

impose a minimal burden on small entities.

E. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

37. None.

Ordering Clauses

38. Pursuant to Sections 1, 3, 4, 201–205, 251 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 153, 154, 201–205, and 251, this *Second Further Notice of Proposed Rulemaking* is hereby *Adopted*.

39. The Commission's Consumer Information Bureau, Reference Information Center, *Shall Send* a copy of this *Second Report and Order and Second Further Notice of Proposed Rulemaking*, including the Initial and Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of Small Business Administration.

List of Subjects

Communications common carriers, Telecommunications, Telephone.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AH33

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the Appalachian Elktoe

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the Fish and Wildlife Service (Service), propose to designate critical habitat for the Appalachian elktoe (*Alasmidonta raveneliana*) under the Endangered Species Act of 1973, as amended (Act). The areas proposed for critical habitat designation include approximately 231.1 kilometers (km) (144.3 river miles [rm]) of various segments of rivers in Tennessee and North Carolina.

If this proposal is made final, section 7(a)(2) of the Act requires that Federal agencies ensure that actions they fund, permit, or carry out are not likely to result in the destruction or adverse modification of critical habitat. The

regulatory effect of the critical habitat designation does not extend beyond those activities funded, permitted, or carried out by Federal agencies. State or private actions, with no Federal involvement, are not affected.

Section 4 of the Act requires us to consider the economic and other relevant impacts of specifying any particular area as critical habitat. We solicit data and comments from the public on all aspects of this proposal, including data on the economic and other impacts of the designation. We may revise this proposal to incorporate or address comments and other information received during the comment period.

DATES: We will consider comments received by April 9, 2001. Requests for public hearings must be received, in writing, at the address shown in the **ADDRESSES** section by March 26, 2001.

ADDRESSES: If you wish to comment, you may submit your comments by any one of several methods:

1. You may submit written comments and information to the State Supervisor, Asheville Field Office, U.S. Fish and Wildlife Service, 160 Zillicoa Street, Asheville, North Carolina 28801.

2. You may hand-deliver written comments to our Asheville Field Office, at the above address, or fax your comments to 828/258–5330.

3. You may send comments by electronic mail (e-mail) to john_fridell@fws.gov. For directions on how to submit electronic filing of comments, see the "Public Comments Solicited" section.

Comments and materials received, as well as supporting documentation used in the preparation of this proposed rule, will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: John A. Fridell, Fish and Wildlife Biologist, (828)258–3939.

SUPPLEMENTARY INFORMATION:

Background

The Appalachian elktoe (*Alasmidonta raveneliana*) is a freshwater mussel that has a thin, kidney-shaped shell, reaching up to about 10 centimeters (4 inches) (J.A. Fridell, pers. observation 1999). Juveniles generally have a yellowish-brown periostracum (outer shell surface), while the periostracum of the adults is usually dark brown to greenish-black in color. Although rays are prominent on some shells, particularly in the posterior portion of the shell, many individuals have only obscure greenish rays. The shell nacre (inside shell surface) is shiny, often

white to bluish-white, changing to a salmon, pinkish, or brownish color in the central and beak cavity portions of the shell; some specimens may be marked with irregular brownish blotches (adapted from Clarke 1981). Clarke (1981) contains a detailed description of the species' shell, with illustrations; Ortmann (1921) discussed soft parts.

Distribution, Habitat, and Life History

The Appalachian elktoe is known only from the mountain streams of western North Carolina and eastern Tennessee. Although the complete historical range of the Appalachian elktoe is unknown, available information suggests that the species once lived in the majority of the rivers and larger creeks of the upper Tennessee River system in North Carolina. In Tennessee, the species is known only from its present range in the main stem of the Nolichucky River.

Currently, the Appalachian elktoe has a very fragmented, relict distribution. The species still survives in scattered pockets of suitable habitat in portions of the Little Tennessee River system, Pigeon River system, the Little River in North Carolina, and the Nolichucky River system in North Carolina and Tennessee. In the Little Tennessee River system in North Carolina, populations survive in the reach of the main stem of the Little Tennessee River, between the city of Franklin and Fontana Reservoir, in Swain and Macon Counties (Service 1994, 1996; McGrath 1999; J.A. Fridell, pers. observation 2000), and in scattered reaches of the main stem of the Tuckasee River in Jackson and Swain Counties (M. Cantrell, Service, pers. comm. 1996; J.A. Fridell, pers. observation 1996, 1997; McGrath 1998), from below the town of Cullowhee downstream to Bryson City. A single live individual and one shell have also been recently recorded from the Cheoah River, below Santeetlah Lake, in Graham County (W. Pennington, Pennington and Associates, Inc., Knoxville, Tennessee, pers. comm. 2000).

In the Pigeon River system in North Carolina, a small population of the Appalachian elktoe occurs in small scattered sites in the West Fork Pigeon River and in the main stem of the Pigeon River, above Canton, in Haywood County (J.A. Fridell, pers. observation 1999; McGrath 1998). The Little River (upper French Broad River system) population of the species, in Transylvania County, North Carolina (J.A. Fridell, pers. observation 2000; C. McGrath, North Carolina Wildlife Resources Commission (NCWRC), pers.

comm. 2000), is restricted to small scattered pockets of suitable habitat downstream of Cascade Lake.

In the Nolichucky River system, the Appalachian elktoe survives in a few scattered areas of suitable habitat in the Toe River, Yancey and Mitchell Counties, North Carolina (Service 1994, 1996; McGrath 1996, 1999); Cane River, Yancey County, North Carolina (Service 1994, 1996; McGrath 1997); and the main stem of the Nolichucky River, Yancey and Mitchell Counties, North Carolina, extending downstream to the vicinity of Erwin in Unicoi County, Tennessee (Service 1994, 1996). Two individuals have also recently been found in the North Toe River, Yancey and Mitchell Counties, North Carolina, below the confluence of Crabtree Creek (McGrath 1999), and 15 live individuals, with no more than 2 to 3 at each site (J.A. Fridell, pers. observation 1998, 2000) and one shell (S. Fraley, Tennessee Valley Authority, Norris, Tennessee, pers. comm. 1999) have been recorded from the South Toe River, Yancey County, North Carolina. The majority of the surviving occurrences of the Appalachian elktoe appear to be small to extremely small and restricted to scattered pockets of suitable habitat.

Historically, the species has been recorded from Tulula Creek (Tennessee River drainage), the main stem of the French Broad River, and the Swannanoa River (French Broad River system) (Clarke 1981), but has apparently been eliminated from these streams (Service 1994, 1996). There is also a historical record of the Appalachian elktoe from the North Fork Holston River in Tennessee (S. S. Haldeman collection); however, this record is believed to represent a mislabeled locality (Gordon 1991). If the historical record for the species in the North Fork Holston River was a good record, the species has apparently been eliminated from this river as well.

We know very little about the life history and microhabitat requirements of the Appalachian elktoe. The species has been reported from relatively shallow, medium-sized creeks and rivers with cool, clean, well-oxygenated, moderate-to fast-flowing water. The species is most often found in riffles, runs, and shallow flowing pools with stable, relatively silt-free, coarse sand and gravel substrate associated with cobble, boulders, and/or bedrock. Stability of the substrate appears to be critical to the Appalachian elktoe, and the species is seldom found in stream reaches with accumulations of silt or shifting sand, gravel, or cobble. Individuals that have been encountered in these areas are believed to have been

scoured out of upstream areas during periods of heavy rain, and have not been found on subsequent surveys (C. McGrath, pers. comm. 1996; J.A. Fridell, pers. observation 1995, 1996, 1999).

