin AFB

estimates that these efforts have reduced soil loss from roughly 69,000 tons/year in darter watersheds in 1994 to approximately 3,000 tons/year in 2004 (Pizzalotto 2005, pers. comm.). As of 2006, Eglin AFB had completed about 95 percent of the erosion control projects identified for the darter watersheds (USAF 2006, p. 3–5). Restoration activities began earlier in the Boggy Bayou drainages. Accordingly, darter numbers increased in the Boggy Bayou drainages earlier than in the Rocky Bayou drainages. Increases in darter numbers over the past 10 years generally track the cumulative area restored in that timeframe (Jordan and Jelks 2004, p. 9).

Many road crossing structures have been eliminated as part of Eglin AFB's restoration activities. Of the 152 road crossings that previously existed in Okaloosa darter drainages, 57 have been eliminated: 28 in Boggy Bayou streams, and 29 in Rocky Bayou streams. Most of these were likely barriers to fish passage or problems for stream channel stability, and removing them has improved habitat and reduced population fragmentation. Of the remaining 95 road crossings, we have determined that 21 are barriers to fish passage. Many of these are culverts with the downstream end perched above the stream bed, precluding the upstream movement of fish during normal and low-flow conditions. Ten of the 21 barriers are of little to no adverse consequence to darter habitat connectivity because they occur on the outskirts of the current range or immediately adjacent to another barrier or impoundment. However, darters downstream of the 11 remaining barriers cannot move upstream during normal and low-flow conditions.

Impoundments may also fragment darter habitat and populations. Like road-crossing barriers to passage, many of the 32 impoundments within the darter's range are located within reaches from which darters are extirpated or are near the margins of the extant range. Only three impoundments, one each in the Toms Creek, Turkey Creek, and Rocky Creek basins, separate more than 1 kilometer (km) (0.62 miles (mi)) of stream from the rest of the stream network in the basin.

In FY 2007, Eglin AFB restored portions of Mill Creek. Staff from Eglin Natural Resources, the Eglin golf course, and the Service determined that it was feasible to restore all impoundments upstream of Plew Lake, the largest impoundment on the system, to free-flowing streams and to remove all but one of the culverts that convey the stream underneath fairways on the golf course. The Service prepared the designs for the restoration, and Eglin AFB and Florida Fish and Wildlife Conservation Commission (FWC) secured funding for the work, which was completed in May 2007. Present in the smallest of the six darter watersheds, the darter population in Mill Creek is probably most vulnerable to extirpation. We anticipate that restoration at Mill Creek will secure a viable population in this system. Eglin and FWC also secured funding for removal of the abandoned railroad crossing of Little Rocky Creek and completed the removal in May 2007. These two projects eliminated five fish passage barriers and three impoundments, restoring approximately 3 km (1.8 mi) of stream habitat. Accomplishments have been made in recovering Okaloosa darter habitat, and the Service continues to work with Eglin AFB, the City of Niceville, and Okaloosa and Walton Counties to restore additional habitat through the removal and replacement of road crossings and impoundments throughout the darter's range.

The management plans of several agencies apply to streams in the range of the Okaloosa darter and are being implemented to protect this fish's water quality and quantity and its overall habitat. Probably the most influential of these is Eglin's Integrated Natural Resource Management Plan (INRMP) (USAF 2007), including the Final Threatened and Endangered Species Component Plan (USAF 2006). The INRMP is updated every 5 years in consultation with the Service and FWC (see Factor D. under the Summary of Factors Affecting the Species section below for further detail and description of Department of Defense (DOD) protections, and the Available Conservation Measures section for Endangered Species Act protections). The INRMP defines goals and specific objectives for managing natural resources on the base. The primary goal of Okaloosa darter management on Eglin AFB is to provide the highest level of capability and flexibility to the military testing and training mission while meeting the legal requirements of the Endangered Species Act, Clean Water Act (33 U.S.C. 1251 *et seq.*), and other applicable laws. Another goal of the 2007 INRMP is to maintain or restore hydrologic processes in streams, floodplains, and wetlands when feasible. The specific objectives of Okaloosa darter management on Eglin AFB include:

(1) Downlist the Okaloosa darter from endangered to threatened by the end of 2007 and delist the darter by the end of 2012;

(2) Complete the restoration of Mill Creek for Okaloosa darter by 2008;

(3) Annually restore 2 fish passage barriers from the 20 identified sites in Okaloosa darter drainages as funding allows;

(4) Develop a public information and awareness program for threatened and endangered species on Eglin AFB that have greater potential to be impacted by public activities, such as Okaloosa darters;

(5) Complete a program by 2010 that would include an A3 class (combined with Endangered Species Act class), informational brochures, and portable display boards;

(6) Cooperate with the City of Niceville, Okaloosa County, and private landowners adjacent to Eglin AFB to recover the Okaloosa darter;

(7) Identify and rehabilitate 150 soil erosion sites that have the potential to impact threatened and endangered species (Gulf sturgeon and Okaloosa darter) habitat by 2011; and

(8) Train and use Okaloosa darter monitoring crews and aquatic monitoring crews to survey and report the presence of invasive nonnative plants and animals during their regular monitoring activities and treat invasive nonnative plants as necessary.

In 2005, the Service, Eglin's Natural Resources Branch, the Nature Conservancy, and the FWC signed an agreement to cooperate in the stewardship of aquatic systems on lands of the Gulf Coastal Plain Ecosystem Partnership (GCPEP) in western Florida. GCPEP's Aquatic Team agreed to initially assign priority to strategies and projects that contribute to the recovery of the Okaloosa darter. We are working with GCPEP to use stream restoration techniques and management actions that have been established for Okaloosa darter watersheds on partner lands.

The Three Rivers Resource Conservation and Development Council is a nonprofit organization set up to conserve the natural resources for, and to improve the overall economic condition of, rural and urban citizens. The Council is composed of representatives from the county Commissions and Soil and Water Conservation Districts, and includes three members at large from Escambia, Santa Rosa, Okaloosa, Walton, Bay, Washington, and Holmes Counties in Florida. The Council has developed an Area Plan (2003–2008) which includes:

(1) A natural resources goal of encouraging proper management use and protection of the natural resource base;

(2) An objective to assist local military bases in conservation planning efforts;

(3) A strategy to continue a non-point project to control erosion with Eglin AFB; and

(4) Several projects funded for 2008 that will assist with Okaloosa darter restoration.

The Florida Department of Environmental Protection (DEP) (2003) classifies all streams in the range of the Okaloosa darter as Class III waters for administration of the Clean Water Act. Class III waters are used for recreation, propagation, and maintenance of a healthy, well-balanced population of fish and wildlife. Although no streams in the Okaloosa darter's range are designated as impaired in DEP's 2003 Basin Status Report, six stream segments are on the "3c planning list," which means that "enough data and information are present to determine that one or more designated uses may not be attained according to the Planning List methodology." The six segments are:

(1) Anderson Branch (Turkey Creek tributary);

(2) Lower Turkey Creek (including South Branch near the City of Niceville landfill and the rest of the basin downstream to Boggy Bayou);

(3) Mill Creek;

(4) Shaw Still Branch (Swift Creek Basin);

(5) Little Rocky Creek; and

(6) Open Branch (Rocky Creek Basin).

All six segments are considered potentially impaired using a set of three biological indicators based upon aquatic insect samples. DEP characterized a site on South Branch near the landfill as severely limited by pollutants from the landfill (Ray 2001, p. 1).

Using aquatic insect sampling methods and indicators comparable to DEP's, we sampled 42 sites in the darter's range (Thom and Herod 2005, pp. 4–3 thru 4–17). About 26 sites appeared healthy, 4 were suspect, and 12 were impaired. Three small darter basins, Mill Creek, Swift Creek, and East Turkey Creek, had the highest percentage of impaired sites. Several sites in these three basins, plus a site on South Branch near the Niceville landfill, also had unusually high stream conductivity measurements, which is generally an indicator of degraded water quality (Thom and Herod 2005, p. 5–3). It appears likely that the wastewater treatment sprayfields located near the headwaters of East Turkey Creek and Swift Creek are adversely affecting water quality, as this is the principal non-forested land use in the area. The Okaloosa darter recovery plan identifies wastewater treatment sprayfields as potential sources of habitat degradation.

In 2007, the Service, along with the U.S. Geological Survey, Loyola University, and Eglin AFB, initiated a 3-year research project to comprehensively assess water quality data for these two streams. Preliminary samples show unusually high conductivity and salinity—an indication of wastewater introduction. Water quality data will be compared to darter population status and trends information. This will enable us to identify the problems and recommend corrective actions that will prevent future declines in Okaloosa darter populations. Elimination of stressors originating from these sprayfields will prevent continued declines in Okaloosa darter populations. It will also achieve recovery objectives outlined in the recovery plan (Objectives 2.2, 3.2, 3.2.2), and meet a critical delisting criterion (1F).

