(xi) ASTM standard method D5453–08a (''ASTM D5453''), Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Spark Ignition Engine Fuel, Diesel Engine Fuel, and Engine Oil by Ultraviolet Fluorescence, approved February 1, 2008.

(xii) ASTM standard method D6920–07 (''ASTM D6920''), Standard Test Method for Total Sulfur in Naphthas, Distillates, Reformulated Gasolines, Diesels, Biodiesels, and Motor Fuels by Oxidative Combustion and Electrochemical Detection, approved December 1, 2007.

(xiii) ASTM standard method D3120–06$^{\varepsilon 1}$ (''ASTM D3120''), Standard Test Method for Trace Quantities of Sulfur in Light Petroleum Hydrocarbons by Oxidative Microcoulometry, approved December 1, 2006.

(xiv) ASTM standard method D7039–07 (''ASTM D7039''), Standard Test Method for Sulfur in Gasoline and Diesel Fuel by Monochromatic Wavelength Dispersive X-ray Fluorescence Spectrometry, approved May 1, 2007.

(xv) ASTM standard method D6667–01 (''ASTM D6667''), Standard Test Method for Determination of Total Volatile Sulfur in Gaseous Hydrocarbons and Liquefied Petroleum Gases by Ultraviolet Fluorescence.

(xvi) ASTM standard method D4468–85 (reapproved 2000) (''ASTM D4468''), Standard Test Method for Total Sulfur in Gaseous Fuels by Hydrogenolysis and Rateometric Colorimetry.

(2) [Reserved]

Subpart I—[Amended]

■ 4. Section 80.580 is amended as follows:

■ a. By revising paragraph (b)(2)

■ b. By revising paragraph (c)(2)(i).

■ c. By revising paragraphs (e).

§ 80.580 What are the sampling and testing methods for sulfur?

* * * * *

(b) * * *

(2) For motor vehicle diesel fuel and diesel fuel additives subject to the 500 ppm sulfur standard of § 80.520(c), and NRLM diesel fuel subject to the 500 ppm sulfur standard of § 80.510(a)(1), sulfur content may be determined using ASTM D2622 (incorporated by reference, see paragraph (e) of this section).

* * * * *

(c) * * *

(2) * * *

(i) For motor vehicle diesel fuel and diesel fuel additives subject to the 500 ppm sulfur standard of § 80.520(c), and for NRLM diesel fuel subject to the 500 ppm sulfur standard of § 80.510(a), sulfur content may be determined using ASTM D4294, ASTM D5453, or ASTM D6920 (all incorporated by reference, see paragraph (e) of this section), provided that the refiner or importer test result is correlated with the appropriate method specified in paragraph (b)(2) of this section; or

* * * * *

(e) *Materials incorporated by reference.* The Director of the Federal Register approved the incorporation by reference of the document listed in this section as prescribed in 5 U.S.C. 552(a) and 1 CFR part 51. Anyone may inspect copies at the U.S. EPA, Air and Radiation Docket and Information Center, 1301 Constitution Ave., NW., Room B102, EPA West Building, Washington, DC 20460, under EPA docket ID Number EPA–HQ–OAR–2008–0558, or at the National Archives and Records Administration (NARA). The telephone number for the Air Docket Public Reading Room is (202) 566–1742. For information on the availability of this material at NARA, call 202–741–6030 or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.* For further information on these test methods, please contact the Environmental Protection Agency at 734–214–4582.

(1) *ASTM material.* Anyone may purchase copies of these materials from the American Society for Testing and Materials (ASTM), 100 Barr Harbor Dr., West Conshohocken, PA 19428–2959, or by contacting ASTM customer service at 610–832–9585, or by contacting the e-mail address of *service@astm.org* from the ASTM Web site of *http://www.astm.org.*

(i) ASTM standard method D2622–05 (''ASTM D2622''), Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-Ray Fluorescence Spectrometry, approved November 1, 2005.

(ii) [Reserved].

(iii) ASTM standard method D4294–03 (''ASTM D4294), Standard Test Method for Sulfur in Petroleum and Petroleum Products by Energy Dispersive X-ray Fluorescence Spectrometry, approved November 1, 2003.

(iv) ASTM standard method D5453–08a (''ASTM D5453''), Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Spark Ignition Engine Fuel, Diesel Engine Fuel, and Engine Oil by Ultraviolet Fluorescence, approved February 1, 2008.

(v) ASTM standard method D6920–07 (''ASTM D6920''), Standard Test Method for Total Sulfur in Naphthas, Distillates, Reformulated Gasolines, Diesels, Biodiesels, and Motor Fuels by Oxidative Combustion and Electrochemical Detection, approved December 1, 2007.

(2) [Reserved]

[FR Doc. E8–28370 Filed 12–5–08; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R2-ES-2008-0031; 92220-1113-0000-C3]

RIN 1018-AU68

Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Rio Grande Silvery Minnow in the Big Bend Reach of the Rio Grande in Texas

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), in cooperation with the National Park Service and the United States Section of the International Boundary and Water Commission, will reestablish the Rio Grande silvery minnow (*Hybognathus amarus*), a federally-listed endangered fish, into its historical habitat in the Big Bend reach of the Rio Grande in Presidio, Brewster, and Terrell Counties, Texas.

We are reestablishing the Rio Grande silvery minnow under section 10(j) of the Endangered Species Act of 1973, as amended (Act), and are classifying it as a nonessential experimental population (NEP). On the Rio Grande, the geographic boundaries of the NEP extend from Little Box Canyon downstream of Fort Quitman, Hudspeth County, Texas, through Big Bend National Park and the Rio Grande Wild and Scenic River, to Amistad Dam (Big Bend reach of the Rio Grande), Val Verde County, Texas. On the Pecos River, the geographic boundaries of the NEP extend from the river's confluence with Independence Creek to its confluence with the Rio Grande.

This action is part of the recovery actions that the Service, Federal and State agencies, and other partners are conducting throughout the historic range of the species. This final rule

establishes the NEP and provides for limited allowable legal taking of Rio Grande silvery minnows within the defined NEP area. An Environmental Assessment (EA) and Finding of No Significant Impact have been prepared for this action (see **ADDRESSES** section below).

DATES: The effective date of this rule is December 8, 2008.

ADDRESSES: This final rule and environmental assessment are available on the Internet at *http://www.regulations.gov* and *http://www.fws.gov/southwest/es/AustinTexas/*. Supporting documentation we used in preparing this final rule will be available for public inspection, by appointment, during normal business hours, at the Fish and Wildlife Service's office at 500 West Avenue H, Suite 104F, Alpine, Texas 79830.

FOR FURTHER INFORMATION CONTACT: Adam Zerrenner, Field Supervisor, Austin Ecological Services Field Office, 107011 Burnet Road, Suite 200, Austin, Texas 78758 (telephone 512-490-0057, facsimile 512-490-0974). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

It is our intent to discuss only those topics directly relevant to the establishment of a Rio Grande silvery minnow NEP in this final rule. For more information on the Rio Grande silvery minnow, refer to the September 5, 2007, proposed rule (72 FR 50918) and the Rio Grande Silvery Minnow Draft Revised Recovery Plan (Service 2007a) (Draft Revised Recovery Plan).

Legislative

The Act provides that species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the requirements of section 7. Section 9 of the Act, among other things, prohibits the take of endangered wildlife. ''Take'' is defined by the Act as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. Service regulations (50 CFR 17.31) generally extend the prohibitions of take to threatened wildlife. Section 7 of the Act outlines the procedures for Federal interagency cooperation to conserve federally listed species and protect designated critical habitat. It mandates that all Federal agencies use their existing authorities to further the purposes of the Act by carrying out programs for the conservation of listed species. It also states that Federal agencies will, in consultation with the Service, ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 of the Act does not affect activities undertaken on private land unless they are authorized, funded, or carried out by a Federal agency.

Under section 10(j) of the Act, the Secretary of the Department of the Interior can designate reintroduced populations established outside the species' current range, but within its historical range, as ''experimental.'' With the experimental population designation, the relevant population is treated as threatened for purposes of section 9 of the Act, regardless of the species' designation elsewhere in its range. Threatened designation allows us greater discretion in devising management programs and special regulations for such a population. Section 4(d) of the Act allows us to adopt whatever regulations are necessary and advisable to provide for the conservation of a threatened species. In these situations, the general regulations that extend most section 9 prohibitions to threatened species do not apply to that species, and the 10(j) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species.

Based on the best scientific and commercial data available, we must determine whether the experimental population is *essential* or *nonessential* to the continued existence of the species. The regulations (50 CFR 17.80(b)) state that an experimental population is considered essential if its loss would be likely to appreciably reduce the likelihood of survival of that species in the wild. All other populations are considered nonessential.

For the purposes of section 7 of the Act, we treat an NEP as a threatened species when the NEP is located within a National Wildlife Refuge or National Park, and section 7(a)(1) and the consultation requirements of section 7(a)(2) of the Act apply. Section 7(a)(1) requires all Federal agencies to use their authorities to carry out programs for the conservation of listed species. Section 7(a)(2) requires that Federal agencies, in consultation with the Service, insure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat. When NEPs are located outside a National Wildlife Refuge or National Park, we treat the population as proposed for listing, and only two provisions of section 7 apply—section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are in the form of conservation recommendations that are optional as the agencies carry out, fund, or authorizeactivities. Activities that are not carried out, funded, or authorized by Federal agencies and are not on Federal lands are not affected by an NEP designation.

Rio Grande silvery minnows that are used to establish an experimental population may come from a donor population, provided their removal will not create adverse impacts upon the parent population, and provided appropriate permits are issued in accordance with our regulations (50 CFR 17.22) prior to their removal. In the case of the Rio Grande silvery minnow, the donor population is a captive-bred population that was propagated with the intention of re-establishing wild populations to achieve recovery goals. In addition, it is possible that stock raised from wild eggs could also be released into the NEP area. Rio Grande silvery minnow eggs are collected from the wild population in New Mexico each year and are raised in captivity to provide individuals for captive propagation and augmentation of the wild population.