Like other freshwater mussels, the Appalachian elktoe feeds by filtering food particles from the water column. The specific food habits of the species are unknown, but other freshwater mussels have been documented to feed on detritus, diatoms, phytoplankton, and zooplankton (Churchill and Lewis 1924). The reproductive cycle of the Appalachian elktoe is similar to that of other native freshwater mussels. Males release sperm into the water column; the sperm are then taken in by the females through their siphons during feeding and respiration. The females retain the fertilized eggs in their gills until the larvae (glochidia) fully develop. The mussel glochidia are released into the water, and within a few days they must attach to the appropriate species of fish, which they then parasitize for a short time while they develop into juvenile mussels. They then detach from their fish host and sink to the stream bottom where they continue to develop, provided they land in a suitable substrate with the correct water conditions. Personnel with the Tennessee Technological University at Cookeville, Tennessee, identified the banded sculpin (*Cottus carolinae*) as a host species for glochidia of the Appalachian elktoe (M. Gordon, Tennessee Technological University, pers. comm. 1993). The Environmental Protection Agency's (EPA) Science and Ecosystem Support Division's Aquatic Lab in Athens, Georgia, documented the mottled sculpin (*Cottus bairdi*), a species more common within the majority of the range of the Appalachian elktoe than the banded sculpin, as a suitable host for Appalachian elktoe (A. Keller, EPA, Athens, Georgia, pers. comm. 1999). The life span and many other aspects of the mussel's life history are currently unknown.

Reasons for Decline and Threats to Surviving Populations

Available information indicates that several factors adversely affect water and habitat quality of our creeks and rivers and have contributed to the decline and loss of populations of the Appalachian elktoe and threaten the remaining populations. These factors include pollutants in wastewater discharges (sewage treatment plants and industrial discharges); habitat loss and alteration associated with impoundments, channelization, and dredging operations; and the run-off of silt, fertilizers, pesticides, and other

pollutants from poorly implemented land-use activities (Service 1994, 1996).

Freshwater mussels, especially in their early life stages, are extremely sensitive to many pollutants (chlorine, ammonia, heavy metals, high concentrations of nutrients, etc.) commonly found in municipal and industrial wastewater effluents (Havlik and Marking 1987, Goudreau *et al.* 1988, Keller and Zam 1991). In the early 1900s, Ortmann (1909) noted that the disappearance of mussels is one of the first and most reliable indicators of stream pollution.

Activities such as impoundments, channelization projects, and in-stream dredging operations eliminate mussel habitat. These activities can also alter the quality and stability of the remaining stream reaches by affecting the flow regimes, water velocities, and water temperature and chemistry.

Agriculture (both crop and livestock) and forestry operations, mining activities, highway and road construction, residential and industrial developments, and other construction and land-clearing activities that do not adequately control soil erosion and storm-water run-off contribute excessive amounts of silt, pesticides, fertilizers, heavy metals, and other pollutants. These pollutants suffocate and poison freshwater mussels. The run-off of storm water from cleared areas, roads, rooftops, parking lots, and other developed areas, which is often ditched or piped directly into streams, not only results in stream pollution but also results in increased water volume and velocity during heavy rains. The high volume and velocity cause channel and stream-bank scouring that leads to the degradation and elimination of mussel habitat. Construction and land-clearing operations are particularly detrimental when they result in the alteration of flood plains or the removal of forested stream buffers that ordinarily would help maintain water quality and the stability of stream banks and channels by absorbing, filtering, and slowly releasing rainwater. When storm water run-off increases from land-clearing activities, less water is absorbed to recharge ground water levels. Therefore, flows during dry months can decrease and adversely affect mussels and other aquatic organisms.

Previous Federal Actions

We recognized the Appalachian elktoe in the May 22, 1984, Animal Notice of Review published in the **Federal Register** (49 FR 21675) and again in the January 6, 1989, Animal Notice of Review (54 FR 579) as a species under review for potential

addition to the *Federal List of Endangered and Threatened Wildlife and Plants*. We designated the Appalachian elktoe as a category 2 candidate for Federal listing on these candidate lists. We no longer maintain a list of category 2 candidate species. At that time, category 2 represented those species for which we had some information indicating that the taxa may be under threat, but sufficient information was lacking to determine if they warranted Federal listing and to prepare a proposed rule. Subsequently, surveys of historical and potential Appalachian elktoe habitat were conducted and revealed that the species had undergone a significant decline throughout its historical range and that the remaining occurrences were threatened by many of the same factors that are believed to have resulted in this decline. Accordingly, on June 10, 1992, we reclassified the Appalachian elktoe as a category 1 candidate. At that time, category 1 candidates were those species for which we had enough substantial information on biological vulnerability and threats to support proposals to list them as endangered or threatened species. On April 20, 1992, and again on August 21, 1992, we notified appropriate Federal, State, and local government agencies that we were gathering information on the Appalachian elktoe and that the species might be proposed for Federal listing. We received a total of six written comments on these two notices. The North Carolina Wildlife Resources Commission (NCWRC) (two written comments), the North Carolina Natural Heritage Program (two written comments), and an interested biologist expressed their support for the species' being proposed for protection under the Act. The U.S. Soil Conservation Service stated that they did not have any additional information on this species. We did not receive any comments opposing the potential listing.

On September 3, 1993, we published in the **Federal Register** (58 FR 46940) a proposed rule to list the Appalachian elktoe as an endangered species. The proposed rule provided information on the species' biology, status, and threats to its continued existence and included our proposed determination that the designation of critical habitat was not prudent for the Appalachian elktoe. We solicited comments or suggestions concerning the proposed rule from the public, concerned governmental agencies, the scientific community, industry, and other interested parties. We requested comments from appropriate Federal and State agencies,

county governments, scientific organizations, and interested parties by letters dated September 14, 1993, and January 27, 1994. We published a legal notice, which invited general public comment, in the following newspapers: *The Erwin Record*, Erwin, Tennessee, September 22, 1993; *Mitchell News Journal*, Spruce Pine, North Carolina, September 22, 1993; *Yancey Journal*, Burnsville, North Carolina, September 22, 1993; *Smoky Mountain Times*, Bryson City, North Carolina, September 23, 1993; and *Franklin Press*, Franklin, North Carolina, September 24, 1993.

In response to the proposed rule, we received four comments, one supporting the listing and three requesting a public hearing. In the **Federal Register** of January 21, 1994, (59 FR 3326) we published a notice announcing the public hearing and the reopening of the comment period to extend to February 21, 1994, to ensure that all interested parties had ample time to provide information on the proposed rule. On February 8, 1994, we held the public hearing at the Mitchell High School in Bakersville, North Carolina. We received 20 verbal statements and written comments during the public hearing; 14 of them expressed opposition to the listing of the Appalachian elktoe, 5 expressed support for the listing, and 1 expressed an interest but offered neither support nor opposition. We received 40 additional written comments during the reopened comment period; 8 opposed the listing, 31 supported the listing, and 1 expressed neither opposition nor support.

Following our review of all the comments and information received throughout the listing process, by final rule (59 FR 60324) dated November 23, 1994, we listed the Appalachian elktoe as endangered. We addressed the comments received throughout the listing process and incorporated changes into the final rule, as appropriate. That decision included our determination that the designation of critical habitat was not prudent for the Appalachian elktoe because, after a review of all the available information, we determined that such designation would not be beneficial to the species (see "Prudency Determination" section below).

On June 30, 1999, the Southern Appalachian Biodiversity Project and the Foundation for Global Sustainability filed a lawsuit in United States District Court for the District of Columbia against the Service, the Director of the Service, and the Secretary of the Department of the Interior, challenging the Service's "not prudent" critical

habitat determinations for four species in North Carolina—the Appalachian elktoe (*Alasmidonta raveneliana*), Carolina heelsplitter (*Lasmigona decorata*), spruce-fir moss spider (*Microhexura montivaga*), and rock gnome lichen (*Gymnoderma lineare*). On February 29, 2000, the U.S. Department of Justice entered into a settlement agreement with the plaintiffs in which we agreed to reexamine our prudency determination and submit to the **Federal Register**, by February 1, 2001, a withdrawal of the existing not prudent determination for the Appalachian elktoe, together with a new proposed critical habitat determination if appropriate. We have agreed further that if, upon consideration of all the available information and comments, we determine that designating critical habitat is not prudent for the Appalachian elktoe, we will submit a final rule of that finding to the **Federal Register** by August 1, 2001. On the other hand, if we determine that the designation of critical habitat is prudent for the Appalachian elktoe, we will send a final rule of this finding to the **Federal Register** by November 1, 2001.