The Eglin golf course dominates land use in the Mill Creek Basin. Along with West Long Creek in the Rocky Creek Basin, these are the same drainages where monitoring suggests darter numbers have been declining in recent years. As noted above, the Service and Eglin AFB have recently completed a habitat restoration project in the portion of Mill Creek that runs through the Eglin golf course. Work is ongoing to assess causes of declines in East Turkey and West Long Creeks.

The Choctawhatchee Basin Alliance (a citizen's group), along with supporting state and Federal agencies, is implementing a program called "Breaking New Ground," which is a set of place-based air and watershed action plans for the Choctawhatchee River and Bay watershed. These plans address water quality monitoring, point- and non-point source pollution, growth management, water supply, education, and citizen involvement in all Choctawhatchee Bay watersheds, including the darter drainages. This planning effort has resulted in the funding of studies to assess point and non-point source water pollution in the basin, including darter watersheds, and is expected to continue to assist in identifying and addressing potential long-term water quality and supply issues in the watershed, which is a positive step towards securing permanent protections for Okaloosa darter water quality and quantity.

In addition, the Northwest Florida Water Management District (NWFWMD) (in conjunction with the DEP) has a Surface Water Improvement and Management (SWIM) Plan that addresses water issues in the Choctawhatchee River and Bay System, including the projected water supply needs of the coastal portions of Okaloosa and Walton Counties. Protecting water-dependent endangered species and their habitats are integral components of the SWIM Plan. In its water supply plan for the counties that encompass the range of the darter, the NWFWMD examines the water sources that could supply growing human water demands in the region (Bartel *et al.* 2000). Depending on its magnitude and spatial distribution, substantial new use of the Sand and Gravel Aquifer could diminish stream flow in the darter streams; however, the potential well fields that the NWFWMD identified are located south and west of the darter drainages.

The opportunities for easements or acquisitions or both to protect the Okaloosa darter are limited, because 98.7 percent of the extant range is on Federal land. Because Eglin AFB and others have demonstrated a commitment to recovery of the Okaloosa darter through natural resource management planning and coordination with the Service, we consider this downlisting criterion to be satisfied.

Downlisting Criterion (2): Eglin AFB Has (and Is Implementing) an Effective Habitat Restoration Program To Control Erosion From Roads, Clay Pits, and Open Ranges

Eglin AFB has implemented a habitat restoration program to control erosion since 1995. The details and accomplishments previously described above in downlisting criterion (1) all contribute to this criterion. Based on the facts shared above, Eglin AFB has effectively implemented this downlisting criterion and continues to make additional progress in reducing remaining erosion problems on the base. These actions have resulted in identifiable increases in Okaloosa darter numbers and occupied range. We will continue to partner with Eglin AFB to find similar opportunities like Mill Creek to restore habitat and reduce erosion.

In addition, Eglin's Threatened and Endangered Species Component Plan (Eglin 2006, pp. 3–3 and 3–4) identifies several objectives for the Okaloosa darter, including the development of a public information program for threatened and endangered species on Eglin AFB that have greater potential to be impacted by public activities. The public information program would include an Air Armament Academy (A3) class (Eglin's civilian employee training program), combined with an Endangered Species Act class,

informational brochures, and portable display boards. The goal of completion of the public information program is 2010. The program will be provided to both Eglin military users and the general public. As of December 2007, Eglin has completed two brochures and portable display boards. There is also a permanent display board in the lobby of the Natural Resources Section, known as Jackson Guard, which provides information to the public about the darter and efforts to protect and restore its habitat. The A3 class is in the process of being designed, and as needed it will be scheduled and presented twice a year beginning in 2008. Additionally, tours of Eglin, for military personnel, non-government delegates, and the general public frequently involve presentations of ongoing darter conservation activities. Because Eglin AFB and others have demonstrated a commitment to recovery of the Okaloosa darter through natural resource management planning and coordination with the Service, we consider this downlisting criterion to be satisfied.

Downlisting Criterion (3): Okaloosa Darter Population Is Stable or Increasing and Comprised of Two Plus Age-Classes in All Six Stream Systems for 5 Consecutive Years

We had no estimate of population size at the time of listing, although the historic range of the Okaloosa darter is fairly well documented. Relative abundance estimates were determined annually from 1987–88 to 1998 while monitoring increases in sprayfield loading at Eglin AFB. Bortone (1999, p. 15) compared the relative abundance (number per sampling hour) of darters at 16 to 18 stations over 10 sampling seasons. The mean number of Okaloosa darters per sample (in those samples that yielded darters) was slightly lower in the earlier sampling period (1987 to 1991), higher during the middle sampling years (1992 to 1997), and distinctly lower in 1998 and 1999. Bortone (1999, p. 9) concluded that this may not have indicated an overall trend in the reduction in Okaloosa darters as much as it may be indicative of changes that specifically reduced preferable habitat and increased sampling effectiveness at certain sites, as several sites were altered by beaver activity while others became more rooted with undergrowth. Generally, the data do not indicate any overall major trends in decline or increase during the 10-year sampling period (Bortone 1999, p. 10).

The U.S. Geological Survey (USGS) and cooperators have surveyed between 12 and 60 sites for Okaloosa darters annually since 1995 (Jordan and Jelks 2004, p. 2), primarily using visual counts in 20-m (66-ft) segments. Collectively, Jordan and Jelks' data show an almost tripling of darter numbers in a 10-year timeframe, from an average of about 20 darters per 20-m (66-ft) segment sampled in 1995 to about 55 darters per segment in 2004. A dip in the increasing trend occurred in 2001 and 2002, which corresponded with years of regional drought conditions. Even during these years, however, darter numbers were almost double those of 1995 and 1996.

The current rangewide population, estimated by applying Jordan and Jelks (2004, p. 3) study area-wide density estimate of 3.1 darters per meter (m) (or per 3.28 feet) to our estimates of occupied stream length in each of the six Okaloosa darter basins, gives a total population estimate of 802,668 darters with an estimated 625,279 mature individuals (Service 2007, Table 2). In order to expand the surveyed range of the species, 69 sites were seine surveyed in 50-m (164-ft) segments by the Service in 2004–2005, with many of those being outside the area surveyed by Jordan and Jelks (2004). Observed segment densities were transformed to local abundance estimates based upon Jordan and Jelks' (2004, App. 1) comparison of seine versus visual counts and depletion sampling. These surveys produced an overall density estimate of 1.28 darters per meter (or per 3.28 ft) and an abundance estimate of 259,355 mature individuals (Service 2007, Table 3). Acknowledging the greater error likely associated with seine-based calculations, they provide a more conservative population estimate.

Annual population monitoring is conducted at 26 long-term monitoring sites by the USGS per the sampling methodology outlined in the Okaloosa darter recovery plan (Service 1998). This methodology has evolved into counting darters using mask and snorkel visual surveys, and includes collection of numerous habitat conditions including water depth and discharge, substrate type, and canopy cover. Annual monitoring has been conducted on Eglin AFB by personnel from Loyola University (New Orleans) and the Service since 1995, and on private lands since 1987. For complete information, see the Service's 2007 5-year status review of the Okaloosa darter (Service 2007).

Downlisting criterion number (3) is further defined in Appendix A of the Okaloosa darter recovery plan to include a specific standardized sampling methodology. An operational definition of a "stable" population is also provided in Appendix A of the recovery plan. The definition of a "stable" population applies to 26 long-term monitoring sites and has three parts:

(1) Okaloosa darter numbers remain above 1.75 standard deviations below the cumulative long-term average at each of the monitoring sites;

(2) The long-term trend in the average counts at each monitoring site is increasing, or neutral; and

(3) The range that the species inhabits is not decreased by more than a 500-meter (1,640.4-ft) stream reach within any of the six stream systems.

Although the darter meets the criterion for a stable population, the validity of the criteria in the operational definition of "stable" has come into question since 1998 when the recovery plan was prepared.

As identified in our 2007 5-year status review of the Okaloosa darter (Service 2007, p. 6), monitoring has shown that natural variation coupled with sampling method (seining versus visual survey) might result in a variation greater than 1.75 standard deviations while still maintaining a stable or increasing trend. Therefore, we have found that this operational definition may no longer reflect the best available science. Current estimates of Okaloosa darter numbers have instead been calculated using two different methods of standardizing monitoring and survey data. Using visual survey methods in 28 20-m (66-ft) segments of stream, encompassing the six principal basins, a study areawide density estimate was then applied to the known occupied stream length for a total population estimate of 802,668 darters (Service 2007, Table 2). A population estimate based on seine samples, which transformed density estimates to local abundance estimates based upon Jordan and Jelks' (Jordan and Jelks 2004, App. 1; Jordan *et al.* 2008) comparison of seine versus visual counts and depletion sampling, calculated a 2004–2005 population estimate of 302,590 darters (Service 2007, Table 3).