Critical habitat has been designated for the Rio Grande silvery minnow in New Mexico (68 FR 8088-8135; February 19, 2003), and the designated critical habitat does not include this NEP area. Section 10(j)(2)(C)(ii) of the Act states that critical habitat shall not be designated for any experimental population that is determined to be nonessential. Accordingly, we cannot designate critical habitat in areas where we have already established an NEP.

Biological Information

The Rio Grande silvery minnow is one of seven species in the genus Hybognathus found in the United States (Pflieger 1980, p. 177). The species was first described by Girard (1856 in Service 1999, p. 38) from specimens taken from the Rio Grande near Fort Brown, Cameron County, Texas. It is a stout silvery minnow with moderately small eyes and a small, slightly oblique mouth. Adults may reach 5 inches (in)

(125 millimeters (mm)) in total length (Remshardt 2006). Its dorsal fin is distinctly pointed with the front of it located slightly closer to the tip of the snout than to the base of the tail. The fish is silver with emerald reflections. Its belly is silvery white; its fins are plain; and it does not have barbels (Sublette *et al.* 1990, pp. 129-130).

This species was historically one of the most abundant and widespread fishes in the Rio Grande Basin, occurring from Española, New Mexico, to the Gulf of Mexico (Bestgen and Platania 1991, p. 225). It was also found in, but is now absent from, the Pecos River, a major tributary of the Rio Grande, from Santa Rosa, New Mexico, downstream to its confluence with the Rio Grande (Pflieger 1980, p. 177). The Rio Grande silvery minnow is extirpated from the Pecos River and also from the Rio Grande downstream of Elephant Butte Reservoir and upstream of Cochiti Reservoir (Bestgen and Platania 1991, pp. 226-229). The current distribution of the Rio Grande silvery minnow is limited to the Rio Grande between Cochiti Dam and Elephant Butte Reservoir in New Mexico, which is only about 5 percent of its historical range (Bestgen and Platania 1991, pp. 226-229). Throughout much of its historical range, the decline of the Rio Grande silvery minnow has been attributed to modification of the flow regime (hydrological pattern of flows that vary seasonally in magnitude and duration, depending on annual precipitation patterns such as runoff from snowmelt), channel drying, reservoirs and dams, stream channelization, decreasing water quality, and perhaps interactions with nonnative fish (Cook *et al.* 1992, p. 42; Bestgen and Platania 1991, pp. 229-230; Service 1999, pp. 1-2). Decreased river water quality caused by municipal and agricultural runoff (i.e., sewage and pesticides) as a result of the development of irrigated agriculture and the growth of cities within the historical range of the Rio Grande silvery minnow is also likely to have adversely affected the range and distribution of the Rio Grande silvery minnow (Service 1999, p. 2).

The various life history stages of the Rio Grande silvery minnow require low-velocity habitats with a sandy and silty substrate that is generally associated with a meandering river that includes side channels, oxbows, and backwaters (Bestgen and Platania 1991, pp. 227-228). It is not uncommon for Rio Grande silvery minnows in captivity to live beyond 2 years (Service 2007a, p. 8). However, although the Rio Grande silvery minnow is a hardy fish, capable of withstanding many of the natural stresses of the desert aquatic environment, its maximum documented longevity in the wild is about 25 months, and very few survive more than 13 months. Thus, a successful annual spawn (reproductive event) is key to the survival of the species (Service 1999, p. 20; Dudley and Platania 2001, pp. 16-21; Dudley and Platania 2002, p. 3). More information about the life history of, decline of, and threats to the Rio Grande silvery minnow can be found in the final designation of critical habitat for the species (February 19, 2003; 68 FR 8088-8090), in the Rio Grande Silvery Minnow Recovery Plan (Recovery Plan; Service 1999, pp. 1-38), and the Draft Revised Recovery Plan (Service 2007a).

The Rio Grande silvery minnow is extirpated from the Big Bend reach of the Rio Grande (Service 2007a, p. 10). The last documentation of a Rio Grande silvery minnow in the Big Bend reach of the Rio Grande was in 1960 (Bestgen and Platania 1991, p. 229). Natural repopulation is not possible without human assistance due to extensive reaches of river lacking Rio Grande silvery minnow habitat (including large reservoirs, where this species cannot survive) between where the species currently exists in the wild in New Mexico and the Big Bend reach.

The Service contracted a study examining the suitability of the habitat in the Big Bend reach of the Rio Grande for the Rio Grande silvery minnow (Edwards 2005). The completed study indicates that there is a reasonable likelihood that Rio Grande silvery minnows will survive in this portion of the Rio Grande and become established. It also identifies the need for habitat restoration projects, with an emphasis on the removal of nonnative species, such as salt cedar (*Tamarix chinensis*) and giant river cane (also known as giant reed; *Arundo donax*), which can adversely affect aquatic habitat, including Rio Grande silvery minnow habitat (Edwards 2005, pp. 43-44). Reasons for the species' extirpation in the Rio Grande in Texas are uncertain, but are believed to have been due to a combination of low flows, caused by drought and water diversion from the river, and water pollution in the 1950s (Edwards 2005, p. 3). However, the Big Bend reach has not experienced extensive drying since the drought of the 1950s and the extirpation of the Rio Grande silvery minnow. The continuing presence of members of the pelagic spawning guild (group of fish who broadcast semi-buoyant eggs into the water during reproduction) with life history requirements similar to the Rio Grande silvery minnow is evidence that the Big Bend reach of the Rio Grande may support reestablishment of Rio Grande silvery minnows (Edwards 2005, pp. 37-38). In addition, water quality in the Big Bend reach, which may have been one of the factors in the decline of the species, appears to be generally improving over time (Edwards 2005, p. 26).

Throughout most of the NEP area, the lands along the Rio Grande are protected and managed on both the United States and Mexico side of the border by Federal, State, and private conservation-oriented landowners. These entities are all working together to conserve the aquatic and riparian habitats along 281 miles (452 kilometers) of the Rio Grande/Rio Bravo. This provides a unique and significant measure of protection for the Rio Grande silvery minnow in the NEP area. We anticipate working with land managers and other interested parties, on a voluntary basis, to develop plans to further guide and accomplish habitat management and restoration activities, including removal and control of nonnative species, such as salt cedar and giant river cane.

Recovery Efforts

We published the final rule to list the Rio Grande silvery minnow as an endangered species on July 20, 1994 (59 FR 36988). Restoring an endangered or threatened species to the point where it is recovered is a primary goal of our endangered species program. Thus, on July 1, 1994, the Rio Grande Silvery Minnow Recovery Team (Recovery Team) was established under section 4(f)(2) of the Act and our cooperative policy on recovery plan participation, a policy intended to involve stakeholders in recovery planning (July 1, 1994; 59 FR 34272). Numerous individuals, agencies, and affected parties were involved in the development of the Recovery Plan or otherwise provided assistance and review (Service 1999, pp. 63-67). On July 8, 1999, we finalized the Recovery Plan (Service 1999, 71 pp.). The Recovery Plan has been updated and revised, and the Draft Revised Recovery Plan (Service 2007a) was released for public comment on January 18, 2007 (72 FR 2301). The Draft Revised Recovery Plan is currently in the process of being finalized, and thus, the final published version could be slightly different. In implementing and evaluating the success of this reintroduction effort, we will rely on the information in the Draft Revised Recovery Plan until the final revised Rio Grande Silvery Minnow Recovery Plan is published.

The Draft Revised Recovery Plan describes recovery goals for the Rio

Grande silvery minnow (Service 2007a, pp. 66-73) and actions for their completion (Service 2007a, pp. 74-109). The three goals identified for the recovery and delisting of the Rio Grande silvery minnow are:

(1) Prevent the extinction of the Rio Grande silvery minnow in the middle Rio Grande of New Mexico;

(2) Recover the Rio Grande silvery minnow to an extent sufficient to change its status on the List of Endangered and Threatened Wildlife from endangered to threatened (downlisting). This may be considered when three populations (including at least two that are self-sustaining) of the species have been established within the historical range of the species and have been maintained for at least 5 years; and

(3) Recover the Rio Grande silvery minnow to an extent sufficient to remove it from the List of Endangered and Threatened Wildlife (delisting). This may be considered when three self-sustaining populations have been established within the historical range of the species, and they have been maintained for at least 10 years (Service 2007a, p. 66).

The Rio Grande silvery minnow's range has been so greatly restricted that the species is extremely vulnerable to catastrophic events, such as a prolonged period of low or no flow in its habitat in the middle Rio Grande in New Mexico (i.e., the loss of all surface water) (Dudley and Platania 2001, p. 21). Reestablishment of the Rio Grande silvery minnow in other areas of its historical range will assist in the species' recovery and long-term survival in part because it is unlikely that any single event would simultaneously eliminate the Rio Grande silvery minnow from three geographic areas (Service 1999, pp. 57-61).

The Recovery Team developed a reach-by-reach analysis of the Rio Grande and Pecos River basins to identify the salient hydrological, chemical, and biological features of each reach. This analysis addressed the threats to the Rio Grande silvery minnow and considered the suitability of each reach for potential reestablishment (Service 2007a, pp. 159-171). The Recovery Team's reach-by-reach analysis considered: (1) the reasons for the species' extirpation from the selected reach; (2) the presence of other members of the reproductive guild (pelagic spawner; non-adhesive, semibuoyant eggs); (3) habitat conditions (including susceptibility to river drying and presence of diversion structures); and (4) the presence of congeners (i.e., other fishes in the genus Hybognathus). After completing their analysis, the Recovery Team identified the Big Bend reach of the Rio Grande as the first priority for reestablishment efforts (Service 2007a, p. 160) (see ''Reestablishment Area'' below for more details).

In accordance with the Recovery Plan (Service 1999, pp. 60-61), we initiated a captive propagation program as a strategy to assist in the recovery of the Rio Grande silvery minnow in 2000. We currently have Rio Grande silvery minnows housed at: (1) the Service's Dexter National Fish Hatchery and Technology Center, Dexter, New Mexico; (2) the City of Albuquerque's Biological Park, Albuquerque, New Mexico; and (3) New Mexico State University, Las Cruces, New Mexico. These facilities are actively propagating and rearing Rio Grande silvery minnows. Offspring of these fish are currently being used to augment the Rio Grande silvery minnow population in the middle Rio Grande, New Mexico.