This proposal is the product of our reexamination of our prudency determination for the Appalachian elktoe and reflects our interpretation of the recent judicial opinions on critical habitat designation and the standards placed on us for making a not prudent determination. If additional information becomes available on the species' biology and distribution and threats to the species, we may reevaluate this proposal to designate critical habitat, including proposing additional critical habitat, proposing the deletion or boundary refinement of existing proposed critical habitat, or withdrawing our proposal to designate critical habitat.

Prudency Determination

Section 4(a)(3) of the Act and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, we designate critical habitat at the time a species is determined to be endangered or threatened. Regulations under 50 CFR 424.12(a)(1) state that the designation of critical habitat is not prudent when one or both of the following situations exist: (1) The species is threatened by taking or other activity and the identification of critical habitat can be expected to increase the degree of threat to the species or (2) such designation of critical habitat would not be beneficial to the species. In our November 23, 1994, final rule, we determined that the designation of critical habitat was not

prudent for the Appalachian elktoe because such designation would not be beneficial to the species.

A critical habitat designation has no effect on actions in which a Federal agency is not involved, including actions on private or State land unless these actions require Federal funds or a Federal permit. The regulations that provide for the protection of designated critical habitat come into play through section 7 of the Act. Requirements under section 7 of the Act apply only to Federal actions and activities. They require Federal agencies to ensure, in consultation with us, that activities they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat. Regulations for the implementation of section 7 of the Act (50 CFR 402.2) provide for both a "jeopardy" standard and an "adverse modification or destruction of critical habitat" standard. 50 CFR 402.2 defines "jeopardize the continued existence of" as meaning to engage in an action that would reasonably be expected, directly or indirectly, to appreciably reduce the likelihood of both the "survival and recovery" of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

"Destruction or adverse modification" is defined as a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the "survival and recovery" of a listed species. These regulations require that the analysis of adverse modification or destruction of critical habitat, like the jeopardy analysis, consider the detrimental effects of a proposed Federal action to both the survival and recovery of the listed species. Because of the restricted range and limited amount of suitable habitat available to the Appalachian elktoe, we determined in the November 23, 1994, final rule that any action that would likely result in the destruction or adverse modification of the species' habitat would also likely jeopardize the species' continued existence. Since Federal actions resulting in jeopardy are also prohibited by section 7, we determined that the designation of critical habitat would not provide any additional protection benefitting the species beyond that provided by the jeopardy standard.

In addition, we were concerned that the rarity and uniqueness of the Appalachian elktoe could generate interest in the species and that the publicity associated with the designation of critical habitat, together with the publication of maps and

descriptions of critical habitat, could increase the vulnerability of the species to collection, vandalism, or other disturbance. Although we did not base our "not prudent" determination on increased threat to the Appalachian elktoe, we did consider the potential increased threat to the species from critical habitat designation in making our determination that the designation of critical habitat was not prudent for the Appalachian elktoe because it would not benefit the species.

However, in the past few years, several of our determinations that the designation of critical habitat would not be prudent have been overturned by court decisions. For instance, in *Conservation Council for Hawaii v. Babbitt*, the United States District Court for the District of Hawaii ruled that the Service could not rely on the "increased threat" rationale for a "not prudent" determination without specific evidence of the threat to the species at issue (2 F. Supp. 2d 1280 [D. Hawaii 1998]). And in *Natural Resources Defense Council v. U.S. Department of the Interior*, the United States Court of Appeals for the Ninth Circuit ruled that the Service must balance, in order to invoke the "increased threat rationale," the threat against the benefit to the species of designating critical habitat, 113 F. 3d 1121, 1125 (9th Cir. 1997).

We continue to be concerned that the Appalachian elktoe is vulnerable to unrestricted collection or disturbance of its habitat and that these threats might be increased by the publication of critical habitat maps and further dissemination of location and habitat information. Although we have received one unconfirmed report since the Appalachian elktoe was listed as endangered, where Appalachian elktoes have been collected and used as fish bait, at this time we do not have specific evidence for the taking, collection, trade, vandalism, or other unauthorized human disturbance specific to the Appalachian elktoe. Consequently, we hereby propose to withdraw our previous determination that the identification of critical habitat can be expected to increase the degree of threat to the species.

The courts also have ruled that, in the absence of a finding that the designation of critical habitat would increase threats to a species, the existence of another type of protection, even if it offers potentially greater protection to the species, does not justify a "not prudent" finding *Conservation Council for Hawaii v. Babbitt* 2 F. Supp. 2d 1280. Accordingly, we withdraw our previous determination that designation of critical habitat will not benefit the

Appalachian elktoe. It is true that we are already working with Federal and State agencies, private individuals, and organizations in carrying out conservation activities for the Appalachian elktoe and in conducting surveys for additional occurrences of the species and to assess habitat conditions. These entities are fully aware of the distribution, status, and habitat requirements for the Appalachian elktoe, as currently known. However, as stated above, some additional educational or informational benefit may result from designating critical habitat. Therefore, we propose that the designation of critical habitat is prudent for the Appalachian elktoe.

Proposed Critical Habitat

Critical habitat is defined in section 3(5)(A) of the Act as (i) the specific areas within the geographic area occupied by the species on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management consideration or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. Areas outside the geographic area currently occupied by the species shall be designated as critical habitat only when a designation limited to its present range would be inadequate to ensure the conservation of the species. "Conservation" is defined in section 3(3) of the Act as the use of all methods and procedures necessary to bring endangered or threatened species to the point where listing under the Act is no longer necessary. Regulations under 50 CFR 424.02(j) define "special management considerations or protection" to mean any methods or procedures useful in protecting the physical and biological features of the environment for the conservation of listed species.

In order to be included in a critical habitat designation, the habitat must first be "essential to the conservation of the species." Critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)).

Section 4 requires that we designate critical habitat at the time of listing and based on what we know at the time of the designation. When we designate critical habitat at the time of listing or under short court-ordered deadlines, we

will often not have sufficient information to identify all areas of critical habitat. We are required, nevertheless, to make a decision and thus must base our designations on what, at the time of designation, we know to be critical habitat.

Within the geographic area occupied by the species, we will designate only areas currently known to be essential. Essential areas should already have the features and habitat characteristics that are necessary to sustain the species. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area should not be included in the critical habitat designation. Within the geographic area occupied by the species, we will not designate areas that do not now have the primary constituent elements, as defined at 50 CFR 424.12(b), that provide essential life cycle needs of the species.

Our regulations state that, "The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

The Service's Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that decisions made by the Service represent the best scientific and commercial data available. It requires Service biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies,

and biological assessments or other unpublished materials (i.e., gray literature).

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, all should understand that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Section 4(b)(2) of the Act requires us to base critical habitat proposals on the best scientific and commercial data available, after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of excluding those areas outweigh the benefits of including the areas within the critical habitat, provided the exclusion will not result in the extinction of the species.

Methods

The proposed areas of critical habitat described below constitute our best assessment of the areas needed for the conservation and recovery of the Appalachian elktoe in accordance with the goals outlined in our recovery plan for the species (Service 1996), and are based on the best scientific and commercial information currently available to us concerning the species' known present and historical range, habitat, biology, and threats. All of the areas we propose to designate as critical habitat are within what we believe to be

the geographic area occupied by the Appalachian elktoe, include all known surviving occurrences of the species, and are essential for the conservation of the species. To the extent feasible, we will continue, with the assistance of other Federal, State, and private researchers, to conduct surveys and research on the species and its habitat. If new information becomes available indicating that other areas within the Appalachian elktoe's historical range are essential to the conservation of the species, we will revise the proposed critical habitat or designated critical habitat for the Appalachian elktoe accordingly.

Primary Constituent Elements

In accordance with sections 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas to propose as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species and that may require special management considerations or protection. Such requirements include, but are not limited to: space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species.

When considering areas for designation as critical habitat, we are required to focus on the principal biological and physical constituent elements within the defined area that are essential to the conservation of the species (50 CFR 424.12 (b)). Although additional information is needed to better define the habitat requirements of the species, particularly the microhabitat requirements, based on the best available information, the primary constituent elements essential for the conservation of the Appalachian elktoe are:

1. Permanent, flowing, cool, clean water;
2. Geomorphically stable stream and river channels and banks;
3. Pool, riffle, and run sequences within the channel;
4. Sand, gravel, cobble, boulder, and bedrock substrates with no more than low amounts of fine sediment;
5. Moderate to high stream gradient;
6. Periodic natural flooding; and

7. fish hosts, with adequate living, foraging, and spawning areas for them.