The long-term trend in the average counts at each monitoring site indicates that the four smallest darter basins (Toms, Swift, Mill, and East Turkey), as well as West Long Creek and East Long Creek, are decreasing while the other watersheds of Rocky Creek and Turkey Creek are increasing. However, after restoration activities on Mill Creek in 2007, darter numbers are now increasing. Using the estimated length of occupied habitat for these creeks, darter numbers are increasing in 223.6 km (138.9 mi) or 86 percent of their range and decreasing in 37.1 km (23.1

mi) or 14 percent of their range. All of the declining trends were sampled by seining, not visual surveys, and may reflect variable sampling efficiency over time. For example, one site has become almost impossible to seine due to the exposure of tree roots resulting from stream bed degradation. Because seining detects only about 32 percent as many Okaloosa darters as visual surveys (Jordan and Jelks 2004, App.1), the long-term trends in darter counts at sites sampled by seine may be subject to error during interpretation. Furthermore, there appears to be a reduction in numbers at many of the sites beginning in 1998, prior to which counts appear to be relatively consistent or generally increasing, which may correspond to a drought which began in1998 or could reflect a difference in sampling ability as a shift in USGS personnel occurred at this time.

The range of the Okaloosa darter is represented as the cumulative stream length of occupancy in a basin. However, the annual monitoring identified in the recovery plan is not specifically designed to measure the length of a range reduction. Therefore, we are unable to determine whether part (3) of the operational definition of "stable" (A population will be considered stable if * * * (3) the range that the species inhabits is not decreased by more than a 500-meter (1,640.4-ft) stream reach within any of the six stream systems) has been met. Further, as noted previously, seining has been shown (Jordan *et al.* 2008, p. 313) to detect only about 32 percent as many darters as visual surveys, increasing the probability of incorrectly concluding that darters are absent when using this survey method. Acknowledging these limitations, we consider this downlisting criterion to be satisfied. Okaloosa darters appear to have expanded their range in two areas, one in Mill Creek following habitat restoration activities in 2007, and the other a 1- to 2-mile expansion in the southern/western tributary of Tom's Creek previously thought to be uninhabited. Annual population monitoring by USGS has detected young-of-the-year and adult fish in all six stream systems for the past 5 years (Service 2007).

Downlisting Criterion (4): The Range of the Okaloosa Darter Has Not Decreased at All Historical Monitoring Sites

As noted above, trends in the range of the Okaloosa darter are difficult to interpret. However, darters appear to have expanded their range in two tributaries: Mill's Creek and the southern/western tributary of Tom's Creek. Although Okaloosa darters appear to have decreased their range in Swift's Creek, this decrease seems to have occurred prior to 1987. The Okaloosa darter has been extirpated from only about 9 percent of the 402 km (249.8 mi) of streams that comprise its total historical range. Given that the small decrease likely occurred more than 20 years ago, and since then the species has expanded their range as noted above, we consider this criterion to be met.

Downlisting Criterion (5): No Foreseeable Threats Exist That Would Impact the Survival of the Species

At this stage of the recovery of Okaloosa darter, threats remain under Listing Factor A: The present or threatened destruction, modification, or curtailment of its habitat or range. Resource stewardship on Eglin AFB is generally reducing the threat of habitat destruction and range reduction from sedimentation from unpaved roads and areas adjacent to poorly designed or maintained paved roads. As of 2006, about 95 percent of the erosion control projects identified in darter watersheds had been completed (USAF 2006, pp. 3–5). Eglin AFB is continuing to fund these projects to completely eliminate the threat. We will continue to work with Eglin AFB to remove remaining erosion sources or point and non point pollution sources in Okaloosa darter habitat. In addition, new projects are being considered on Eglin AFB and we will work with the AFB to ensure Okaloosa darter habitat is protected. Although water quality issues associated with the Niceville landfill and sprayfield continue to threaten the darter, they are being examined in a 3-year research project, which began in 2007. We recently worked with the city of Niceville to improve its wastewater collection system and install more appropriate culverts at a number of road crossings. In addition, as stated above, a few of the Okaloosa darter's streams have been indicated as potentially impaired due to biological indicators. We will continue to work with Eglin to determine the causes of impairment and remove them. Proposed plans to assign additional military forces to Eglin AFB may alter the military mission and could potentially impact Okaloosa darter populations. On the smaller creeks, where we noted a general long-term decline in average counts, we will continue to investigate if habitat attributes at these sites are the cause while simultaneously trying to improve survey protocols.

The Okaloosa darter was listed in 1973 as an endangered species. At the time of listing, the species faced significantly greater threats than it does today, as evidenced by the numerous recovery actions to date that have improved and restored its habitat conditions. These recovery actions include completing 95 percent of the erosion control projects identified in darter watersheds, thereby significantly reducing the most intense threat to the species (see the Summary of Factors Affecting the Species section below for further details). Now, more than 35 years after it was listed under the Act, the Okaloosa darter continues to survive and its overall status has improved. Given that the threats to the species have been significantly reduced, and that for the purposes of this proposed rule we have defined "foreseeable future" for the Okaloosa darter as a 20-year period (see the Foreseeable Future section below), we have determined that the Okaloosa darter has recovered to the point where it now better meets the definition of a threatened species—one that is "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." In other words, although some threats to the Okaloosa darter continue to exist, these threats are not likely to cause the species to become extinct throughout all or a significant portion of its range within the next 20 years. Data collected on the distribution and abundance of the species indicate that the species' range has expanded and overall population numbers are increasing. The Okaloosa darter has met all five downlisting criteria in its recovery plan.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations (50 CFR part 424) set forth the procedures for listing, reclassifying, or removing species from the Federal Lists of Endangered and Threatened Species. "Species" is defined by the Act as including any species or subspecies of fish or wildlife or plants, and any distinct vertebrate population segment of fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). Once the "species" is determined, we then evaluate whether that species may be endangered or threatened because of one or more of the five factors described in section 4(a)(1) of the Act. Those factors are: (1) Habitat modification, destruction, or curtailment; (2) overutilization of the species for commercial, recreational, scientific or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors

affecting it's continued existence. We must consider these same five factors in reclassifying or delisting a species. Listing, reclassifying, or delisting may be warranted based on any of the above threat factors, either singly or in combination.

For species that are already listed as threatened or endangered, this analysis of threats is an evaluation of both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following the delisting or downlisting and the removal or reduction of the Act's protections.

Under section 3 of the Act, a species is "endangered" if it is in danger of extinction throughout all or a significant portion of its range and is "threatened" if it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The word "species" also includes any subspecies or, for vertebrates, distinct population segments. The word "range" in the phrase "significant portion of its range" (SPR) refers to the range in which the species currently exists, and the word "significant" refers to the value of that portion of the range being considered to the conservation of the species.

The Act does not define the term "foreseeable future." However, in a January 16, 2009, memorandum addressed to the Acting Director of the Service from the Office of the Solicitor, Department of the Interior, concluded, "* * * as used in the [Act], Congress intended the term 'foreseeable future' to describe the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the future conservation status of the species" (U.S. Department of the Interior 2009). "Foreseeable future" is determined by the Service on a case-by-case basis, taking into consideration a variety of species-specific factors such as lifespan, genetics, breeding behavior, demography, threat projection timeframes, and environmental variability.

In considering the foreseeable future as it relates to the status of the Okaloosa darter, we defined the "foreseeable future" to be the extent to which, given the amount and substance of available data, events, or effects can and should be anticipated, or the threats reasonably extrapolated. We considered the historical data to identify any relevant existing threats acting on the species, ongoing conservation efforts, data on species abundance and persistence at individual sites since the time of listing, identifiable informational gaps and uncertainties regarding residual and emerging threats to the species, as well as population status and trends, its life history, and then looked to see if reliable predictions about the status of the species in response to those factors could be drawn. We considered the historical data to identify any relevant existing trends that might allow for reliable prediction of the future (in the form of extrapolating the trends). We also considered whether we could reliably predict any future events (not yet acting on the species and therefore not yet manifested in a trend) that might affect the status of the species, recognizing that our ability to make reliable predictions into the future is limited by the variable quantity and quality of available data.