Ongoing recovery efforts involving the release of captive-bred Rio Grande silvery minnows for augmentation of the population in the middle Rio Grande of New Mexico have demonstrated the potential viability of reestablishment as a tool for Rio Grande silvery minnow conservation. Captive propagation is conducted in a manner that will, to the maximum extent possible, preserve the genetic and ecological distinctiveness of the Rio Grande silvery minnow and minimize risks to existing wild populations consistent with our 2000 policy for captive propagation (65 FR 56916) (Service 2007b, 26 pp.)

Since 2000, approximately one million silvery minnows have been propagated (using both adult wild silvery minnows and wild-caught eggs) and then released into the wild in the middle Rio Grande in New Mexico (Remshardt 2008, p. 23). Wild gravid adults are successfully spawned in captivity at the City of Albuquerque's propagation facilities. Eggs left in the wild in the Rio Grande in New Mexico have a very low survivorship because many of them end up in Elephant Butte Reservoir where there is no suitable habitat for the species and the eggs are subject to a high rate of depredation. Spawning in captivity ensures that an adequate number of spawning adults are present to repopulate the river each year. While hatcheries continue to successfully spawn silvery minnows, wild eggs are collected to ensure genetic diversity within the remaining population. This program is carefully monitored so that it will not have an adverse effect on the wild population of Rio Grande silvery minnows in New Mexico.

Direct and indirect evidence from the Rio Grande silvery minnow monitoring program indicates that augmentation efforts in the Rio Grande near Albuquerque, New Mexico, are contributing to an increase in catch rates (i.e., during seining) of marked and unmarked Rio Grande silvery minnows. The success of this augmentation effort indicates that hatchery-raised individuals can be released back to the wild with adequate retention in or near original release sites, experiencing survival of at least 2 years after release, and ultimately can contribute to future spawning efforts (Remshardt 2008, pp. 11-12).

The source of Rio Grande silvery minnows for releases in the Big Bend reach will likely be from the Service's Dexter National Fish Hatchery and Technology Center, or another Service facility set up to provide fish specifically for this purpose. Expanding the Rio Grande silvery minnow's propagation program for potential releases into the Big Bend reach will result in more fish being produced overall and will not negatively impact the current program, which is producing Rio Grande silvery minnows for augmentation of the population in New Mexico (Service 2007b, pp. 6-7, 17-18).

Reestablishment Area

The primary factors resulting in the determination by the Recovery Team that the Rio Grande reach from Presidio to Amistad Reservoir is the most suitable area for reintroduction efforts are: water quality and quantity; the presence of suitable habitat; an absence of barriers to fish movement within the reach; a lack of ongoing activities that are likely to adversely affect the Rio Grande silvery minnow; and the presence of designated conservation areas on both sides of the river that are managed for habitat protection and improvement by the State of Texas, the National Park Service, and governmental agencies and private organizations in Mexico (Edwards 2005, p. 11).

River flow in the Big Bend reach is generally perennial, with a base flow of approximately 400 cubic feet per second (11.3 cubic meters per second). Severe flow reductions occurred only during the severest droughts in the 1950s. A period of intermittent drying did occur in 2003. However, this drying event appears to have been brief and occurred in a small area. In addition, this reach of the river does not have flood control levies. It also contains only a few small, rock dam weirs, all but one of which

does not appear to be a barrier to fish movement (Foster's weir may be a barrier, but it is at the downstream end of the river reach deemed as suitable). The substrate ranges from silt to cobble and boulder depending on local conditions. Almost half of this reach is in canyons, including Big Bend National Park. The reach known as the lower canyons, from approximately Reagan Canyon to Bullis Fold, within the Rio Grande Wild and Scenic River, has spring input resulting in improved water quality and quantity. Outside the canyon reaches, the river is braided in some sections with a moderate gradient, providing areas of suitable habitat for Rio Grande silvery minnows. In addition, there are no regular channel maintenance activities in this reach.

Based on the above information, we believe that the Rio Grande, from Mulato Dam (near the western border of Big Bend Ranch State Park) to Foster's Weir, east of the Terrell/Val Verde county line (the expected extent of reestablishment), contains suitable habitat for the Rio Grande silvery minnow and that it is likely the species can be successfully reestablished in the Big Bend reach. Establishing a viable population of Rio Grande silvery minnows in the Big Bend reach of the Rio Grande under this NEP designation would help achieve one of the primary recovery goals for downlisting and eventually delisting this species (see ''Recovery Efforts'' section above for more information). It is expected to take multiple introductions and several years of monitoring to evaluate if Rio Grande silvery minnows have become established and can be self-sustaining in this river reach.

Therefore, we intend to release the Rio Grande silvery minnow into its historical habitat in this area. The NEP area, which encompasses all potential release sites, is located (1) in the Rio Grande, from Little Box Canyon downstream of Fort Quitman, Hudspeth County, Texas, through Big Bend National Park and the Rio Grande Wild and Scenic River, to Amistad Dam; and (2) in the Pecos River, from its confluence with Independence Creek to its confluence with the Rio Grande.

Section 10(j) of the Act requires that an experimental population be geographically separate from other wild populations of the same species. This NEP area is isolated from existing populations of this species by large reservoirs. This fish is not known to survive in or move through large reservoirs due to the presence of unsuitable habitat and predators (64 FR 36275); therefore, the reservoirs will act as barriers to the species' downstream movement in the Rio Grande below Amistad Reservoir, and will ensure that this NEP remains geographically isolated and easily distinguishable from existing upstream wild populations in New Mexico. Based on the habitat requirements of the Rio Grande silvery minnow, we do not expect them to become established outside the NEP because they are unlikely to move into the unsuitable habitat at the edges of the NEP beyond the expected extent of reestablishment and are not able to move past physical barriers (dams and weirs) at either end of the NEP.

The geographic extent of the NEP designation is larger than needed as only portions of the NEP area contain suitable habitat. However, as described above, this area represents what we believe to be the maximum geographic extent to which the fish could move if released in the Big Bend reach of the Rio Grande. We believe including this additional area provides a more effective recovery strategy by eliminating changing regulatory requirements in case Rio Grande silvery minnows unexpectedly move beyond the expected establishment area. If any of the released Rio Grande silvery minnows, or their offspring, move outside the designated NEP area, then the Service would consider these fish to have come from the NEP area, and we would propose to amend this 10(j) rule to enlarge the boundaries of the NEP area to include the entire range of the expanded populations.

Release Procedures

Based on our experience with releasing the species to augment its population in New Mexico, we have determined that it would be best to release fish once per year in December or January. An implementation plan, including information about potential release sites, methods, and the number of individuals to be released, is appended to our environmental assessment (EA) and includes additional information on release sites, release timing, monitoring, and suggested management and research.

As part of the Rio Grande silvery minnow augmentation program in New Mexico, we evaluated different release strategies such as time of year, time of day, specific release habitats, and various hatchery environments (natural outdoor ponds versus indoor facilities). All of this information adds to our knowledge of the species and will assist us in future recovery actions, such as providing release procedures and monitoring strategies for the reestablishment of Rio Grande silvery minnows in the Big Bend reach.

Status of Reestablished Population

As described in the Recovery Plan and the Draft Revised Recovery Plan, reestablishment of populations within the Rio Grande silvery minnow's historical range is necessary to further the conservation and recovery of this species (Service 2007a, p. 67). The anticipated success of this reestablishment would enhance the conservation and recovery potential of this species by extending its present range into currently unoccupied historical habitat (Service 2007a, pp. 159-171). However, as required by section 10(j)(2)(B) of the Act, we have determined that this experimental population is not essential to the continued existence of the species in the wild for the following reasons:

(1) We will ensure, through our section 10 permitting authority and the section 7 consultation process, that the use of Rio Grande silvery minnows from any donor population for releases in the Big Bend reach is not likely to jeopardize the continued existence of the species in the wild;

(2) A population of Rio Grande silvery minnows exists in the middle Rio Grande, New Mexico, and the possible failure of the NEP that is the subject of this rule will not appreciably reduce the likelihood of survival of the species' existing wild population. Captive propagation facilities maintain a captive population, maximizing genetic diversity to the extent possible, and provide adequate numbers of Rio Grande silvery minnows to maintain the wild New Mexico population and also provide fish for releases in the Big Bend reach. The additional number of Rio Grande silvery minnows needed for reestablishment in the Big Bend reach will not inhibit the population augmentation efforts in the middle Rio Grande, New Mexico; and,

(3) The captive population is protected against the threat of extinction from a single catastrophic event by housing Rio Grande silvery minnows in three separate facilities. Juvenile minnows produced in excess of the numbers needed to maintain the captive population and augment the wild population in New Mexico are available for reintroduction to the Big Bend reach. Some members of the experimental population are expected to die during the reintroduction efforts after removal from the captive population. The Service finds that even if the entire experimental population died, this would not appreciably reduce the prospects for future survival of the species in the wild. That is, the captive population could produce more surplus

minnows and future reintroductions still would be feasible if the reasons for the initial failure are understood. As a result, any loss of an experimental population in the wild will not threaten the survival of the species as a whole.

In view of all these safeguards the Service finds that the reintroduced population would not be ''essential'' under 50 CFR 17.81(c)(2). Essential status for experimental populations is not required by section 10(j) of the Act or the implementing regulations, and it has not been used in past reintroductions of captive-raised animals, such as the red wolf (*Canis rufus*), Mexican grey wolf (*Canis lupus baileyi*), blackfooted ferret (*Mustela nigripes*), and California condor (*Gymnogyps californianus*).