Areas Proposed for Designation as Critical Habitat

The proposed designation of critical habitat for the Appalachian elktoe includes 38.5 kilometers (km)—24.0 river miles (rm)—of the Little Tennessee River in Swain and Macon Counties, North Carolina; 41.6 km (26.0 rm) of the Tuckasegee River in Jackson and Swain Counties, North Carolina; 14.6 km (9.1 rm) of the Cheoah River in Graham County, North Carolina; 7.5 km (4.7 rm) of the Little River in Transylvania County, North Carolina; 17.8 km (11.1 rm) of the West Fork Pigeon River and the Pigeon River in Haywood County, North Carolina; 22.6 km (14.1 rm) of the South Toe River and 26.4 km (16.5 rm) of the Cane River in Yancey County, North Carolina; 5.9 km (3.7 rm) of the North Toe River and 34.6 km (21.6 rm) of the Toe River in Yancey and Mitchell Counties, North Carolina; and 21.6 km (13.5 rm) of the Nolichucky River in Yancey and Mitchell Counties, North Carolina, and Unicoi County, Tennessee.

Approximately 67 percent—14.4 km (9.0 rm)—of the portion of the Nolichucky River that is proposed for designation as critical habitat is bordered by the Pisgah National Forest in North Carolina and the Cherokee National Forest in Tennessee; 88 percent—12.8 km (8.0 rm)—of the portion of the Cheoah River proposed for designation as critical habitat is bordered by the Nantahala National Forest; and a small percentage of the portion of the Tuckasegee River proposed for designation as critical habitat is bordered by land belonging to the Eastern Band of the Cherokee Indians. The remainder of the land along the portions of the Nolichucky River, Cheoah River, and Tuckasegee River proposed for designation as critical habitat, and all of the land along the portions of the Little Tennessee River, Little River, West Fork Pigeon River, Pigeon River, North Toe River, South Toe River, and Cane River that are proposed for designation as critical habitat are privately owned.

We are proposing the following areas for designation as critical habitat for the Appalachian elktoe; these areas provide all of the above primary constituent elements. The lateral extent of proposed critical habitat is up to the ordinary high water line on each bank. In addition, given the threats to the species' habitat discussed in the final listing rule (59 FR 60324) and summarized above, we believe these areas may need special

management considerations or protection:

Unit 1. Macon County and Swain County, North Carolina

Unit 1 encompasses the main stem of the Little Tennessee River (Tennessee River system), from the Lake Emory Dam at Franklin, Macon County, North Carolina, downstream to the backwaters of Fontana Reservoir in Swain County, North Carolina. This unit is part of the currently occupied range of the Appalachian elktoe and, based on the best available information, provides the physical and biological habitat elements necessary for the life cycle needs of the species. In accordance with the recovery goals and criteria outlined in the recovery plan for the Appalachian elktoe (Service 1996), protection of this unit is essential to the conservation of the species.

Unit 2. Jackson County and Swain County, North Carolina

Unit 2 encompasses the main stem of the Tuckasegee River (Little Tennessee River system), from the N.C. State Route 1002 Bridge in Cullowhee, Jackson County, North Carolina, downstream to the N.C. Highway 19 Bridge, north of Bryson City, Swain County, North Carolina. This unit is part of the currently occupied range of the Appalachian elktoe and, based on the best available information, provides the physical and biological habitat elements necessary for the life cycle needs of the species. In accordance with the recovery goals and criteria outlined in the recovery plan for the Appalachian elktoe (Service 1996), protection of this unit is essential to the conservation of the species.

Unit 3. Graham County, North Carolina

Unit 3 encompasses the main stem of the Cheoah River (Little Tennessee River system), from the Santeetlah Dam, downstream to its confluence with the Little Tennessee River. This unit is part of the currently occupied range of the Appalachian elktoe and, based on the best available information, provides the physical and biological habitat elements necessary for the life cycle needs of the species. In accordance with the recovery goals and criteria outlined in the recovery plan for the Appalachian elktoe (Service 1996), protection of this unit is essential to the conservation of the species.

Unit 4. Transylvania County, North Carolina

Unit 4 encompasses the main stem of the Little River (French Broad River system), from the Cascade Lake Power

Plant, downstream to its confluence with the French Broad River. This unit is part of the currently occupied range of the Appalachian elktoe and, based on the best available information, provides the physical and biological habitat elements necessary for the life cycle needs of the species. In accordance with the recovery goals and criteria outlined in the recovery plan for the Appalachian elktoe (Service 1996), protection of this unit is essential to the conservation of the species.

Unit 5. Haywood County, North Carolina

Unit 5 encompasses the main stem of the West Fork Pigeon River (French Broad River system), from the confluence of the Little East Fork Pigeon River, downstream to the confluence of the East Fork Pigeon River, and the main stem of the Pigeon River, from the confluence of the West Fork Pigeon River and the East Fork Pigeon River, downstream to the N.C. Highway 215 Bridge crossing, south of Canton, North Carolina. This unit is part of the currently occupied range of the Appalachian elktoe and, based on the best available information, provides the physical and biological habitat elements necessary for the life cycle needs of the species. In accordance with the recovery goals and criteria outlined in the recovery plan for the Appalachian elktoe (Service 1996), protection of this unit is essential to the conservation of the species.

Unit 6. Yancey County and Mitchell County, North Carolina, and Unicoi County, Tennessee

Unit 6 encompasses the main stem of the North Toe River, Yancey and Mitchell Counties, North Carolina, from the confluence of Big Crabtree Creek, downstream to the confluence of the South Toe River; the main stem of the South Toe River, Yancey County, North Carolina, from the N.C. State Route 1152 Bridge, downstream to its confluence with the North Toe River; the main stem of the Toe River, Yancey and Mitchell Counties, North Carolina, from the confluence of the North Toe River and the South Toe River, downstream to the confluence of the Cane River; the main stem of the Cane River, Yancey County, North Carolina, from the N.C. State Route 1381 Bridge, downstream to its confluence with the Toe River; and the main stem of the Nolichucky River from the confluence of the Toe River and the Cane River in Yancey County and Mitchell County, North Carolina, downstream to the U.S. Highway 23/19W Bridge southwest of Erwin, Unicoi County, Tennessee. This unit is part of

the currently occupied range of the Appalachian elktoe and, based on the best available information, provides the physical and biological habitat elements necessary for the life cycle needs of the species. In accordance with the recovery goals and criteria outlined in the recovery plan for the Appalachian elktoe (Service 1996), protection of this unit is essential to the conservation of the species.

Effects of Critical Habitat Designation

Designating critical habitat does not, in itself, lead to the recovery of a listed species. The designation does not establish a reserve, create a management plan, establish numerical population goals, prescribe specific management practices (inside or outside of critical habitat), or directly affect areas not designated as critical habitat. Specific management recommendations for areas designated as critical habitat are most appropriately addressed in recovery and management plans and through section 7 consultation and section 10 permits.

Critical habitat receives regulatory protection only under section 7 of the Act through the prohibition against destruction or adverse modification of designated critical habitat by actions carried out, funded, or authorized by a Federal agency. Section 7 also requires conferences on Federal actions that are likely to result in the adverse modification or destruction of proposed critical habitat. Aside from the protection that may be provided under section 7, the Act does not provide other forms of protection to land designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal land that do not involve a Federal action, the critical habitat designation would not afford any protection under the Act against such activities. Accordingly, the designation of critical habitat on private land will not have any regulatory effect on private or State activities in these areas unless those activities require a Federal permit, authorization, or funding.