The average lifespan of an Okaloosa darter is 2–4 years with a breeding season that extends from March to October, peaking in April. This lengthy breeding season is an indicator of fractional spawning (eggs develop and mature throughout the spawning season). The early results of recently funded and ongoing genetic studies of the darter indicate that the two large lineages (Turkey and Rocky Creek) are similar in size and have been relatively stable since diverging from their ancestral population (Austin 2007, pers. comm.), suggesting demographic stability over time. Therefore, a genetics consideration does not appear relevant to determination of the foreseeable future.

Threat projection timeframes are typically fairly short for Okaloosa darter and range from the 5-year planning cycle of the INRMP, to mission-specific activities that can arise at any time, to the Department of Transportation's 20-year planning projections. Lastly, because the darter's streams are mostly small, spring-fed systems, environmental variability is most simply expressed in terms of the variability in the hydrologic cycle.

The Okaloosa darter recovery plan identifies one recovery criterion, a stable or increasing population for 20 years, based on the 20-year hydrologic cycle. Therefore, for the purposes of this proposed rule, we define "foreseeable future" for the Okaloosa darter as a 20-year period, which encompasses both the variable hydrologic cycle and the long-term planning projections. Given the available data, we believe this represents a reasonable timeframe to measure demographic changes that could reflect potential threat factors to the Okaloosa darter.

The following threats analysis examines the five factors currently affecting, or that are likely to affect the listed Okaloosa darter within the foreseeable future. For the purposes of this analysis, we will first evaluate whether the currently listed species, the Okaloosa darter, should be considered threatened or endangered throughout its range. Then we will consider whether there are any portions of the species' range where it is in danger of extinction or likely to become endangered within the foreseeable future.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The Okaloosa darter was listed under the Act in 1973, because of its extremely limited range and potential problems resulting from erosion, water impoundment, and competition with brown darters. The Okaloosa darter has been extirpated from only about 9 percent of the 402 km (249.8 mi) of streams that comprise its total historical range. This historic loss of range is most likely due to physical and chemical habitat degradation from sediment and pollutant loading and the urbanization of the City of Niceville. Recent surveys in a southern/western tributary of Tom's Creek, however, have established the darter's presence in a 1- to 2-mile stretch of stream previously thought to be uninhabited. All but 5 km (3.1 mi), or 1.3 percent, of the extant range is also currently within Eglin AFB.

Sediment loading is perhaps the most intense and uniform factor continuing to threaten the Okaloosa darter. A recent report (Rainer *et al.* 2005, pp. 3–13) identified the following primary sources of sediment to aquatic ecosystems on Eglin AFB: accelerated streamside erosion, borrow pits, developed areas, land test areas, silviculture, and roads. Of these, the stream crossings of unpaved roads and subsequent bank erosion probably have the greatest impact because of their distribution on Eglin AFB, relative permanence as base infrastructure, and long-term soil disturbance characteristics. The largest remaining source of sediment input to darter streams is the unpaved road network. As of 2005, 87 percent (4,348 km or 2,701.7 mi) of Eglin's road network was unpaved. However, as of 2006, Eglin AFB had completed about 95 percent of the erosion control projects identified in darter watersheds, substantially reducing runoff and sedimentation (USAF 2006, pp. 3–5). From 1995 to 2004, 317 borrow pits and non-point erosion sites (485 ac) were rehabilitated and maintained. Although most of the erosion control projects have already been completed, Eglin has a continuing objective of identifying and rehabilitating 150 soil erosion sites that

have the potential to impact threatened and endangered species like the listed Okaloosa darter. These remaining soil erosion sites pose a continuing threat to the darter and its habitat. For example, five road crossings in the Turkey Creek drainage have repeatedly exceeded state water quality standards for turbidity.

Of the 153 road crossings that previously existed in Okaloosa darter drainages, 57 have been eliminated: 28 in Boggy Bayou streams and 29 in Rocky Bayou streams. Eglin AFB estimates that these and other restoration efforts have reduced soil loss from roughly 69,000 tons/year in darter watersheds in 1994 to approximately 3,000 tons/year in 2004 (Pizzalotto 2005, pers. comm.).

Borrow pits were a major source of sediment loading to darter streams cited in the 1998 darter recovery plan. At that time, 29 of 39 borrow pits located within or immediately adjacent to Okaloosa darter drainages had been restored so that they no longer posed sedimentation threats. As of 2004, all of the remaining borrow pits within Okaloosa darter drainages have been restored and no longer pose sedimentation threats (Rainer *et al.* 2005, p. 3–18).

While sedimentation and erosion problems still exist on Eglin, they have been significantly reduced through improvements such as bottomless culverts, bridges over streams, and bank restoration and revegetation. There are other areas where sedimentation remains a higher magnitude threat to the continued existence of the Okaloosa darter. Primarily in the downstream-most portion of the darter's range, urban development and construction activity pose a threat to the darter due to poor stormwater runoff control and pollution prevention measures that degrade habitat and may pose potential barriers to movement between basins. This threat is present primarily in the 5 km (3.1 mi) of habitat located outside of Eglin AFB. With improvement and reduction of sediment erosion on Eglin (98.7 percent of the darter's range), we believe that, with lessons learned, we can continue to work with off-base partners in recovery efforts that will enable delisting of this fish.

Additionally, one road development project has surfaced as a new potential threat that may negatively impact the Okaloosa darter. The Northwest Florida Transportation Corridor Authority has proposed a new, high-speed, toll bypass road across Eglin AFB. However, the proposed bypass road would not prevent implementation of management actions for the Okaloosa darter in Eglin's INRMP, which will continue to provide a benefit to the darter. Eglin AFB has granted the Transportation Corridor Authority conceptual agreement for the proposed bypass road. Although this project may cross darter drainages, the agreement includes 19 stipulations that will minimize impacts to darter drainages. For example, road and bridge design must also address maintenance of riparian zones and stream habitat. In addition, placement of interchanges should be outside sensitive natural areas. Therefore, we do not consider the proposed bypass road to be a serious threat to Okaloosa darters. Currently, this project has yet to complete National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*) requirements or consultation requirements under the Act, the latter of which will require specific measures to avoid and minimize take of the darter. We are seeking additional information on proposed activities or ongoing activities like this one (see Public Comments section) during the comment period for this proposed rule.

Eglin AFB is a military training facility and as such is divided into 37 land test areas where weapons testing and training operations are conducted, 12 of which are wholly or partially within darter drainages (SAIC 2001, pp. 2 and 7). Eglin AFB maintains large portions of the test areas in an early stage of plant succession with few mature trees and varying degrees of soil disturbance as a result of maintenance or military missions. Since 1998, only one section 7 consultation with Eglin under the Act (related to test area activities) has resulted in the issuance of an incidental take statement. However, there is a proposal to increase the military personnel and use at Eglin through the 2005 Defense Base Realignment and Closure (BRAC). The BRAC action involves establishing the Joint Strike Fighter Integrated Training Center and relocating the Army 7th Special Forces Group (Airborne) to Eglin AFB, increasing the number of personnel present on base, the number of test ranges, and the amount of test area activities. The Service has provided preliminary comments on the military's Notice of Intent to Prepare an Environmental Impact Statement under NEPA and completed a formal consultation for other species but not the Okaloosa darter. We do not anticipate any increase in threats to the Okaloosa darter from this action as the new ranges have been moved outside of Okaloosa darter habitat and Eglin has agreed to provide a 300-ft. buffer along all darter streams when conducting any troop maneuvers.

While poorly designed silvicultural programs can result in accelerated soil erosion and stream sedimentation, Eglin has designed its program within darter habitat to avoid and minimize impacts to the aquatic ecosystems such that the program is not likely to adversely affect the Okaloosa darter.

Pollution other than sedimentation poses a potential threat to darters in six stream segments. While no streams in the darter's range are designated by DEP as impaired, 6 of the 13 segments sampled using three biological indicators were considered potentially impaired and are on the "3c planning list," which means that "enough data and information are present to determine that one or more designated uses may not be attained according to the Planning List methodology." One stream site has been characterized as "severely limited by pollutants from the landfill." Using comparable aquatic insect sampling methods, the Service (Thom and Herod 2005, Table 4–1) found 12 out of the 42 sites sampled within the darter's range to be impaired. An impaired water body is one where the biological integrity of the system as determined through indicators has been compromised because of pollutants, indicating that Okaloosa darter habitat is degraded.

Water withdrawals for human consumption in and around the range of the Okaloosa darter are presently served by wells that tap the Floridan Aquifer, which is declining substantially in the most populated areas near the coast. However, at this time, there is no evidence that pumping from the aquifer has reduced flows in darter streams. The darter drainages are spring-fed from the shallow sand and gravel aquifer that is not used for human consumption. Additionally, the low permeability of the Pensacola Clay confining bed probably severely limits hydraulic connectivity between the two aquifers (Fisher *et al.* 1994, p. 86). Therefore, we do not anticipate that local population growth would adversely affect water flows in the darter's drainages.