Location of Reintroduced Population

Section 10(j) of the Act requires that an experimental population be geographically separate from other populations of the same species. On the Rio Grande, the geographic boundaries of the NEP extend from Little Box Canyon downstream of Fort Quitman, Hudspeth County, Texas, through Big Bend National Park and the Rio Grande Wild and Scenic River, to Amistad Dam (Big Bend reach of the Rio Grande). On the Pecos River, the geographic boundaries of the NEP extend from the river's confluence with Independence Creek to its confluence with the Rio Grande. The NEP area is isolated from the existing population of this species in New Mexico by hundreds of river miles, including large reservoirs and other areas of unsuitable habitat. The best available information indicates that large reservoirs serve as a barrier to movement for the Rio Grande silvery minnow because they contain many predators and do not contain suitable habitat for the species (64 FR 36275). These reservoirs will ensure that this NEP remains geographically isolated and easily distinguishable from existing upstream wild populations in New Mexico. In addition, Amistad Reservoir will act as a barrier to the species' downstream movement in the Rio Grande.

Management

The aquatic resources in the reestablishment area are managed by the National Park Service, the International Boundary and Water Commission, the State of Texas, and private landowners. Multiple-use management of these waters will not change as a result of the experimental population designation. Agricultural, recreational, and other activities by private landowners within and near the NEP area will not be affected by this rule and the subsequent release of the Rio Grande silvery minnow. Because of the exceptions provided by NEP designation, we do not believe the reestablishment of Rio Grande silvery minnows will conflict with existing human activities or hinder public use of the area.

The Service, the National Park Service, the International Boundary and Water Commission, Texas Parks and Wildlife Department employees, and other conservation partners will plan and manage the reestablishment of Rio Grande silvery minnows. This group will closely coordinate on releases, monitoring, coordination with landowners and land managers, and public awareness, among other tasks necessary to ensure successful reestablishment of the species. The Service has also convened a Technical Team comprised of representatives from these agencies and other experts. This Technical Team assisted in the development of the Implementation and Monitoring Plan that is appended to the EA.

(a) *Mortality*: The regulations implementing the Act define ''incidental take'' as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity (50 CFR 17.3) such as recreation (e.g., fishing, boating, wading, trapping or swimming), forestry, agriculture, and other activities that are in accordance with Federal, Tribal, State, and local laws and regulations. Under this final 10(j) rule, take of Rio Grande silvery minnows within the experimental population area will be allowed provided that the take is unintentional and is not due to negligent conduct. The exception to this applies to Federal agencies, which must consult under section 7 of the Act on their activities that may affect the Rio Grande silvery minnow within Big Bend National Park or the Wild and Scenic River. We expect levels of incidental take to be low since the reestablishment is compatible with existing human use activities and practices for the area. More specific information regarding take can be found in the Final Regulation Promulgation section of this rule.

(b) *Special handling*: In accordance with 50 CFR 17.21(c)(3), any employee or agent of the Service, any other Federal land management agency, or State personnel, designated for such purposes, may, in the course of their official duties and in association with the reestablishment program in the Big Bend reach, handle Rio Grande silvery minnows for scientific purposes; relocate Rio Grande silvery minnows to avoid conflict with human activities; relocate Rio Grande silvery minnows to other release sites for recovery purposes; aid sick or injured Rio Grande silvery minnows; and salvage dead Rio Grande silvery minnows. However, non-Service personnel and their agents will need to acquire permits from the Service for these activities.

(c) *Coordination with landowners and land managers*: The Service and cooperators have identified issues and concerns associated with Rio Grande silvery minnow reestablishment through the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq*.) scoping comment period. The reestablishment also has been discussed with potentially affected State agencies and private landowners. Affected State agencies, landowners, and land managers have indicated support for the reestablishment, provided an NEP is designated and land and water use activities in the NEP area are not constrained.

(d) *Monitoring*: The Service has developed an implementation and monitoring plan specific to this NEP and associated reestablishment efforts. After the initial release of Rio Grande silvery minnows, we will monitor their presence or absence at least annually and document any spawning behavior or young-of-year fish that might be present. Section 6 funding has been approved for pre-release and quarterly monitoring associated with this project for the first 2 years. Depending on available resources, quarterly monitoring will likely continue, especially during the first few years of reestablishment efforts. This monitoring will be conducted primarily by seining and will be accomplished by Service, National Park Service, or State employees or by contracting with the appropriate species experts. Annual reports will be produced detailing stocking and monitoring activities that took place during the previous year. We will also fully evaluate these reestablishment efforts every 5 years to determine whether to continue or terminate them.

(e) *Disease*: All Federal fish hatcheries rearing and producing fish are inspected annually as per the Service's Aquatic Animal Health Policy using the American Fisheries Society, Fish Health Section Blue Book Standards. Facilities must maintain a Class-A certification, meaning they are free of all tested pathogens, in order to stock fish into the wild. Targeted pathogens include internal and external parasites, bacteria, and viruses. Dexter National Fish Hatchery and Technology Center, where Rio Grande silvery minnows are currently being raised for augmentation

and reintroduction efforts, has qualified as a Class-A facility for 76 years, since it was constructed. In addition to the standard yearly fish health inspection, an additional Fish Lot inspection will be completed on the Rio Grande silvery minnow destined for the Big Bend reach 30 days prior to being transported to release sites. This inspection will be conducted according to the guidelines listed above. If any of the targeted pathogens are diagnosed the fish will not be released and remedial actions will be taken immediately. Any additional facilities that are used to raise Rio Grande silvery minnows for this re-establishment effort will also be regularly inspected to ensure that they meet the standards described above.

(f) *Genetic variation*: In cooperation with conservation partners with expertise in the captive propagation of Rio Grande silvery minnows and genetics management, the Service has formed a Rio Grande Silvery Minnow Captive Propagation and Genetics Workgroup. This group worked with Dexter National Fish Hatchery and Technology Center to develop the Rio Grande Silvery Minnow Genetics Management and Propagation Plan (Service 2007b, 26 pp.) and meets regularly to plan the captive propagation contribution to the recovery of the Rio Grande silvery minnow and provide fish for restoration and augmentation in the middle Rio Grande and reintroduction of the species into other areas of its historical range.

The propagation strategy is based on two key elements: (1) the collection of eggs from the middle Rio Grande to meet the majority of targeted stocking numbers, and (2) maintaining fish from the annual wild egg collection as broodstock in the event catastrophic changes occur in the river. These actions minimize the risk to the extant population by preventing broodstock mining and maximize the potential to replicate as closely as possible a natural recruitment cycle. The propagation program will be contingent on an orchestrated balance between the use of wild-caught eggs and captive propagation that will require ongoing monitoring of river populations and genetic monitoring of wild and captive stocks (Service 2007b, p. 2).

The propagation program will use a combination of wild-egg collections and hatchery spawning of fish from wild-eggs (F1) to produce fish for stocking. Eggs will be collected in the river every spring from natural spawning events and delivered to propagation facilities. The majority of these eggs drift into hostile waters such as Elephant Butte reservoir or river reaches that become dewatered. The eggs will be hatched, and larval fish reared to adulthood in captivity. A small portion from each year class will be retained as captive broodstock. If recruitment fails in any given year, the captive stock can be used to produce fish to maintain the species through the next year (Service 2007b, p. 2).

Additionally, paired or communal spawning will be conducted annually. Ongoing genetic monitoring will be used to ensure a minimum number of breeding animals contribute to the next generation. We expect that in low water years, when natural spawning is not expected to yield adequate numbers of eggs for the program, captive propagation will be required in terms of increasing the genetic effective population size, and to meet targeted stocking numbers (Service 2007b, pp. 2-3).

The Rio Grande Silvery Minnow Genetics Management and Propagation Plan is designed to provide a strategy for maintenance of genetic diversity in the species. In concert with strategies to address the underlying cause of the species' decline, fish from collected eggs and captively propagated fish will ensure long-term survival and recovery of the Rio Grande silvery minnow by providing offspring appropriate for reintroduction as identified in the Draft Revised Recovery Plan (Service 2007a) and in the Service's conservation strategy for the species (67 FR 39212).

(g) *Protection of Rio Grande silvery minnows*: We will transport Rio Grande silvery minnows from hatcheries to release sites using methods developed from our experience with augmenting the species' population in New Mexico. We will release Rio Grande silvery minnows using a ''soft'' release technique that provides short-term protection from natural predators and allows individuals to acclimate to their new environment. This soft release technique includes placing the minnows in holding pens in the river before releasing them to the wild. Rio Grande silvery minnows will be released into reaches of the Rio Grande within the NEP that we have determined to have the best habitat available. Should causes of mortality be identified, we will work with the private landowners or agency land managers to try to correct the problem. As reestablishment and monitoring efforts proceed, we will use the knowledge gained to further refine transport and release methods.

(h) *Public awareness and cooperation*: On August 9, 2005, we mailed letters to potentially affected Congressional offices, Federal and State agencies, local governments, landowners, and interested parties to notify them that we were considering proposing NEP status in the Rio Grande and Pecos River for the Rio Grande silvery minnow. We received a total of 10 responses during the September 2005 scoping meetings and comment period. The comments received are listed in the EA and have been considered in the formulation of alternatives considered in the NEPA process. The following section describes the public outreach we conducted and the responses received during the public and peer review comment period on the proposed rule and draft EA.

Summary of Public and Peer-Review Comments and Recommendations

We requested written comments from the public on the proposed NEP and draft EA in the proposed rule published on September 5, 2007 (72 FR 50918). We also contacted the appropriate Federal, State, and local agencies; Tribes; scientific organizations; and other interested parties and invited them to comment on the proposed rule. The initial comment period was open from September 5, 2007, to November 5, 2007. In response to requests from interested parties, a second comment period was open from February 22, 2008, through March 10, 2008 (73 FR 9755).

In accordance with our policy on peer review, published on July 1, 1994 (59 FR 34270), we solicited opinions from three expert aquatic biologists who are familiar with this species regarding pertinent scientific or commercial data and assumptions relating to supportive biological and ecological information for the proposed rule. Reviewers were asked to review the proposed rule and the supporting data, to point out any mistakes in our data or analysis, and to identify any relevant data that we might have overlooked. All three of the peer reviewers submitted comments and were generally supportive of the proposal to reestablish Rio Grande silvery minnow in the Big Bend reach. Their comments are included in the summary below and/or incorporated directly into this final rule.