Section 7(a)(4) of the Act and regulations at 50 CFR 402.10 require Federal agencies to confer with us on any action that is likely to result in the destruction or adverse modification of proposed critical habitat. "Destruction or adverse modification" is defined as a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. These conferences, which consist of informal discussions, are intended to assist responsible agencies and the applicant, if applicable, in identifying and

resolving potential conflicts. Conference reports resulting from these discussions provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. We may issue a formal conference opinion if requested by a Federal agency. Formal conference opinions on proposed critical habitat are prepared according to 50 CFR 402.14 as if critical habitat were designated. We may adopt the formal conference opinion as the biological opinion when the critical habitat is designated if no significant new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

If this proposal is finalized, activities on Federal land, activities on private or State land carried out by a Federal agency, or activities receiving funding or requiring a permit from a Federal agency that may affect the designated critical habitat of the Appalachian elktoe will require consultation under section 7 of the Act. However, section 7 of the Act also requires Federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the continued existence of listed species and to consult with us on any action that may affect a listed species. Activities that jeopardize listed species are defined as actions that "directly or indirectly, reduce appreciably the likelihood of both the survival and recovery of a listed species" (50 CFR 402.02). Federal agencies are prohibited from jeopardizing listed species through their actions, regardless of whether critical habitat has been designated for the species. Where critical habitat is designated, section 7 also requires Federal agencies to ensure that activities they authorize, fund, or carry out do not result in the destruction or adverse modification of designated critical habitat. Activities that destroy or adversely modify critical habitat are defined as an action that "appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species" (50 CFR 402.02). Common to the definitions of both "jeopardy" and "destruction or adverse modification of critical habitat" is the concept that the likelihood of both the survival and recovery of the species are appreciably reduced by the action. Because of the small size of the majority of the surviving populations of the Appalachian elktoe, the species' restricted range, and the limited amount of suitable habitat available to the species, actions that are likely to destroy

or adversely modify critical habitat are also likely to jeopardize the species. Accordingly, even though Federal agencies will be required to evaluate the potential effects of their actions on any habitat that is designated as critical habitat for the Appalachian elktoe, this designation would not be likely to change the outcome of section 7 consultations.

Section 4(b)(8) of the Act requires us to briefly evaluate, in any proposed or final regulation that designates critical habitat, those activities that may adversely modify such habitat or may be affected by such designation. Activities that may destroy or adversely modify critical habitat are, as discussed above, those that alter the primary constituent elements to the extent that the value of critical habitat for both the survival and recovery of the Appalachian elktoe is appreciably diminished. This may include any activity, regardless of the activity's location in relation to designated or proposed critical habitat, that would significantly alter the natural flow regime, channel morphology or geometry, or water chemistry or temperature of any of the six proposed critical habitat units, as described by the constituent elements, or any activity that could result in the significant discharge or deposition of sediment, excessive nutrients, or other organic or chemical pollutants into any of the six proposed critical habitat units. Such activities include (but are not limited to) carrying out or issuing permits, authorization, or funding for reservoir construction; stream alterations; wastewater facility development; hydroelectric facility construction and operation; pesticide/herbicide applications; forestry operations; and road, bridge, and utility construction. Please note that these same activities also have the potential to jeopardize the continued existence of the Appalachian elktoe, and Federal agencies are already required to consult with us on these types of activities, or any other activity, that may affect the species.

Requests for copies of the regulations on listed wildlife and inquiries about prohibitions and permits, or questions regarding whether specific activities will constitute adverse modification of critical habitat, may be addressed to the U.S. Fish and Wildlife Service, Asheville Field Office, 160 Zillicoa Street, Asheville, North Carolina 28801.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available and to consider the economic and other relevant

impacts of designating a particular area as critical habitat. We may exclude areas as critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species. We will conduct an analysis of the economic impacts of designating the areas identified above as critical habitat prior to a final determination. When a draft economic analysis is completed, we will announce its availability with a notice in the **Federal Register** and will open a 30-day comment period at that time. Secretarial Order 3206: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act.

In accordance with the Presidential Memorandum of April 29, 1994, and E.O. 13175 we are required to assess the effects of critical habitat designations on tribal land and tribal trust resources. A portion of the Tuckasegee River that we consider to be essential to the conservation of the Appalachian elktoe and that we are proposing for designation as critical habitat for the species is partially bordered by land owned by the Eastern Band of the Cherokee Indians. The short amount of time allowed to us under the settlement agreement (see "Previous Federal Actions" section above) for preparing this proposal has precluded us from coordinating the proposal with the Eastern Band of the Cherokee Indians. However, subsequent to this proposal, we will consult with them before making a final determination as to whether this reach of the Tuckasegee River should be designated as critical habitat for the Appalachian elktoe.

Public Comments Solicited

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

1. The reasons why any habitat should or should not be determined to be critical habitat as provided by section 4 of the Act;
2. Specific information on the numbers and distribution of the Appalachian elktoe and what habitat is essential to the conservation of the species and why;

3. Information on specific characteristics of habitat essential to the conservation of the Appalachian elktoe;

4. Land-use practices and current or planned activities in the subject areas and their possible effects on proposed critical habitat;

5. Any foreseeable economic or other impacts resulting from the proposed designation of critical habitat, in particular, any impacts on small entities or families;

6. Economic and other values associated with designating critical habitat for the Appalachian elktoe, such as those derived from nonconsumptive uses (e.g., hiking, camping, bird-watching, enhanced watershed protection, improved air quality, "existence values," and reductions in administrative costs); and

7. Potential adverse effects to the Appalachian elktoe and/or its habitat associated with designating critical habitat for the species; e.g., increased risk to the species from collecting or the destruction of its habitat.

8. Whether our approach to critical habitat designation could be improved or modified in any way to provide for greater public participation and understanding, or to assist us in accommodating public concern and comments.

Please submit comments as an ASCII file format and avoid the use of special characters and encryption. Please also include "Attn: [RIN number]" and your name and return address in your e-mail message. If you do not receive a confirmation from the system that we have received your e-mail message, contact us directly by calling our Asheville Field Office (see **ADDRESSES** section).

Our practice is to make all comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we would withhold also from the rulemaking record a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this prominently at the beginning of your comments. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Peer Review

In accordance with our policy published on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of such a review is to ensure that listing decisions are based on scientifically sound data, assumptions, and analyses. We will send these peer reviewers copies of this proposed rule immediately following publication in the **Federal Register**. We will invite these peer reviewers to comment, during the comment period, on the specific assumptions and conclusions regarding the proposed designation of critical habitat.

We will consider all comments and information received during the 60-day comment period on this proposed rule during preparation of a final rulemaking. Accordingly, the final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if requested. Requests must be filed within 45 days of the date of this proposal. Such requests must be made in writing and should be addressed to the State Supervisor, Asheville Field Office (see **ADDRESSES** section). Written comments submitted during the comment period receive equal consideration with those comments presented at a public hearing.

Clarity of the Rule

Executive Order 12866 requires each agency to write regulations/notices that are easy to understand. We invite your comments on how to make this notice easier to understand, including answers to questions such as the following: (1) Are the requirements in the notice clearly stated? (2) Does the notice contain unnecessary technical language or jargon that interferes with the clarity? (3) Does the format of the proposed rule (grouping and order of sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) Is the description of the notice in the "Supplementary Information" section of the preamble helpful in understanding the notice? (5) What else could we do to make the notice easier to understand?

Send a copy of any comments that concern how we could make this notice easier to understand to: Office of Regulatory Affairs, Department of the Interior, Room 7229, 1849 C Street, NW, Washington, DC 20240. You may e-mail your comments to the following address: Execsec@ios.doi.gov.

Required Determinations

Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this rule is a significant regulatory action and has been reviewed by the Office of Management and Budget (OMB).

(a) In the economic analysis, we will determine whether this rule will have an annual economic effect of \$100 million or more, or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. The Appalachian elktoe was listed as an endangered species in 1994. Since that time we have conducted, and will continue to conduct, formal and informal section 7 consultations with other Federal agencies to ensure that their actions will not jeopardize the continued existence of the Appalachian elktoe.

Under the Act, critical habitat may not be adversely modified by a Federal agency action; critical habitat does not impose any restrictions on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency (see Table 1 below). Section 7 of the Act requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based on our experience with the species and its needs, we believe that any Federal action or authorized action that could potentially cause an adverse modification of the proposed critical habitat would currently be considered as "jeopardy" to the species under the Act.