The Intergovernmental Panel on Climate Change (IPCC) concluded that warming of the climate system is unequivocal (IPCC 2007a, p. 30). Numerous long-term changes have been observed including changes in arctic temperatures and ice, widespread changes in precipitation amounts, ocean salinity, wind patterns and aspects of extreme weather including droughts, heavy precipitation, heat waves and the intensity of tropical cyclones (IPCC 2007b, p. 7). While continued change is certain, the magnitude and rate of change is unknown in many cases.

The currently occupied range of the darter is restricted to approximately

364.6 and 402 km (227.9 and 251.3 mi.) of streams, respectively, in Walton and Okaloosa Counties, Florida. While we acknowledge the general scientific consensus that global scale increases in temperatures have occurred, we do not have any data to indicate that climate change poses a threat to the Okaloosa darter and do not believe that climate change will adversely affect this species because the darter drainages are spring-fed. The information currently available on the effects of climate change and the available climate change models do not make sufficiently accurate estimates of location and magnitude of effects at a scale small enough to apply to the range of the Okaloosa darter. There is no evidence that climate changes observed to date have had any adverse impact on the Okaloosa darter or its habitat.

Summary of Factor A: About 51,397 hectares (127,000 acres), or 457 square kilometers (176 square miles), of the darter's drainage basins (90 percent) are managed by Eglin AFB, while 485.6 hectares or 12,000 acres (10 percent) of the drainage basins are situated within the Niceville-Valparaiso urban complex. Urban runoff continues to degrade darter habitat off Eglin through pollution and sedimentation. Additionally, there is a continued threat of further development in the darter's drainages outside of the AFB.

The military mission or mandate of Eglin AFB, which holds 98.7 percent of the darter's range and 90 percent of the drainage basins for the darter, will lead to foreseeable actions that could impact the darter's range. Impacts resulting from a road development project within the darter's range have been minimized, and it does not present a significant threat to the species. On the other hand, the growing coastline human population in Florida that is pressing into the boundaries of Eglin AFB will have foreseeable needs that could cross Eglin's boundaries and impact the darter's range.

Stream sedimentation and erosion control problems still exist on Eglin AFB and we will continue to cooperatively work with our partner to resolve these. Habitat restoration efforts done on the base to date have reduced 95 percent of the sedimentation into streams occupied by the Okaloosa darter, nearly eliminating the largest threat to the species. Okaloosa darter populations are stable or increasing in the majority of the species' range. The current rangewide population is estimated at 802,668 darters with an estimated 625,279 mature individuals (Service 2007, Table 2). We do not have any data to indicate that climate change poses a threat to the Okaloosa darter. Therefore, we believe the rangewide threat of habitat destruction, modification, or fragmentation over this large area from sources like sedimentation and pollution has been reduced to a point where the Okaloosa darter no longer meets the definition of an endangered species. We find that the present or threatened destruction, modification, or curtailment of its habitat or range is not likely to place the Okaloosa darter in danger of extinction throughout all or a significant portion of its range. However, although the threats under this factor have been reduced, they have not been entirely eliminated. Accordingly we find that the Okaloosa darter meets the definition of a threatened species because it is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Overutilization for commercial, recreational, scientific, or educational purposes is not, nor has it ever been, a significant threat to the Okaloosa darter anywhere within the species' range. Any utilization for recreational purposes is limited to the occasional mistaken use as a bait fish. Therefore, we find that this factor is not likely to cause the Okaloosa darter to become an endangered species within the foreseeable future throughout all or a significant portion of its range. We do not have any data to suggest that this threat will increase in any portion of the darter's range now or within the future.

Factor C. Disease or Predation

Neither disease nor predation is considered a threat to the Okaloosa darter. The six basins of the darter's range are relatively free of introduced aquatic predators, and the native predators, such as the largemouth bass, are relatively low in numbers due to the generally low productivity of the groundwater-fed streams. We have no indications that terrestrial predation is a problem. It is possible that diseases or parasites were indirectly associated with the extirpation of the darter from various stream segments as a result of physical or chemical habitat degradation. However, apart from this potential association, we do not otherwise suspect that disease or predation unduly limits the distribution or abundance of the darter. Therefore, we find that this factor is not likely to cause the Okaloosa darter to become an endangered species within the foreseeable future throughout all or a significant portion of its range. We do not have any data to suggest that this threat will increase in any portion of the darter's range now or within the future.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

The State of Florida has listed the Okaloosa darter as an endangered species under its protected species statute since 1976. Recently, the FWC incorporated the IUCN Red List Criteria (*http://www.iucnredlist.org*) in its procedures for classifying species (Florida Administrative Code 68A–27.0012), but the FWC has not yet evaluated the Okaloosa darter using the new procedures (Gruver 2008, pers. comm.). Our application of the Red List Criteria classifies the darter as "near threatened" (Service 2007, p. 43).

In addition, land management on DOD lands is governed by the Sikes Act (16 U.S.C. 670a *et seq.*) and the Sikes Improvement Act, which provide for the conservation and rehabilitation of natural resources and require DOD to periodically prepare an INRMP in consultation with the Service and the applicable state wildlife agency. Because the Okaloosa darter's extant range occurs almost exclusively on Eglin AFB, the species is afforded considerable protections from large-scale habitat disturbance. Its habitat is further conserved and rehabilitated, through fish and wildlife and land management actions, consistent with the use of the military installation, as required by the Sikes Act, as amended by the Sikes Improvement Act.

Department of Defense Instruction (DODI) 4715.3, Environmental Conservation Program, is the overarching instruction for Department of Defense (DOD) natural and cultural resource management, and is the primary agent for implementing policy (including the Sikes Act), assigning responsibility, and prescribing procedures for the integrated management of natural and cultural resources on DOD properties. In compliance with these programs, Eglin AFB has taken a proactive role in the recovery of the Okaloosa darter by managing its lands to provide for the recovery of the darter and assuring that its recovery is integrated with the military training purposes of the base.

Air Force Policy Directive (AFPD) 32–70, Environmental Quality, establishes policy to: Responsibly manage natural and cultural resources on Air Force properties, clean up past environmental damage, meet current environmental standards, plan future activities to minimize impacts, and eliminate pollution from Air Force activities whenever possible. Under this

Directive, an Air Force Environmental Quality Program was developed. This program includes the following activities: cleanup, compliance, conservation, and pollution prevention. Additionally, this directive states that the Air Force will pursue adequate funding to meet environmental legal obligations. Compliance with this directive has resulted in funding and implementation of considerable erosion control measures and fish barrier removal, which has significantly reduced runoff and sedimentation in Okaloosa darter streams and expanded the range of the species.

Air Force Instruction (AFI) 32–7064, Integrated Natural Resources Management, implements AFPD 32–70 and DODI 4715.3. This instruction provides details on how to manage natural resources on Air Force installations to comply with applicable Federal, state, and local laws and regulations. The current INRMP and Threatened and Endangered Species Component Plan for Eglin AFB identify management practices to benefit the Okaloosa darter. The purpose of the INRMP for Eglin AFB is to provide interdisciplinary strategic guidance for the management of the base's natural resources, while the primary objective of the Air Force Natural Resources Program is to ensure continued access to land and air space required to accomplish the Air Force mission while maintaining these resources in a healthy condition. The INRMP for Eglin AFB facilitates compliance with Federal, state, and local environmental requirements. These requirements deal with analysis of potential environmental impacts, water and air quality, wetlands, endangered species, marine mammals, migratory birds, other wildlife, forest and fire management, and public access and recreation. Eglin AFB has a recently approved INRMP (2007) and Threatened and Endangered Species Component Plan (2006) that identifies conservation objectives for the Okaloosa darter as described under item (2) in the Recovery section above.

Summary of Factor D: We estimate that 98.7 percent of the darter's extant range is within the boundaries of Eglin AFB. The 1.3 percent of the range that is not on Eglin is in all instances downstream of the base boundary. For this reason, almost all human activities that may affect the existing darter population are Federal actions, including actions implemented, funded, or approved by the DOD. The INRMP prepared for Eglin AFB under the Sikes Act and Sikes Improvement Act requires habitat improvements that will continue to benefit the darter. Federal actions must also comply with the National Environmental Policy Act, the Clean Water Act, and applicable state law. These regulatory mechanisms will remain in place if the Okaloosa darter is downlisted to threatened. Therefore, the existing regulatory mechanisms are substantial, and they will be adequate to protect the darter and its habitat in the majority of its range now and within the foreseeable future. We do not have any data to suggest that this threat will increase in any portion of the darter's range now or within the future.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Okaloosa darters were not adversely affected by the active hurricane and storm seasons of 2004 and 2005, which brought numerous severe storm events to the southern boundaries of Eglin AFB. Nor were the darters affected by the ongoing 2007–2008 drought affecting much of Florida. This is likely due to the spring-fed nature of the darter's drainages.