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

We received comments from 14 parties, including comments from natural resource management agencies

in Mexico and from three peer reviewers. Nine of the 14 commenters specifically expressed support for reestablishing the silvery minnow in the Big Bend reach of the Rio Grande. None of the commenters specifically opposed the reintroduction of the Rio Grande silvery minnow to the Big Bend reach, except for one commenter, who stated that they would be opposed to reintrodcution if it would reduce or make less reliable El Paso's surface water supply. Seven of the 14 parties expressed an opinion on the proposal to designate the experimental population as nonessential; of these, five commenters expressed support for a NEP, while two commenters, including one peer reviewer, expressed concern that a NEP designation would not provide enough protection for the silvery minnow.

Comments in support of the proposed action by peer reviewers included agreement with the following determinations: (1) the proposed NEP is wholly separate geographically from existing populations of Rio Grande silvery minnows; (2) establishment of a second population of Rio Grande silvery minnows is essential for the recovery of the species; (3) the Big Bend reach of the Rio Grande likely provides the best location for a second population; and (4) it seems appropriate to assume that Rio Grande silvery minnows will not become established outside of the proposed NEP area. One peer reviewer also agreed with our assertion that the continuing presence of speckled chub (*Macrhybopsis aestivalis*) indicates that the proposed action seems to have a reasonably high probability of success. Commenters from Mexico's National Institute of Ecology indicated that the reintroduction of Rio Grande silvery minnows is a very important initiative for species conservation and habitat restoration on this reach of the Rio Grande.

Peer-Review Comments

(1) *Comment*: All three peer reviewers and one commenter asked whether an NEP is an acceptable component of recovery or if another rulemaking is necessary to reclassify the population before it can be counted toward recovery.

Our Response: Section 10(j) and its implementing regulations require that experimental reintroduction activities further the conservation of the species. Because these actions are directly guided by the Recovery Plan (Service 1999) and the Draft Revised Recovery Plan (Service 2007a), if our efforts to reestablish the Rio Grande silvery minnow in the Big Bend reach result in a self-sustaining population (as described in the species' Draft Revised Recovery Plan or the final revised version, once it is published), then the NEP will be counted toward the recovery of the species. This would not require an additional rulemaking effort.

Our intent is for the 10(j) rule to remain in place until the status of the species improves to a point where listing is no longer necessary, as defined by the Draft Revised Recovery Plan or the final revised version, and the Rio Grande silvery minnow can be delisted. Once the threats to the Rio Grande silvery minnow are reduced and at least three populations are self-sustaining, the Service will likely publish a proposed rule to delist the Rio Grande silvery minnow in the **Federal Register**. During the proposed delisting process, there would be opportunities for the public to comment and request public hearings. Information gathered during the public comment period would be incorporated into our evaluation of the species' listing status. If we were to determine that listing is no longer appropriate, a final rule delisting the Rio Grande silvery minnow would then be published in the **Federal Register**.

(2) *Comment*: An augmentation plan with a genetics management strategy is necessary and should be identified as the first step by the Service.

Our Response: The Implementation and Monitoring Plan, found in Appendix B of the EA, includes information about reintroduction implementation and genetic and population monitoring. In cooperation with conservation partners with expertise in the captive propagation of Rio Grande silvery minnows and genetics management, we have formed a Rio Grande Silvery Minnow Captive Propagation and Genetics Workgroup. This group worked with Dexter National Fish Hatchery and Technology Center to develop the Rio Grande Silvery Minnow Genetics Management and Propagation Plan. The group meets regularly to plan the captive propagation contribution to the recovery of the Rio Grande silvery minnow and provide fish for restoration and augmentation in the middle Rio Grande and reintroduction of the species into other areas of its historical range. Please refer to the Implementation and Monitoring Plan appended to the EA and the Rio Grande Silvery Minnow Genetics Management and Propagation Plan (Service 2007b) for more information.

(3) *Comment*: One peer reviewer and several commenters indicated that the implementation and monitoring plan lacked detailed information and should be expanded.

Our Response: We intend that the Implementation and Monitoring Plan, which is appended to the EA, be used as a guide for adaptive management and monitoring. We have added more specific information about release sites, techniques, and monitoring for the first year of the project and will be revisiting this document on a yearly basis, along with our partners in implementing the project, as part of an assessment of what we have learned and what might need to be adapted for best management. From our conservation efforts on this and other species, we know that it may take several years of effort before we can more clearly judge the likelihood of success of reintroduction. Information gathered as reintroduction proceeds will be used to evaluate the progress of the reintroduction program.

(4) *Comment*: One peer reviewer expressed concern that an NEP of Rio Grande silvery minnows in the Big Bend reach could be used to reduce the pressure towards conservation of the species in New Mexico. Another peer reviewer and a commenter stated that with the increasing reliance on augmentation of the only wild population of Rio Grande silvery minnows in New Mexico, captive populations are increasingly important and in need of protection. They further commented that establishment of ''nonessential'' populations should not be attempted if such efforts detract from recovery activities in the middle Rio Grande of New Mexico or adversely affect the species in that area. One commenter stated that there must be some assurance that use of captively propagated Rio Grande silvery minnows are not sacrificed for want of a detailed monitoring plan, reasoned assumptions, rigorous evaluations, and ample financial resources to implement the project.

Our Response: The Service will continue to use our authorities under the Act to protect the wild population of Rio Grande silvery minnows in New Mexico. The Draft Revised Recovery Plan clearly defines criteria for downlisting and delisting the species, including stabilizing the population in New Mexico, as well as establishing self-sustaining populations in other areas of the species' historical range. We will also ensure, through our section 10 permitting authority and the section 7 consultation process, that the use of Rio Grande silvery minnows from the captive population for releases in the Big Bend reach is not likely to jeopardize the continued existence of the species in the wild. Expanding the Rio Grande silvery minnow's propagation program for potential

releases into the Big Bend reach will result in more fish being produced overall and will not negatively affect the current program, which is producing Rio Grande silvery minnows for augmentation of the population in New Mexico.

Additionally, we note that conservation efforts by us and our conservation partners are always subject to funding support by Congress, State legislatures, or private individuals and organizations. Although we have no guarantees about funding in future years, we have a reasonable expectation that we and/or our partners will be able to carry out the monitoring activities that we have identified as appropriate. Please also see our response to Comment 3.

(5) *Comment*: The final rule should include an evaluation of threats to the species as they may exist in the area of the proposed NEP.

Our Response: Throughout much of its historical range, the decline of the Rio Grande silvery minnow has been attributed to modification of the flow regime, channel drying, reservoirs and dams, stream channelization, decreasing water quality, and perhaps interactions with non-native fish. Development of agriculture and the growth of cities within the historical range of the Rio Grande silvery minnow resulted in a decrease in the quality of river water caused by municipal and agricultural runoff (i.e., sewage and pesticides) that may have also adversely affected the range and distribution of the Rio Grande silvery minnow. More information on threats to the Rio Grande silvery minnow within its current and historical range can be found in the final designation of critical habitat for the species (February 19, 2003; 68 FR 8088-8090), in the Rio Grande Silvery Minnow Recovery Plan (Recovery Plan; Service 1999, pp. 1-38), and the Draft Revised Recovery Plan (Service 2007a).

Please see the Biological Information section of this rule for a brief summary of potential threats to the species in the Big Bend reach. A more detailed summary and evaluation of potential threats to the species in the Big Bend reach can be found in the document, Feasibility of Reintroducing Rio Grande Silvery Minnows (*Hybognathus amarus*) to the Rio Grande, Big Bend Region, Texas (Edwards 2005). In general, the threats described above apply to the Big Bend reach and were evaluated prior to publication of the proposed rule. However as described in the feasibility study (Edwards 2005) and as compared to other areas of the species' historical range, as well as its current range in New Mexico, the expected establishment area in the Big Bend reach does not have any major dams or diversions that would block the upstream movement of fish, has not experienced prolonged and extensive channel drying since the 1950s, and has water quality that has generally improved since the species' extirpation from the NEP area. Water quality improvements can be attributed to decreasing agricultural run-off along the banks of the Rio Grande (as a result of less agriculture in the area in general) and improved treatment of municipal sewage (Edwards 2005).

Until we release Rio Grande silvery minnows into the Big Bend reach and monitor the population, as well as that of other fish in the area, we do not know how Rio Grande silvery minnows will be affected by other native and non-native fish in this area. As the experimental reintroduction proceeds we will be gathering information to assist us in identifying and quantifying potential threats to the species in this area.

(6) *Comment*: The rule should identify that the Draft Revised Recovery Plan identifies a density of >5 fish/100 m^2 as necessary for downlisting and delisting the species and provide an evaluation, based on habitat relationships, of the likelihood that this density can be achieved in the NEP area.

Our Response: A Catch per Unit Effort (CPUE) of >5 fish/100 m^2 is identified in the Draft Revised Recovery Plan as a component of the down-listing and delisting goals for the species in the middle Rio Grande of New Mexico. The Service is currently working with the Conservation Breeding Specialist Group, which operates under the International Union for Conservation of Nature's Species Survival Commission; the Middle Rio Grande Endangered Species Collaborative Program; and other conservation cooperators to develop a population viability analysis for the middle Rio Grande and the Big Bend reach. This analysis will assist us in refining our conservation and recovery efforts for the species and in determining a realistic population goal for the species in the Big Bend reach.

(7) *Comment*: The experimental population in the Big Bend reach should be designated as an ''essential'' population under the Act. Much, if not all, of the argument for ''nonessential experimental'' is not biologically or scientifically based and is thus discountable. Because of the vulnerability of the New Mexico population, additional populations of Rio Grande silvery minnows are essential to the continued existence of the species.

Our Response: Although additional populations of Rio Grande silvery minnows are clearly essential to the recovery of the species, we have determined that the Big Bend population is not essential to the continued existence of the species in the wild and should therefore be designated as an NEP. Please see the ''Status of the Reestablished Population'' section of this final rule for more information.