Accordingly, we do not expect the designation of areas as critical habitat within the geographical range occupied by the species to have any incremental impacts on what actions may or may not

be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons who do not have a Federal "sponsorship" of their actions are not restricted by the designation of critical habitat. (However, they continue to be bound by the provisions of the Act concerning "take" of the species, which came into play in 1994 when the species was listed as endangered.)

(b) This rule will not create inconsistencies with other agencies' actions. Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the Appalachian elktoe since the listing in 1994. As shown in Table 1 (below), no additional effects on agency actions are anticipated to result from the critical habitat designation. However, we will continue to review this proposed action for any inconsistencies with other Federal agency actions.

TABLE 1.—IMPACTS OF APPALACHIAN ELKTOE LISTING AND CRITICAL HABITAT DESIGNATION

Categories of activities	Activities potentially affected by species listing only ¹	Additional activities potentially affected by critical habitat designation ²
Federal Activities Potentially Affected ³	Activities such as carrying out or issuing permits, authorization, or funding for reservoir construction; stream alterations; wastewater facility development; hydroelectric facility construction and operation; pesticide/herbicide applications; forestry operations; road, bridge, and utility construction; or other activities that could result in direct or indirect impacts to the Appalachian elktoe and/or its habitat.	None.
Private and other non-Federal Activities Potentially Affected ⁴ .	Activities occurring on Federal land or that require a action (permit, authorization, or funding) and that involve activities such as those listed above that could result in "take" of the Appalachian elktoe or damage or destruction of its habitat.	None.

¹ This column represents the activities potentially affected by listing the Appalachian elktoe as an endangered species (November 23, 1994; 59 FR 60324) under the Endangered Species Act.

² This column represents the effects on activities resulting from critical habitat designation beyond the effects attributable to the listing of the species.

³ Activities initiated by a Federal agency.

⁴ Activities initiated by a private or other non-Federal entity that may need Federal authorization or funding.

(c) The proposed rule, if made final, will not significantly impact entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies currently are required to ensure that their activities do not jeopardize the continued existence of the species, and we do not anticipate that the adverse modification prohibition (resulting from the critical habitat designation) will have any incremental effects in areas of proposed critical habitat.

(d) This rule will not raise novel legal or policy issues. The proposed rule follows the requirements for determining critical habitat contained in the Act.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

In the draft economic analysis (under section 4 of the Act), we will determine whether the designation of critical habitat will have a significant effect on a substantial number of small entities. As discussed under "Regulatory Planning and Review" above, this rule is not expected to result in any restrictions in addition to those currently in existence for areas of proposed critical habitat.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

In the economic analysis, we will determine whether the designation of critical habitat will cause (a) any effect on the economy of \$100 million or more, (b) any increases in costs or prices

for consumers; individual industries; Federal, State, or local government agencies; or geographical regions, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. As discussed above, we anticipate that the designation of critical habitat will not have any additional effects on these activities in areas of critical habitat that are within the geographical range occupied by the species.

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.):

a. This rule will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. Small governments will not be affected unless they propose an action requiring Federal funds, permits, or other authorization. Any such activity will require that the involved Federal agency ensure that the action will not adversely modify or destroy designated critical habitat.

b. This rule will not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no new obligations on State or local governments.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications, and a takings implication assessment is not required. This proposed rule, if made final, will not “take” private property. The designation of critical habitat affects only Federal agency actions. Federal actions on private land could be affected by the critical habitat designation; however, we expect no regulatory effect from this designation since all proposed areas are considered to be within the geographical range occupied by the species and would be reviewed under both the jeopardy and adverse modification standards under section 7 of the Act.

This rule will not increase or decrease the current restrictions on private property concerning taking of the Appalachian elktoe as defined in section 9 of the Act and its implementing regulations (50 CFR 17.31). Additionally, critical habitat designation does not preclude the development of habitat conservation plans and the issuance of incidental take permits. Any landowner in areas that are included in the designated critical habitat will continue to have opportunity to utilize his or her property in ways consistent with the survival of the Appalachian elktoe.

Federalism

In accordance with Executive Order 13132, this rule does not have significant federalism effects. A Federalism Assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated the development of this critical habitat proposal with, appropriate State natural resources agencies in North Carolina and Tennessee. We will continue to coordinate any future designation of critical habitat for the Appalachian elktoe with the appropriate State agencies. The designation of critical habitat for the Appalachian elktoe imposes few, if any, additional restrictions to those currently in place and therefore has little incremental impact on State and local governments and their activities. The designation may provide some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined and, to the extent currently feasible, the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, doing so may assist these local governments in long-range planning (rather than waiting for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The Office of the Solicitor will review the final determination for this proposal. We will make every effort to ensure that the final determination contains no drafting errors, provides clear standards, simplifies procedures, reduces burdens, and is clearly written, such that the risk of litigation is minimized.

Paperwork Reduction Act

This rule does not contain any new collections of information that require

approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* This rule will not impose new record-keeping or reporting requirements on State or local governments, individuals, businesses, or organizations.

National Environmental Policy Act

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

References Cited

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

Author

The primary author of this document is John Fridell (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

For the reasons given in the preamble, we propose to amend 50 CFR part 17, 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. In § 17.11(h), revise the entry for the “Elktoe, Appalachian” under “CLAMS” to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

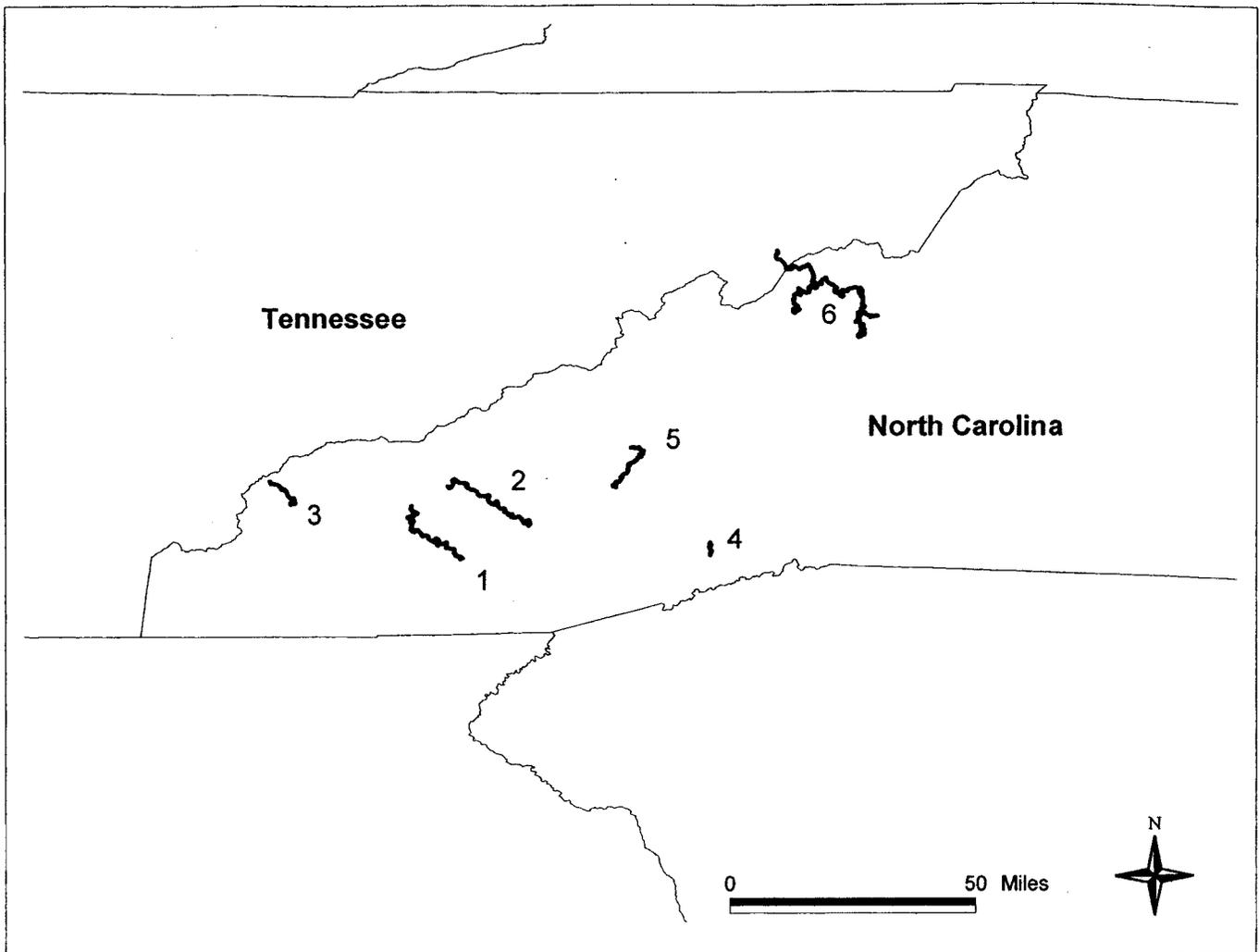
Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
CLAMS							
Elktoe, Appalachian	<i>Alasmidonta raveneliana</i>	U.S.A.	(NC, TN)	E	563	17.95(f)	NA