Two natural factors are identified in the recovery plan as possibly affecting the Okaloosa darter: the brown darter as an introduced competitor species, and the beaver as an agent adversely modifying darter habitat. In 1964, a potential competitor, the brown darter (*Etheostoma edwini*), was found in the lower reaches of Swift Creek. The brown darter is a widespread species in drainages that surround the streams containing the Okaloosa darter, but had not previously been documented in any Okaloosa darter drainages. Early indications were that the brown darter may have been introduced into darter drainages from releases from bait buckets by fishermen, dispersed from Eagle Creek along the shoreline of Choctawhatchee Bay. Otherwise, the brown darter could have simply been overlooked in early collections. Recent genetics analyses of the brown darter shows high genetic structure, and little support for introductions from eastern Florida (Austin 2007, pers. comm.), supporting the theory that they were overlooked in early collections.

Although annual monitoring (1995–2004) of Okaloosa and brown darter populations shows a weak negative correlation between the abundance of the two species, the relative abundance of Okaloosa darters at sites where both species occur has generally increased or remained constant in this timeframe, and the range of the brown darter has not expanded (Jordan and Jelks 2004, p. 3). Earlier comparisons of microhabitat use found little evidence of competitive displacement (Burkhead *et al.* 1994, p. 60). Therefore, at this time, we do not believe the brown darter is an introduced species or that it poses a significant threat to the recovery of the Okaloosa darter because it has not been shown to successfully compete with the Okaloosa darter.

Okaloosa darters do not appear to tolerate impounded conditions and are generally absent in the relatively still water upstream of manmade dams, beaver dams, culverts, and other instream obstructions that act like dams. Jordan and Jelks (2004, p. 29) observed the effects of a beaver dam and a culvert at two locations on Rogue Creek that supported Okaloosa darters before these structures were placed in the stream. Both structures had similar effects on darters and important darter habitat features, including increased water temperature, accumulation of flocculent substrate, loss of typical microhabitat features, and virtual elimination of darters in the impounded areas. However, Jordan and Jelks (2004, p. 29) also observed that darters returned to these locations within a year following removal of the beaver dam and the culvert, the former by Eglin AFB resource managers and the latter by a hurricane.

Because beavers often alter areas contrary to human intentions for those areas, and also because beaver ponds displace Okaloosa darter habitat, resource managers, with the assistance of the U.S. Department of Agriculture—Wildlife Services, control beaver numbers in some areas on Eglin AFB (USAF 2007, pp. 1–6). Although a nuisance in the urban environment, beavers are a natural feature of the landscape in the range of the Okaloosa darter. While the waters impounded behind a beaver dam do not support Okaloosa darters, darter densities in "beaver meadows" were among the highest observed in monitoring surveys. Beaver meadows occur in the vicinity of beaver ponds where the dam and pond induces the stream to assume a braided (multi-channel) form, sometimes in the pond itself following dam blowout or removal. Floodplain trees are killed by the year-round high water level maintained near the pond and by the beavers themselves, and herbaceous vegetation thrives in the resulting open canopy, which apparently creates favorable habitat conditions for the darter as aquatic macrophytes thrive under the open canopy and in higher nutrient substrates. We suspect that a beaver meadow supports as many or more darters than were displaced from the beaver pond itself.

Beaver dams are not permanent structures and may be broken by the

high flows associated with hurricanes and other major storm events. The organic matter that accumulates in a beaver pond is suddenly released when the dam blows out, which provides a pulse of nutrients in the otherwise nutrient-poor darter streams. The pond is gone immediately, of course, and over time the braided channel through the beaver meadow returns to a single channel form. This channel is eventually shaded by riparian trees and shrubs, and the concentrated patch of darter habitat that the meadow provided is also gone. Given the balance of the effects beavers have on their habitats, we do not know at this time whether their numbers pose a threat to Okaloosa darters. However, even if they do pose localized threats, we do not believe these to be significant to the overall Okaloosa darter population.

Summary of Factor E: While brown darters and beavers may pose localized threats to the Okaloosa darter, there is no evidence indicating that these threats are significantly affecting the species on a rangewide or population level because the Okaloosa darter persists in all six basins, with a minimum of 1,200 mature individuals (Service 2007, Table 2). Substantial increasing trends are evident in the two largest basins, Turkey Creek and Rocky Creek, with a minimum of 244,795 and 217,272 mature individuals respectively (Service 2007, Table 2).

At only one of the 26 monitoring sites does the multiyear disappearance of the Okaloosa darter strongly suggest a local extirpation and possible loss of range, but this potential loss is small. This site is a tributary of a tributary of Rocky Creek, and Okaloosa darters have been collected in recent years from sites both upstream and downstream in the West Long Creek watershed. As noted earlier, Okaloosa darters expanded their ranges in two areas: One in Mill Creek following habitat restoration and one in a tributary of Tom's Creek previously thought to be uninhabited. Therefore, we find that this factor is not likely to cause the Okaloosa darter to become an endangered species within the foreseeable future throughout all or a significant portion of its range. We do not have any data to suggest that this threat will increase in any portion of the darter's range now or within the future.

Conclusion of the 5-Factor Analysis

In developing this proposed rule, we have carefully assessed the best scientific and commercial data available regarding the threats facing this species, as well as the ongoing conservation efforts. As identified above, only one of the five listing factors currently poses a known threat to the Okaloosa darter, namely, Factor A.—The present or threatened destruction, modification, or curtailment of its habitat or range. Eglin AFB manages the vast majority of the Okaloosa darter's range, 98.7 percent. We have seen substantial progress on Eglin AFB addressing threats to the darter's habitat under the base's INRMP and general ongoing habitat restoration. Resource stewardship on Eglin AFB is generally reducing the threat of habitat destruction and range reduction (for example, restoring erosive, near-stream borrow pits). Eglin AFB is addressing the threat of sedimentation from unpaved roads and from areas adjacent to poorly designed and maintained paved roads. Similarly, restoration of Mill Creek on the Eglin Golf Course, which had been substantially altered by culverts and manmade impoundments, has recently (2007) been completed. As the smallest of the six darter watersheds, the darter population in Mill Creek is probably most vulnerable to extirpation. We anticipate that restoration at Mill Creek will secure a viable population in this system. Eglin has worked diligently to generally improve habitat quality within its boundaries. Outside of Eglin's borders, we have recently been working with the City of Niceville to improve their wastewater collection system and install more appropriate culverts at a number of road crossings. However, additional improvements are necessary before this threat of sedimentation and pollution is completely removed.

Brown darters and habitat loss from beaver activity were identified as other natural and manmade factors affecting the continued existence of darters. After several years of monitoring and recent genetics work, it does not appear that the brown darter is either expanding its range or displacing Okaloosa darters in most sympatric areas. The overall effect of beaver activity on the darter is poorly understood. However, even if brown darters and habitat loss from beaver activity do pose localized threats, we do not believe these to be significant to the overall Okaloosa darter population.

Recovery plans are intended to guide and measure recovery. Recovery criteria for downlisting and delisting are developed in the recovery planning process to provide measureable goals on the path to recovery; however, precise attainment of all recovery criteria is not a prerequisite for downlisting or delisting. Rather, the decision to change the status of a listed species under the Act is based on the analysis of the 5 listing factors identified in section 4 of the Act. The Act provides for downlisting from endangered to threatened when the best available data indicate that a species, subspecies, or distinct population segment is no longer in danger of extinction throughout all or a significant portion of its range.

The 1998 Recovery Plan for the Okaloosa darter identifies five downlisting criteria. We believe that the intent of all five of the downlisting criteria have been fulfilled; however, the delisting criteria have not been met at this time (see the Recovery section above). While significantly reduced, sedimentation and pollution remain a threat in portions of the darter's range, as well as development.

Based on the analysis above and given the substantial reduction in threats to its habitat, we believe that the Okaloosa darter does not currently meet the definition of endangered in that it is not "in danger of extinction throughout all or a significant portion of its range." Instead, we believe it meets the definition of threatened in that it is "likely to become endangered in the foreseeable future throughout all or a significant portion of its range." Actions still needed for the Okaloosa darter to continue to recover (for example, actions to remove threats to the point that the species no longer meets the definition of threatened) include:

(1) Cooperative agreements to protect and restore habitat, water quality, and water quantity for the Okaloosa darter outside of Eglin AFB to protect the species in the foreseeable future; and

(2) Improved and maintained water quality and riparian habitat on Eglin AFB, minimizing erosion at clay pits, road crossings, and steep slopes to the extent that resembles historic, predisturbance conditions.