We believe that releasing Rio Grande silvery minnows under the section 10(j) NEP provision of the Act is the most appropriate way to achieve conservation for this species in the Big Bend reach and that this action is consistent with the purposes of the Act. In coordination with the Rio Grande Captive Propagation and Genetic Management Working Group and our permitting authorities under section 10 of the Act, we will ensure that our efforts to reestablish the species in the Big Bend reach do not adversely affect the wild population of Rio Grande silvery minnows in New Mexico.

State Comments

(8) *Comment*: The New Mexico Interstate Stream Commission indicated that they understand the NEP will not adversely affect current beneficial uses of water and that they support the reestablishment of Rio Grande silvery minnows in the Big Bend reach as a means of ultimately recovering the species. They also noted that the Draft Revised Recovery Plan calls for reintroduction of the species into a total of three suitable parts of its historical range in addition to the current wild population in New Mexico. They suggested that the Service consider a programmatic approach for such reintroductions so that more than one reintroduction can be considered within the same NEPA and 10(j) rulemaking process.

Our Response: We appreciate the support and suggestion of the New Mexico Interstate Stream Commission. However, we feel it is prudent to focus on one initial area for reintroduction at this time so that we can gain a better understanding of the process of reintroducing this species and apply the lessons we learn to potential future reintroduction efforts in other areas of the species' historical range. Additionally, the Big Bend reach of the Rio Grande has been widely recognized as having the highest potential for successful reintroduction of the Rio Grande silvery minnow within its historical range. Other potential reintroduction areas need to be examined more closely and potential obstacles to successful reintroduction

addressed prior to making attempts at reintroduction. Please see the Draft Revised Recovery Plan (Service 2007a) for more information.

Public Comments

(9) *Comment*: El Paso Water Utilities (EPWU) stated that they are supportive of recovery efforts for the Rio Grande silvery minnow and would be very pleased for the species to recover to such an extent that it might no longer be endangered. However, comments from EPWU and also the Elephant Butte Irrigation District (EBID) indicated that they are mindful of the impact that the Rio Grande silvery minnow has had on water management in New Mexico and particularly on water delivered from U.S. Bureau of Reclamation projects. For this reason, they are opposed to any action that would reduce or make their surface water supply less reliable than it already is, including ''confiscating'' water from upstream users to enhance or maintain flows in the Rio Grande below El Paso.

Our Response: We appreciate the support of EPWU for our efforts to recover the Rio Grande silvery minnow and understand its concerns about water management. In the proposed rule, this final rule, and the draft and final versions of the EA, we clearly state that we do not intend to have an adverse effect on water rights in implementing this project.

Additionally, the NEP designation does not provide a mechanism for us to require upstream water users to provide water resources to the NEP area. If water was supplied to the NEP area from upstream water users to enhance or maintain flows it would be done as a voluntary conservation measure. In order to require that upstream users must deliver additional water resources downstream, we must determine that an action with a Federal nexus is causing jeopardy to the species and that the reasonable and prudent alternative to the proposed action was to let water down. Because this population has been determined to be nonessential to the existence of the species, we would not be able to make a determination of jeopardy to the species due to effects on the NEP. In other words, in order to determine if this population is ''essential'' or ''nonessential'' under section 10(j)(2)(B) of the Act, we have already found that the loss of the fish in the NEP area would not jeopardize the continued existence of the species. Thus, any projects occurring in the NEP area would not jeopardize the continued existence of the species and requiring water from upstream users would not be a necessity.

(10) *Comment*: If this experiment succeeds, what is the likelihood of the Service converting this NEP to one which is essential to the survival of the species? What are the realistic prospects that the NEP designation will be removed, thereby providing this population with the full protections of the Act, and then the Service designating the area as critical habitat? If an NEP for the Rio Grande silvery minnow is established in the Big Bend reach, the Service should, as has been done for other species, declare up front that it permanently guarantees to never change the NEP designation to essential experimental, threatened, or endangered.

Our Response: Section 10(j) of the Act does not give us the authority to ''permanently'' declare an NEP; however, we have made it clear that it is not our intention to change this designation until the species meets the requirements described in the Draft Revised Recovery Plan or the final revised version for delisting as an endangered species. Both the proposed and final rules contain language on this subject found in 50 CFR 17.85(a)(1)(iii), specifically: ''We do not intend to change the NEP designations to 'essential experimental,' 'threatened,' or 'endangered' within the NEP area. Additionally we will not designate critical habitat for the(se) NEP(s), as provided by 16 U.S.C. 1539(j)(2)(C)(ii).'' Please also see our response to Comment 1.

(11) *Comment*: To reintroduce a species into an ecosystem runs the risk of it being a vector for disease or parasites that can affect other native species, so it is important to control and monitor for these in the captive population of Rio Grande silvery minnows that will be reintroduced to the Big Bend reach.

Our Response: All Federal fish hatcheries rearing and producing fish are inspected annually as per the Service's Aquatic Animal Health Policy using the American Fisheries Society, Fish Health Section Blue Book Standards. Facilities must maintain a Class-A certification, meaning they are free of all tested pathogens, in order to stock fish into the wild. Targeted pathogens include internal and external parasites, bacteria, and viruses. Dexter National Fish Hatchery and Technology Center, where Rio Grande silvery minnows are currently being raised for augmentation and reintroduction efforts, has qualified as a Class-A facility for 76 years, since it was constructed. In addition to the standard yearly fish health inspection, an additional Fish Lot inspection will be completed on the Rio Grande silvery minnows destined for the Big Bend reach 30 days prior to being transported to release sites. This inspection will be conducted according to the guidelines listed above. If any of the targeted pathogens are diagnosed, the fish will not be released and remedial actions will be taken immediately. Any additional facilities that are used to raise Rio Grande silvery minnows for this re-establishment effort will also be regularly inspected to ensure that they meet the standards described above.

(12) *Comment*: Big Bend National Park guidelines allow anglers to capture minnows for bait. These guidelines may indirectly permit harm to silvery minnows, and if silvery minnows persist in the Big Bend region, should be the subject of a section 7 consultation between the Service and the National Park Service to avoid adverse impacts to silvery minnows.

Our Response: Section 7 consultations will be conducted with the National Park Service and other Federal agencies whose activities may affect the Rio Grande silvery minnow in the Rio Grande within the jurisdiction of the National Park Service, including Big Bend National Park and the Rio Grande Wild and Scenic River. Within this area and as described in section 10(j) of the Act, the species will be treated as threatened for the purposes of section 7. As described in the EA and based on the information provided by Big Bend National Park, it is unlikely that anglers capturing minnows for bait would have a significant effect on the Rio Grande silvery minnow because the number of people who engage in this activity is low. However, all activities conducted by the National Park Service within Big Bend National Park and the Rio Grande Wild and Scenic River will be evaluated to determine if section 7 consultation is necessary. We have added language to § 17.84(u)(2)(i) regarding section 7 consultation with Federal agencies for activities in these areas.

(13) *Comment*: One comment expressed concern that our section 10 recovery permitting process would not be adequate to protect the wild population of Rio Grande silvery minnows in New Mexico.

Our Response: We will use our permitting authorities under Section 10 to review and manage permit applications related to the existing Rio Grande silvery minnow population in New Mexico, as well as the NEP in Texas, and will ensure that permitted activities do not reduce the likelihood of its survival. Please also see our response to comments 2 and 4.

(14) *Comment*: What if the minnow does well and extends its range upward to Little Box Canyon and to other areas such as into the Pecos River in Texas?

Our Response: The designated NEP area includes the estimated maximum geographic extent to which Rio Grande silvery minnows could move from planned release sites. We expect the species could become established after releases within suitable habitat in the Rio Grande from Mulato Dam (near the western border of Big Bend Ranch State Park) to Foster's Weir (east of the Terrell/Val Verde county line). The reaches of river immediately outside of the expected establishment area that are included in the NEP do not contain suitable habitat, and thus Rio Grande silvery minnows are unlikely to move into these areas. These areas are included in the NEP area to extend it out to the nearest physical barrier that would prevent fish from moving beyond that point. Therefore, it is extremely unlikely that Rio Grande silvery minnows will move beyond the designated NEP area under current conditions.

(15) *Comment*: One commenter objected to the Services' commitment to amend the finalized rule and enlarge the NEP area if any Rio Grande silvery minnows move outside of it and provided the following comments. Individuals that leave the NEP area should retain the protections of its endangered listing. In the EA, the Service has not determined the impacts of current or future Federal activities in an expanded NEP or whether activities in the expanded NEP are compatible with silvery minnow recovery, and thus whether the relaxed protections of an NEP are adequate or whether the more stringent protections are required.

Our Response: It is extremely unlikely that Rio Grande silvery minnows will move beyond the designated NEP area under current conditions (see ''Reestablishment Area'' section in this rule). If Rio Grande silvery minnows do move beyond the current NEP designation and are able to persist, it will likely be because: (1) they are doing well in the current NEP area; (2) barriers to movement at the boundaries of the NEP area have been removed; and (3) aquatic habitat beyond the expected establishment area is greatly improved over current conditions. Should this occur it would likely mean that current activities in those areas are compatible with reestablishment, and thus it is our intention to amend the NEP to include the larger area. However, to do so, we would be required to first engage in the NEPA and rulemaking processes. This would include evaluating new information, seeking and considering public comment, and publishing new proposed and final rules in the **Federal Register**, as discussed in our response to Comment 1.

(16) *Comment*: The reach of river from Fort Quitman to Candelaria is included in the NEP area, but it is not suitable habitat for the silvery minnow, primarily because flow of water cannot be maintained, especially during drought. There is high salinity in the water, worsening with intermittent flows. Rio Grande flows only become reliable enough to support any fish population below the confluence with the Rio Conchos. If the Service seeks a reliable source of flowing water in the Fort Quitman to Candelaria reach, the only source of water belongs to the constituents of Elephant Butte Irrigation District and El Paso County Water Improvement District. The Service should not try to confiscate Rio Grande water to provide marginal habitat for Rio Grande silvery minnows in this reach.