3. Amend § 17.95(f) by adding critical habitat for the Appalachian elktoe (*Alasmidonta raveneliana*), in the same alphabetical order as the species occurs in 17.11(h).

§ 17.95 Critical habitat—fish and wildlife.
 * * * * *
 (f) *Clams and snails.*
 * * * * *

Appalachian elktoe (*Alasmidonta raveneliana*)

1. Critical habitat units proposed for designation as critical habitat are described below and depicted in the maps that follow, with the lateral extent of each designated unit bounded by the ordinary high water line:

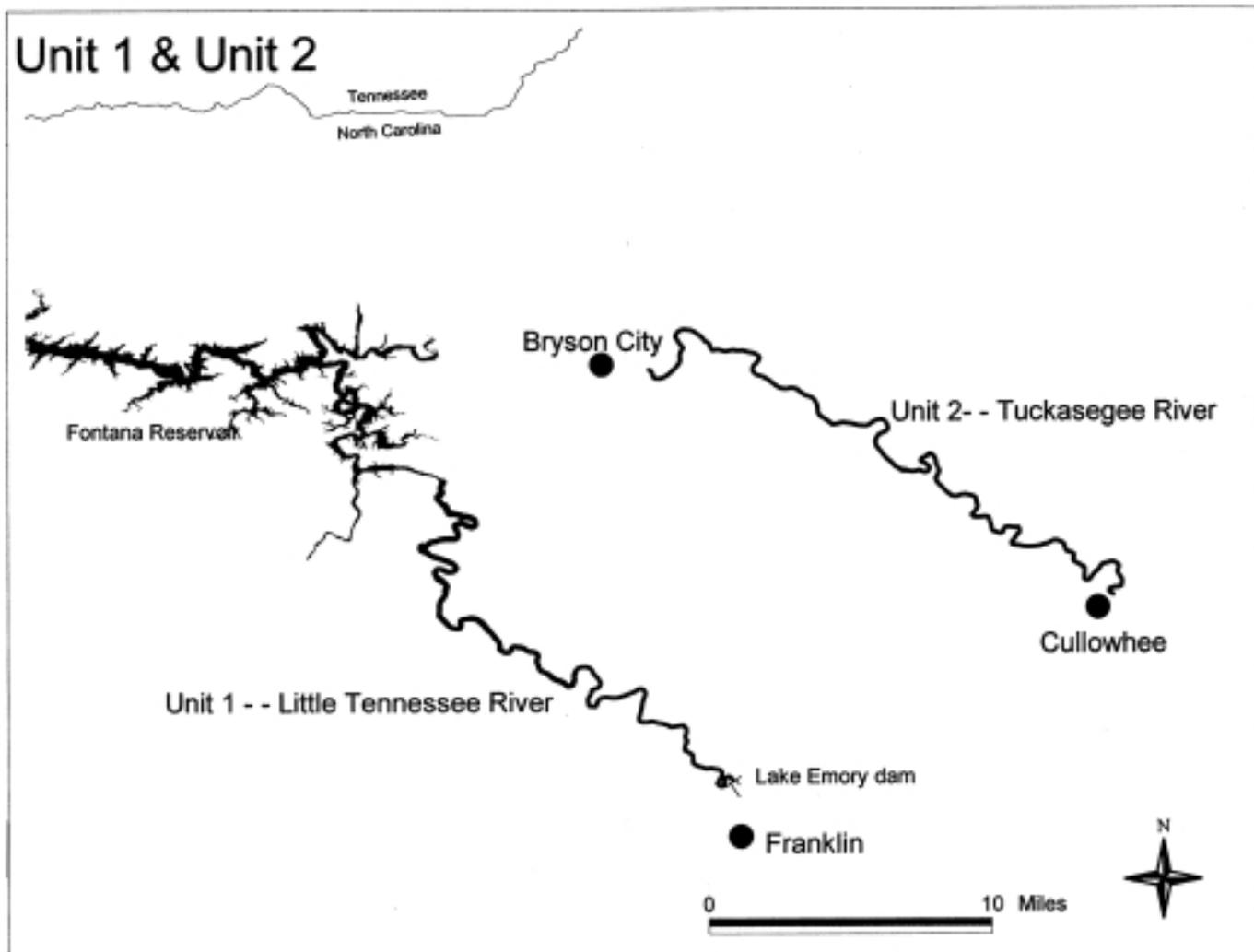


Unit 1: Macon County and Swain County, North Carolina—the main stem of the Little Tennessee River (Tennessee River system), from the Lake Emory Dam at Franklin, Macon County, North Carolina, downstream to the

backwaters of Fontana Reservoir in Swain County, North Carolina.

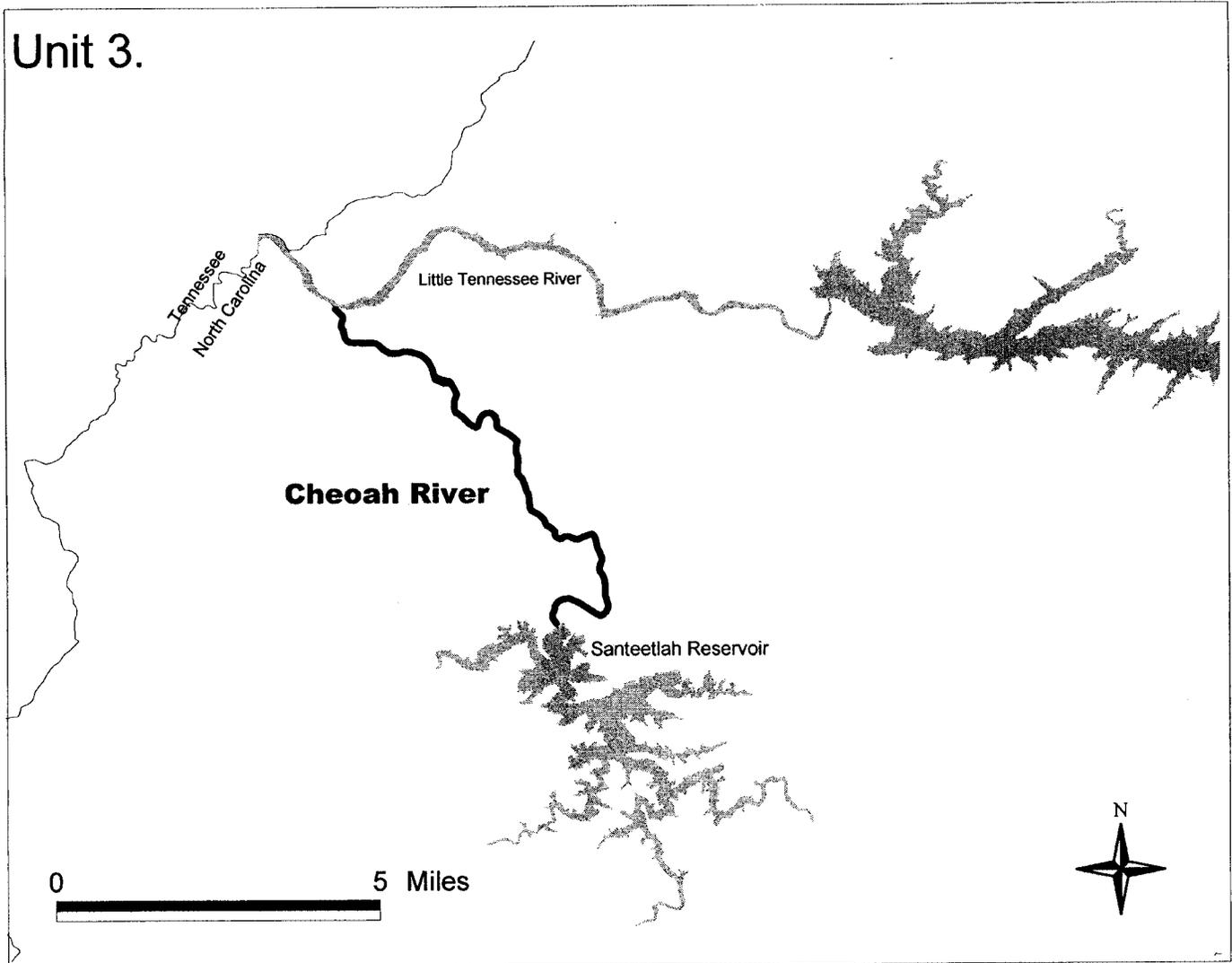
Unit 2: Jackson County and Swain County, North Carolina—the main stem of the Tuckasegee River (Little Tennessee River