Significant Portion of the Range Analysis

Having determined that the Okaloosa darter is no longer endangered throughout its range as a consequence of the threats evaluated under the five threat factors in the Act, we must next consider whether there are any significant portions of its range where the species is currently endangered. On March 16, 2007, a formal opinion was issued by the Solicitor of the Department of the Interior, "The Meaning of 'In Danger of Extinction Throughout All or a Significant Portion of Its Range' " (U.S. DOI 2007). We have summarized our interpretation of that opinion and the underlying statutory language below. A portion of a species' range is significant if it is part of the current range of the species and is important to the conservation of the species because it contributes meaningfully to the representation,

resiliency, or redundancy of the species. The contribution must be at a level such that its loss would result in a decrease in the ability to conserve the species.

The first step in determining whether a species is endangered in a significant portion of its range is to identify any portions of the range that warrant further consideration. The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that are not reasonably likely to be significant and endangered. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be significant, and (2) the species may be in danger of extinction there. In practice, a key part of this analysis is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats applies only to portions of the range that are not significant to the conservation of the species, such portions will not warrant further consideration.

If we identify any portions that warrant further consideration, we then determine whether in fact the species is endangered in any significant portion of its range. Depending on the biology of the species, its range, and the threats it faces, it may be more efficient for the Service to address the significance question first, and in others the status question first. Thus, if the Service determines that a portion of the range is not significant, the Service need not determine whether the species is endangered there. Conversely, if the Service determines that the species is not endangered in a portion of its range, the Service need not determine if that portion is significant. If the Service determines that both a portion of the range of a species is significant and the species is endangered there, the Service will specify that portion of the range where the species is in danger of extinction pursuant to section 4(c)(1) of the Act.

The terms "resiliency," "redundancy," and "representation" are intended to be indicators of the conservation value of portions of the range. Resiliency of a species allows the species to recover from periodic or occasional disturbance. A species will likely be more resilient if large populations exist in high-quality habitat that is distributed throughout the range of the species in such a way as to capture the environmental variability within the range of the species. It is likely that the larger size of a population will help contribute to the viability of the species. Thus, a portion of the range of a species may make a meaningful contribution to the resiliency of the species if the area is relatively large and contains particularly high-quality habitat or if its location or characteristics make it less susceptible to certain threats than other portions of the range. When evaluating whether or how a portion of the range contributes to resiliency of the species, it may help to evaluate the historical value of the portion and how frequently the portion is used by the species. In addition, the portion may contribute to resiliency for other reasons—for instance, it may contain an important concentration of certain types of habitat that are necessary for the species to carry out its life-history functions, such as breeding, feeding, migration, dispersal, or wintering.

Redundancy of populations may be needed to provide a margin of safety for the species to withstand catastrophic events. This does not mean that any portion that provides redundancy is a significant portion of the range of a species. The idea is to conserve enough areas of the range such that random perturbations in the system act on only a few populations. Therefore, each area must be examined based on whether that area provides an increment of redundancy that is important to the conservation of the species.

Adequate representation insures that the species' adaptive capabilities are conserved. Specifically, the portion should be evaluated to see how it contributes to the genetic diversity of the species. The loss of genetically based diversity may substantially reduce the ability of the species to respond and adapt to future environmental changes. A peripheral population may contribute meaningfully to representation if there is evidence that it provides genetic diversity due to its location on the margin of the species' habitat requirements.

For the Okaloosa darter, we applied the process described above to determine whether any portions of the range warranted further consideration to qualify for endangered status. We concluded through the five-factor analysis, in particular Factor A, that the existing or potential threats are consistent throughout the darter's range, and there is no portion of the range where one or more threats are geographically concentrated. We believe that there are no small geographic areas where localized threats still exist. Because the low level of threats to the species is essentially uniform throughout its range, no portion warrants further consideration as a significant portion of the range. A summary of our reasoning follows.

The quality of Okaloosa darter habitat is quite variable throughout its range. However, the basic biological components necessary for the darter to complete its life-history functions are present throughout the range in each of the six stream systems. There is no particular location or area that provides a unique or biologically significant function. The currently occupied range of the darter is restricted to approximately 364.6 and 402 km (227.9 and 251.3 mi.) of streams, respectively, in Walton and Okaloosa Counties, Florida. The threats identified above are fairly uniform throughout this range. The vast majority of the range of the darter, 98.7 percent, is managed by Eglin AFB according to the 2007 INRMP and Threatened and Endangered Species Component Plan. The Component Plan applies equally throughout the darter's range on the base. The greatest threat to the species, sediment loading mainly from stream crossings of unpaved roads, is ubiquitous throughout the darter's range on the base. While there are certain specific locations within the darter's range where pollution impacts are greater than in other locations, for example, those locations considered to be "potentially impaired" by DEP, in no circumstance is an entire stream system so affected.

An exception to the above includes the approximately 5 km (3.1 mi.) of the range that does not occur on Eglin AFB. In this small percentage of the range, several of the threats are more pronounced, including those from urban development and construction activity. However, as this more pronounced threat is only present on 1.3 percent of the range of the Okaloosa darter, it is not "significant" to the species. Therefore, we have determined that there are no portions of the range that qualify as a significant portion of the range in which the darter is in danger of extinction.

In summary, the threats to Okaloosa darter habitat have been significantly reduced as a result of Eglin implementing habitat improvement measures on the AFB. Okaloosa darter populations remain stable throughout most of their range, and have even expanded their range in some areas. Based on the darter's improved status throughout its range and the reduction in threats, we have determined that none of the threats result in the darter being in danger of extinction throughout all or a significant portion of its range.

However, several threats to the darter and its habitat remain. We have determined that, based on the status of the species and these remaining threats, the Okaloosa darter meets the definition of threatened in that it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range. Therefore, we are proposing to reclassify the darter's status from endangered to threatened under the Act.

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 increases public awareness of threats to the Okaloosa darter, and promotes conservation actions by Federal, state, and local agencies; private organizations; and individuals. The Act provides for possible land acquisition and cooperation with the state, and provides for recovery planning and implementation. 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 the Okaloosa darter. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. If a Federal action may affect the Okaloosa darter or its habitat, the responsible Federal agency must consult with the Service to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of the Okaloosa darter. Federal agency actions that may require consultation include: Eglin AFB mission activities, new construction, culvert replacements, stream restoration, sediment control projects, vegetation control, and right-of-way permitting for pipelines and cables; U.S. Army Corps of Engineers involvement in projects such as dredge and fill permits for roads, bridges, and culverts; and Federal Highway Administration road projects.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. These prohibitions, codified at 50 CFR 17.21 and 50 CFR 17.31, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harm, harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in 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 listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to Service agents and agents of state conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving threatened and endangered species under certain circumstances. Regulations governing permits are codified at 50 CFR part 13 and at 50 CFR 17.32 for threatened wildlife species. Such permits are available for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in the course of otherwise lawful activities. For threatened species, permits are also available for zoological exhibition, educational purposes, or special purposes consistent with the purposes of the Act.

Because the Okaloosa darter's extant range occurs almost exclusively on Eglin AFB, the species is afforded considerable protections from large-scale habitat disturbance. Those protections have already been discussed under Factor D. above, and are incorporated here by reference.

Questions regarding whether specific activities will constitute a violation of section 9 of the Act and applicable regulations should be directed to Don Imm, Deputy Field Supervisor, Panama City Field Office (see **FOR FURTHER INFORMATION CONTACT**). Requests for copies of the regulations regarding listed species and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Ecological Services Division, 1875 Century Boulevard, Suite 200, Atlanta, GA 30345, telephone (404) 679–7217, facsimile (404) 679–7081.

Proposed Special Rule

The information presented just above generally applies to threatened species of fish and wildlife. However, the Service has the discretion under section 4(d) of the Act to issue special regulations for a threatened species that are necessary and advisable for the conservation of the species. Threatened species implementing regulations at 50 CFR 17.31 incorporate the prohibitions of section 9 of the Act for endangered species, except when a "special rule" is promulgated under section 4(d) of the Act for a particular threatened species. A special rule for a particular threatened species defines the specific take prohibitions and exceptions that apply for that species rather than incorporating all of the prohibitions of section 9 of the Act. The prohibitions under section 9 of the Act currently make it illegal to import, export, take, possess, deliver, receive, carry, transport, ship in interstate commerce, sell or offer for sale in interstate or foreign commerce species listed under the Act. Take, as defined in section 3 of the Act, means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Threatened species that have special rules under section 4(d) of the Act are listed in our regulations at 50 CFR 17.40 through 17.48.