Our Response: We agree that the reach of the Rio Grande from Fort Quitman to Candelaria does not contain suitable habitat for silvery minnows. We do not intend to reintroduce Rio Grande silvery minnows to these areas. In addition, we have no intention of confiscating anyone's water or water rights, nor the authority to do so. Please also see our response to Comments 9 and 14.

(17) *Comment*: The Service says that an NEP would minimize the regulatory burden on landowners along the Rio Grande, but it does not explain how that can be when the silvery minnow is not present in the area and is not likely to appear except through manmade efforts.

Our Response: The statement that an NEP would minimize the regulatory burden on landowners along the Rio Grande was made in comparison to regulations associated with an essential experimental population and with a species with full endangered status and not listed as an NEP.

(18) *Comment*: It appears the Draft EA and proposed rule downplay the potential for the quality of water to affect, in some regard, the survival of some fish or the recovery of the Rio Grande silvery minnow in this reach.

Our Response: It is not our intention to downplay the potential importance of water quality as it relates to the survival and recovery of Rio Grande silvery minnows in the NEP area. The water quality in the Big Bend reach has generally been improving since the species was extirpated from the area. In the Implementation and Monitoring Plan appended to the EA, we have identified research and monitoring needs for gaining a better understanding of water quality in the Big Bend reach, factors affecting it, and potential effects on the species.

(19) *Comment*: Two commenters suggested implementing a habitat management plan, especially for the semi-aquatic vegetation species, *Tamarix* spp. and *Arundo donax* in the NEP area, in order to recover the habitat and maintain a stable population.

Our Response: We are collaborating with the World Wildlife Fund, U.S. Geological Survey, the U.S. and Mexico Sections of the International Boundary and Water Commission, and superintendents and managers of six protected areas along the Big Bend Reach of the Rio Grande on a series of collaborative, bi-national ecological restoration efforts in the NEP area. Aquatic and riparian habitat studies and ecological restoration and enhancement projects, including the control of the invasive and exotic *Tamarix* spp. and *Arundo donax*, are currently underway within the following six protected areas in the United States and Mexico: Big Bend National Park (National Park Service, Department of the Interior), Big Bend Ranch State Park (Texas Parks & Wildlife Department (TPWD)), Black Gap Wildlife Management Area (TPWD), Área de Protección de Flora y Fauna Cañon Santa Elena (Secretaría de Medio Ambiente y Recursos Naturales (SEMARNAT)), Área de Protección de Flora y Fauna Maderas del Carmen (SEMARNAT), and Rio Grande Wild and Scenic River (National Park Service, Department of the Interior).

(20) *Comment*: Reintroduction of Rio Grande silvery minnows in the Big Bend reach could have an effect on other native species.

Our Response: Rio Grande silvery minnows historically occupied this reach of the Rio Grande, and the native flora and fauna that exist there evolved with the presence of this species. Thus, through reintroducing the Rio Grande silvery minnow, we are aiding in the restoration of this aquatic ecosystem. In addition, we do not expect any significant impact to any other listed or unlisted species to result from reintroduction of Rio Grande silvery minnows. Monitoring of the fish community as a whole and specifically of other native species with life history requirements similar to those of the Rio Grande silvery minnow will be conducted as part of the implementation of this project. If monitoring results indicate that the presence of Rio Grande silvery minnows is having an adverse effect on other native and rare or declining species, the reintroduction program will be re-evaluated and

modified, as appropriate. Please see the Implementation and Monitoring Plan appended to the EA for more information.

(21) *Comment*: The release of these fish into the Big Bend area is prudent; however, as with all reintroductions it may take several (100s or more) releases to actually get the population established, depending on habitat conditions, water conditions, and other environmental conditions that may not be currently known.

Our Response: We appreciate your comment and agree that it may take numerous releases for Rio Grande silvery minnows to become established within the NEP area. As described in the Implementation and Monitoring Plan, along with our conservation cooperators, we will be conducting population monitoring and gathering other information to help us determine the success of the project. Reintroduction, monitoring, and research efforts will be evaluated yearly to determine how we can improve our efforts and the likelihood of reestablishing the species. Our intent is to continue reintroduction efforts in the NEP area until it becomes clear that a self-sustaining population (as defined in the Draft Revised Recovery Plan) has been established or that the project is no longer a conservation benefit to the species.

(22) *Comment*: It is not clear how the Service will handle permitting of ''take'' where the species is classified as ''threatened'' in a national park or refuge. Would the 4(d) regulation apply where the State of Texas would issue ''take'' permits or would ''take'' remain entirely under Service control?

Our Response: Prohibited and allowable take is described at the end of this rule in the amendment to 50 CFR 17.84, which lists the NEP designation for Rio Grande silvery minnows. The Service will retain permitting authorities for intentional take of Rio Grande silvery minnows in the NEP area under section 10 for educational purposes, scientific purposes, enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act. Incidental take permits may be issued by the Service via the section 7 consultation process to Federal agencies who propose actions that are likely to have an adverse effect on the Rio Grande silvery minnow within Big Bend National Park or the Rio Grande Wild and Scenic River.

Finding

We followed the procedures required by the Act, NEPA, and the Administrative Procedure Act during this Federal rulemaking process. Therefore, we solicited public and peer-reviewer comment on the proposed NEP designation. As required by law, we have considered all comments received on the proposed rule, the draft EA, and the draft implementation and monitoring plan before making this final determination. Based on the above information, and using the best scientific and commercial data available (in accordance with 50 CFR 17.81), we find that creating an NEP of Rio Grande silvery minnows and releasing them into the NEP area in the Big Bend reach will further the conservation of the species.

Effective Date

We are making this rule effective upon publication. In accordance with the Administrative Procedure Act, we find good cause as required by 5 U.S.C. 553(d)(3) to make this rule effective immediately upon publication in the **Federal Register**. Rio Grande silvery minnows to be released in the Big Bend reach are currently being housed at the Service's Dexter National Fish Hatchery and Technology Center. Careful timing, taking into consideration the age and size for reintroducing minnows and the conditions in the Rio Grande in the Big Bend reach, is important to increase their chances for survival. Based on our experience with releasing the species to augment its population in New Mexico, we have determined that it would be best to initiate the release of the fish in December of 2008.

Required Determinations

Section 7 Consultation

A special rule under section 4(d) of the Act is included in this establishment of an experimental population under section 10(j) of the Act. A population designated as experimental is treated for the purposes of section 9 of the Act as threatened, regardless of the species' designation elsewhere in its range. The Service is not required to consult on this special rule under section 7(a)(2) of the Act. The development of protective regulations for a threatened species is 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.

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this rule under Executive Order 12866 (E.O. 12866). 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.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*, whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

The area affected by this rule includes the Big Bend reach of the Rio Grande in Texas. Because of the substantial regulatory relief provided by NEP designations, we do not expect this rule to have any significant effect on recreational, agricultural, or development activities within the NEP

area. In addition, when NEPs are located outside a National Wildlife Refuge or unit of the National Park System, we treat the population as a species proposed for listing and only two provisions of section 7 apply: section 7(a)(1) and section 7(a)(4). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(1) requires Federal agencies to use their authorities to carry out programs to further the conservation of listed species. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a proposed species. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

This rule authorizes incidental take of Rio Grande silvery minnows within the NEP area. The regulations implementing the Act define ''incidental take'' as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity such as military training, livestock grazing, recreation, and other activities that are in accordance with Federal, Tribal, State, and local laws and regulations. Intentional take for purposes other than authorized data collection will not be permitted. Intentional take for research or educational purposes will require a section 10 recovery permit under the Act.

This action will not affect recreational fishing or conservation actions, including removal of nonnative vegetation along the Rio Grande, such as salt cedar and giant river cane. The principal activities on private property near the NEP are agriculture, ranching, and recreation. We believe the presence of the Rio Grande silvery minnow will not affect the use of lands for these purposes because there will be no new or additional economic or regulatory restrictions imposed upon States, non-Federal entities, or members of the public due to the presence of the Rio Grande silvery minnow. Outside of Big Bend National Park and the Rio Grande Wild and Scenic River, Federal agencies will only have to comply with sections 7(a)(2) and 7(a)(4) of the Act. Within Big Bend National Park and the Rio Grande Wild and Scenic River, the species will be treated as threatened and Federal agencies whose activities may affect the species in this area will be required to consult under section 7(a)(2) of the Act. However, this area is currently being managed for conservation purposes and thus Federal activities affecting the species in this area are anticipated to be beneficial or relatively minor if they are adverse. Therefore, this rulemaking is not expected to have any significant adverse impacts to recreation, agriculture, or any development activities.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

1. On the basis of information contained in the ''Regulatory Flexibility Act'' section above, this rule will not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments will not be affected because the NEP designation will not place additional requirements on any city, county, or other local municipalities.

2. This rule will not produce a Federal mandate of $100 million or greater in any year (i.e., it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act). This NEP designation for the Rio Grande silvery minnow will not impose any additional management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. When reestablished populations of federally-listed species are designated as NEPs, the Act's regulatory requirements regarding the reestablished listed species within the NEP are significantly reduced. Section 10(j) of the Act can provide regulatory relief with regard to the taking of reestablished species within an NEP area. For example, with the exception of Federal agencies, which must consult under section 7 on their activities that may affect the Rio Grande silvery minnow within Big Bend National Park or the Wild and Scenic River, this rule allows for the taking of reestablished Rio Grande silvery minnows when such take is incidental to an otherwise legal activity, such as recreation (e.g., fishing, boating, wading, trapping, swimming), forestry, agriculture, salt cedar and giant river cane control, and other activities that are in accordance with Federal, State, and local laws and regulations. Because of the substantial regulatory relief provided by NEP designations, we do not believe the reestablishment of this fish will conflict with existing or proposed human activities or hinder public use of the Big Bend reach of the Rio Grande and its tributaries.

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

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In keeping with Department of the Interior policy, we requested information from and coordinated development of this rule with the affected resource agencies in Texas. Achieving the recovery goals for this species will contribute to its eventual delisting and its return to State management. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments will not change; and fiscal capacity will not be substantially directly affected. The special rule operates to maintain the existing relationship between the State and the Federal Government and is being undertaken in coordination with the State of Texas. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment under the provisions of Executive Order 13132.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988 (February 7, 1996; 61 FR 4729), the Office of the Solicitor has determined that this rule will not unduly burden the judicial system and will meet the requirements of sections (3)(a) and (3)(b)(2) of the Order.

Government-to-Government Relationship with Tribes

In accordance with Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Act (June 5, 1997); the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951); Executive Order 13175; and the Department of the Interior's requirement at 512 DM 2, we have notified the Native American Tribes within and adjacent to the NEP area about the proposed rule and this final rule. They have been advised through written contact, including informational mailings from the Service. Furthermore, the potential reintroduction area for Rio Grande silvery minnows in the Big Bend reach does not overlap with any Tribal lands, and we do not expect Rio Grande silvery minnows to move out of their preferred habitats. If future activities resulting from this rule may affect Tribal resources, the Service will communicate and consult on a Government-to-Government basis with any affected Native American Tribes in order to find a mutually agreeable solution.

Paperwork Reduction Act

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. The Office of Management and Budget has approved our collection of information associated with reporting the taking of experimental populations and assigned control number 1018-0095. We may not collect or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have prepared an EA and Finding of No Significant Impact, as defined under the authority of the National Environmental Policy Act of 1969. It is available from the Austin Ecological Services Field Office, 107011 Burnet Road, Suite 200, Austin, Texas 78758 and from our website at *http://www.fws.gov/southwest/es/Library/* and on *www.regulations.gov* at Docket No. FWS-R2_ES-2008-0031.

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

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

References Cited

A complete list of all references cited in this rule is available upon request from the Austin Ecological Services Field Office (see **ADDRESSES** section).

Authors

The primary authors of this rule are staff of the Austin Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

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

Final Regulation Promulgation

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

PART 17—[AMENDED]

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

Authority: 16 U.S.C. 1361-1407; 16 U.S.C. 1531-1544; 16 U.S.C. 4201-4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by revising the entry for ''Minnow, Rio Grande silvery'' 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							
* * * * * * *							
Minnow, Rio Grande silvery	*Hybognathus amarus*	U.S.A.(NM, TX), Mexico.	Entire, except where listed as an experimental population.	E	543	17.95(e)	NA

Species		Historic Range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Minnow, Rio Grande silvery	*Hybognathus amarus*	U.S.A.(NM, TX), Mexico.	Rio Grande, from Little Box Canyon (approximately 10.4 river miles downstream of Fort Quitman, TX) to Amistad Dam; and on the Pecos River, from its confluence with Independence Creek to its confluence with the Rio Grande.	XN	761	NA	17.84(u)
* * * * * * *							

■ 3. Amend §17.84 by adding a new paragraph (u) to read as follows:

§ 17.84 Special rules—vertebrates.

* * * * *

(u) Rio Grande silvery minnow (*Hybognathus amarus*).

(1) *Where are populations of this fish designated as nonessential experimental populations (NEP)?*

(i) The NEP area for the Rio Grande silvery minnow is within the species' historical range and is defined as follows: Rio Grande, from Little Box Canyon downstream of Fort Quitman, Hudspeth County, Texas, through Big Bend National Park and the Rio Grande Wild and Scenic River, to Amistad Dam; and on the Pecos River, from its confluence with Independence Creek to its confluence with the Rio Grande.

(ii) The Rio Grande silvery minnow is not currently known to exist in the Rio Grande or Pecos River in Texas. Based on the habitat requirements of this fish, we do not expect it to become established outside the NEP area. However, if any individuals of this species move upstream or downstream or into tributaries outside the designated NEP area, we would presume that they came from the reestablished populations. We would then amend paragraph (u)(1)(i) of this section to enlarge the boundaries of the NEP to include the entire range of the expanded population.

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

(2) *What take is allowed of this species in the NEP area?*

(i) A Rio Grande silvery minnow may be taken within the NEP area, provided that such take is either not willful, knowing, or due to negligence, or is incidental to and not the purpose of the carrying out of an otherwise lawful activity, such as recreation (e.g., fishing, boating, wading, trapping, or swimming), agriculture, and other activities that are in accordance with Federal, State, and local laws and regulations. However, Federal agencies, must consult under section 7 of the Act on their activities that may affect the Rio Grande silvery minnow within Big Bend National Park or the Wild and Scenic River.

(ii) Any person with a valid permit issued by the U.S. Fish and Wildlife Service (Service) under 50 CFR 17.32 may take Rio Grande silvery minnows for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act;

(iii) Any taking pursuant to paragraph (u)(2)(i) of this section must be reported within 7 days by contacting the Service, Austin Ecological Services Field Office, 107011 Burnet Road, Suite 200, Austin, TX 78758; (512) 490-0057. Once the Service is contacted, a determination will be made as to the disposition of any live or dead specimens. Reporting requirements for take pursuant to paragraph (u)(2)(ii) of this section will be specifically defined in the permit issued by the Service.

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

(i) Except as expressly allowed in paragraph (u)(2) of this section, all the provisions of 50 CFR 17.31(a) and (b) apply to the fish identified in paragraph (u)(1) of this section.

(ii) Any manner of take not described under paragraph (u)(2) of this section is prohibited in the NEP area.

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

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

(4) *How will the effectiveness of the reestablishment be monitored?*

(a) After the initial stocking of this fish, we will monitor their presence or absence at least annually and document any spawning behavior or young-of-year fish that might be present. Depending on available resources, monitoring may occur more frequently, especially during the first few years of reestablishment efforts. This monitoring will be conducted primarily by seining and will be accomplished by Service, National

Park Service, or State employees or by contracting with the appropriate species experts. Annual reports will be produced detailing stocking and monitoring activities that took place during the previous year.

(b) The Service will fully evaluate these reestablishment efforts every 5 years to determine whether to continue or terminate them.

(c) Note: Map of the NEP area for the Rio Grande silvery minnow in Texas follows:

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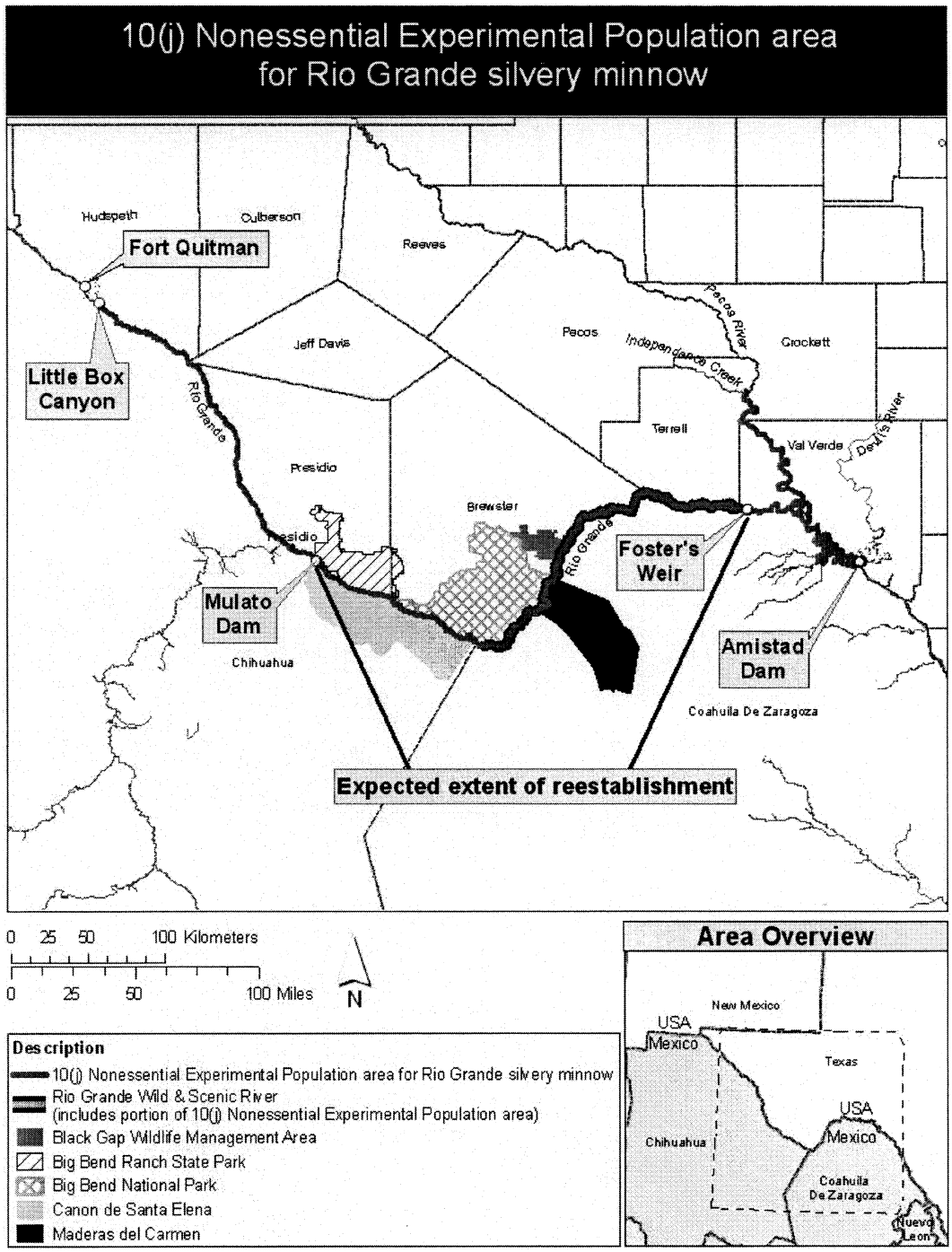

Dated: November 25, 2008

David M. Verhey,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E8–28904 Filed 12–3–08; 4:15 pm]

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