Because we originally listed the Okaloosa darter as endangered, we did not promulgate a special rule. However, now that we are proposing to reclassify the darter to threatened status, we believe that a special rule is appropriate to provide for the continued conservation of the species. Therefore, a proposed special rule is included as part of this proposed reclassification from endangered to threatened status.

Although the range of the species is small, it is almost entirely (98.7 percent) on Eglin AFB Federal lands. Darter drainages comprise 24 percent of the Eglin AFB, subjecting almost all actions undertaken on 24 percent of the base to the interagency cooperation requirements of section 7 of the Act, including habitat management and restoration both specifically targeted at darter conservation and as required by the Sikes Act and SAIA through the Eglin INRMP. This proposed special rule:

(1) Recognizes the positive recovery efforts and accomplishments of Eglin AFB and the DOD in recovering the Okaloosa darter to the extent that the darter no longer meets the definition of endangered;

(2) Provides increased regulatory and mission flexibility for Eglin AFB;

(3) Will help streamline or eliminate review and permitting requirements for habitat management and restoration activities, thus providing a net benefit to the Okaloosa darter; and

(4) Will better enable the Service and Eglin AFB to target limited resources to other, more vulnerable areas or species.

Therefore, under section 4(d) of the Act, we propose, through this special rule, that it is necessary and advisable to provide for the conservation of the Okaloosa darter by allowing the take in accordance with applicable Federal, state, and local laws, during the following activities on Eglin AFB that are consistent with a Service-approved INRMP and the Threatened and Endangered Species Component Plan:

(1) Prescribed fire for land management to promote a healthy ecosystem;

(2) Instream habitat restoration;

(3) Unpaved range road stabilization;

(4) Removal or replacement of culverts for the purpose of road decommissioning, improving fish passage, or enhancing stream habitat; and

(5) Scientific research and monitoring activities consistent with an approved Okaloosa darter recovery plan, or otherwise approved by the Service, both on and off of Eglin AFB.

All other activities resulting in take of Okaloosa darter would remain prohibited.

This proposed special rule would provide for the continued conservation of Okaloosa darter by reducing the regulatory burden under the Act, and thereby encouraging further recovery efforts on DOD lands. Minor adverse impacts to the Okaloosa darter, consistent with provisions of a final 4(d) special rule, if adopted, would not appreciably diminish the likelihood of recovery of the Okaloosa darter.

Effects of This Proposed Rule

This rule, if made final, would revise our regulations at 50 CFR 17.11(h) to reclassify the Okaloosa darter from endangered to threatened throughout its range on the Federal List of Endangered and Threatened Wildlife. If made final, this rule would formally recognize that this species is no longer in imminent danger of extinction throughout all or a significant portion of its range. However, this reclassification would not significantly change the protection afforded this species under the Act. The regulatory protections of section 9 and section 7 of the Act would remain in place. Anyone taking, attempting to take, or otherwise possessing an Okaloosa darter, or parts thereof, in violation of section 9 of the Act would still be subject to a penalty under section 11 of the Act, unless their action is covered under a special rule under section 4(d) of the Act. Under section 7 of the Act, Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of the Okaloosa darter.

If the Okaloosa darter is listed as threatened, recovery actions directed at the darter would continue to be implemented as outlined in the recovery plan for the Okaloosa darter (Service 1998), including:

(1) Restoring and protecting habitat in the six Okaloosa darter stream watersheds;

(2) Protecting water quality and quantity in the six Okaloosa darter streams;

(3) Monitoring and annually assessing populations and habitat conditions of Okaloosa and brown darters, and water quality and quantity in the streams; and

(4) Establishing a public information and education program and evaluating its effectiveness.

Finalization of this proposed rule would not constitute an irreversible commitment by the Service. Reclassification of the Okaloosa darter back to endangered status (uplisting) would be possible if changes occur in management, population status, and habitat or other actions that detrimentally affect the species or increase threats to the species. Federal agencies must still ensure that any actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of the Okaloosa darter when this action is made final.

Peer Review

In accordance with our joint peer review policy with the National Marine Fisheries Service, "Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities," that was published in the **Federal Register** on July 1, 1994 (50 FR 34270), and the Office of Management and Budget's Final Information Quality Bulletin for Peer Review, dated December 16, 2004, we will seek the expert opinions of at least three appropriate and independent specialists regarding the science in this proposed rule. The purpose of this review is to ensure that decisions are based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register.** We will invite these peer reviewers to comment, during the public comment period, on the specific assumptions and conclusions regarding the proposed reclassification of the Okaloosa darter from endangered to threatened and our proposed special rule. The final decision on this proposed rule will take into consideration all of the comments and any additional information we receive during the comment period. Accordingly, the final decision may differ from this proposal.

Required Determinations

Regulatory Planning and Review (Executive Order 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866) and has not reviewed this rule. OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Section 7 Consultation

A proposed special rule under section 4(d) of the Act is included in this proposed downlisting rule. The Service is not required to consult on this rule under section 7(a)(2) of the Act. The development of protective regulations for a threatened species are an inherent part of the section 4 listing process. The Service must make this determination considering only the "best scientific and commercial data available." A necessary part of this listing decision is also determining what protective regulations are "necessary and advisable to provide for the conservation of [the] species." Determining what prohibitions and authorizations are necessary to conserve the species, like the listing determination of whether the species meets the definition of threatened or endangered, is not a decision that

Congress intended to undergo section 7 consultation.

Paperwork Reduction Act of 1995

Office of Management and Budget (OMB) regulations at 5 CFR part 1320 implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). These regulations require that Federal agencies obtain approval from OMB before collecting information from the public. The OMB regulations at 5 CFR 1320.3(c) define a collection of information as the obtaining of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, 10 or more persons. Furthermore, 5 CFR 1320.3(c)(4) specifies that "ten or more persons" refers to the persons to whom a collection of information is addressed by the agency within any 12-month period. For purposes of this definition, employees of the Federal government are not included. The Service may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

This proposed rule does not contain any collections of information that require OMB approval under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on state or local governments, individuals, businesses, or organizations.

National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment, or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), in connection with regulations adopted under section 4(a) of the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A complete list of the references used to develop this proposed rule is available upon request from Don Imm, Deputy Field Supervisor, Panama City Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary author of this document is Janet Mizzi, Chief, Species and Habitat Assessment, U.S. Fish and Wildlife Service, Southeast Regional Office, Atlanta, GA.

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Public Law 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by revising the entry for "Darter, Okaloosa" under "FISHES" in the list of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
FISHES							
*	*	*	*	*	*		*
Darter, Okaloosa	Etheostoma okaloosae.	U.S.A. (FL)	Entire	T	6	NA	17.44(aa)
*	*	*	*	*	*		*

3. Amend § 17.44 by adding a new paragraph (aa) to read as follows:

§ 17.44 Special rules—fishes.

* * * * *

(aa) Okaloosa darter (*Etheostoma okaloosae*). (1) Except as noted in paragraphs (aa)(2) and (aa)(3) of this section, all prohibitions of 50 CFR 17.31 and exemptions of 50 CFR 17.32 apply to the Okaloosa darter.

(i) No person may possess, sell, deliver, carry, transport, ship, import, or export, by any means whatsoever, any Okaloosa darters taken in violation of this section or in violation of applicable state fish and wildlife conservation laws or regulations.

(ii) It is unlawful for any person to attempt to commit, solicit another to commit, or cause to be committed, any offense listed in this special rule.

(2) The following activities, which may result in incidental take of the Okaloosa darter, are allowed on Eglin Air Force Base (AFB), provided that the activities occur in accordance with applicable Federal, state and local laws, and are consistent with a Service-approved Integrated Natural Resource Management Plan by Eglin AFB and with Eglin AFB's Threatened and Endangered Species Component Plan:

(i) Prescribed fire for land management to promote a healthy ecosystem;

(ii) Instream habitat restoration;

(iii) Unpaved range road stabilization; and

(iv) Removal or replacement of culverts for the purpose of road decommissioning, improving fish passage, or enhancing stream habitat.

(3) Scientific research and monitoring activities that may result in incidental take of the Okaloosa darter are allowed, provided these activities are consistent with a Service-approved Okaloosa darter recovery plan, or otherwise approved by the Service, whether those activities occur on and off of Eglin AFB.

(4) All activities not listed in paragraph (aa)(2) and (aa)(3) of this section that result in take of the Okaloosa darter are prohibited.

Dated: January 14, 2010.

Sam D. Hamilton,

Director, Fish and Wildlife Service.

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