system), from the N.C. State Route 1002 Bridge in Cullowhee, Jackson County, North Carolina, downstream to the N.C. Highway 19 Bridge, north of Bryson City, Swain County, North Carolina.

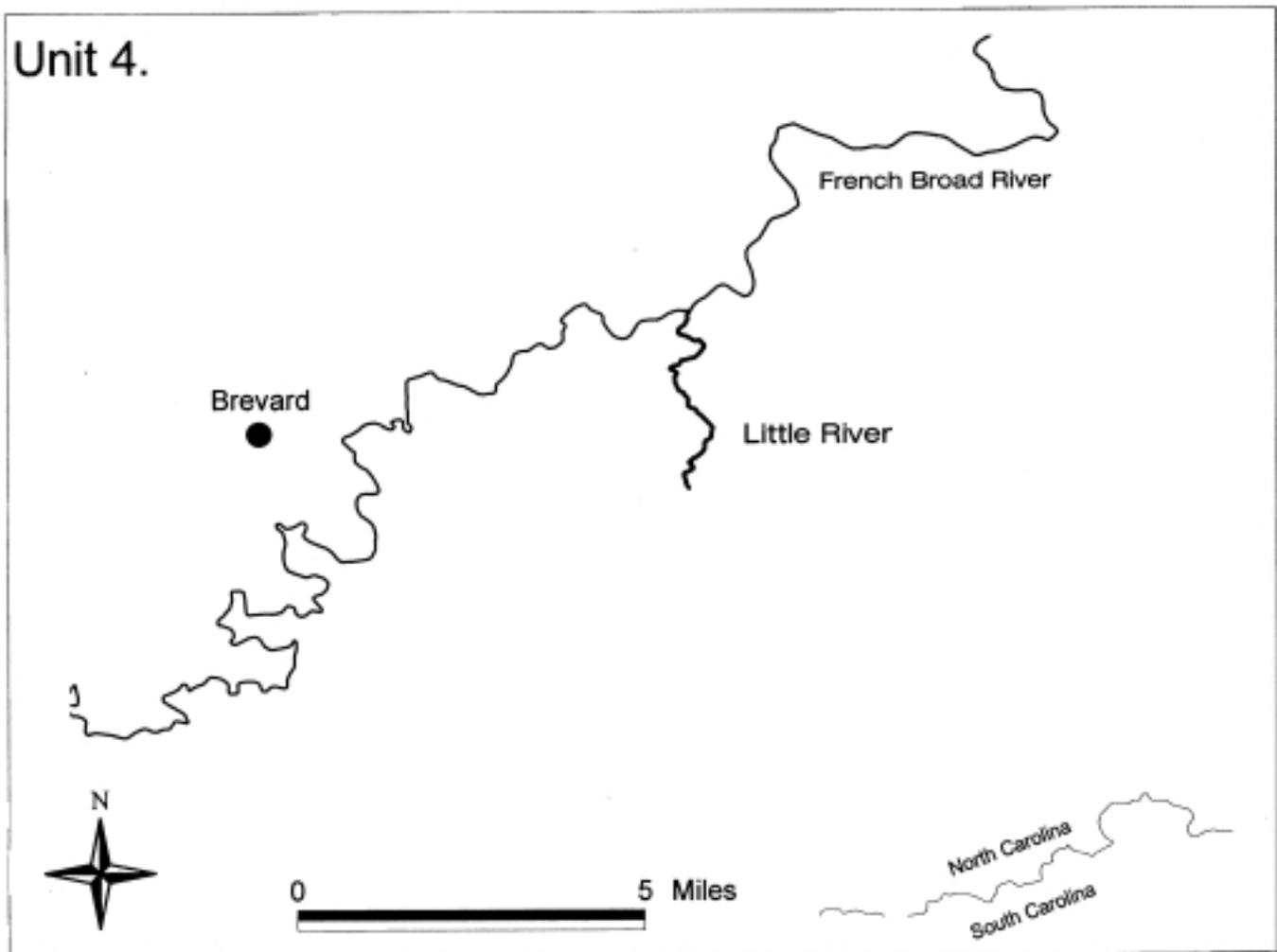


Unit 3: Graham County, North Carolina—
the main stem of the Cheoah River (Little
Tennessee River system), from the Santeetlah

Dam, downstream to its confluence with the
Little Tennessee River.



Unit 4: Transylvania County, North Carolina—the main stem of the Little River (French Broad River system), from the Cascade Lake Power Plant, downstream to its confluence with the French Broad River.

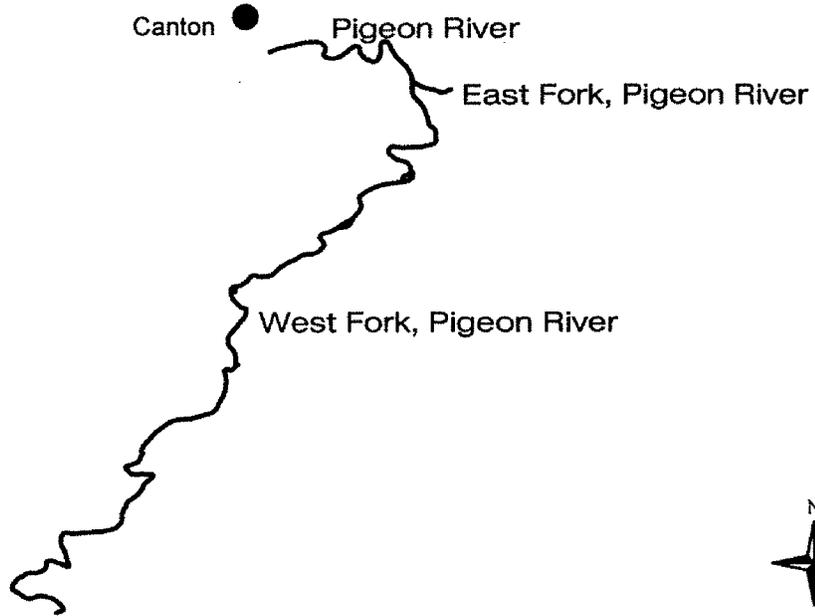


Unit 5: Haywood County, North Carolina—the main stem of the West Fork Pigeon River (French Broad River system), from the confluence of the Little East Fork Pigeon

River, downstream to the confluence of the East Fork Pigeon River, and the main stem of the Pigeon River, from the confluence of the West Fork Pigeon River and the East Fork

Pigeon River, downstream to the N.C. Highway 215 Bridge crossing, south of Canton, North Carolina.

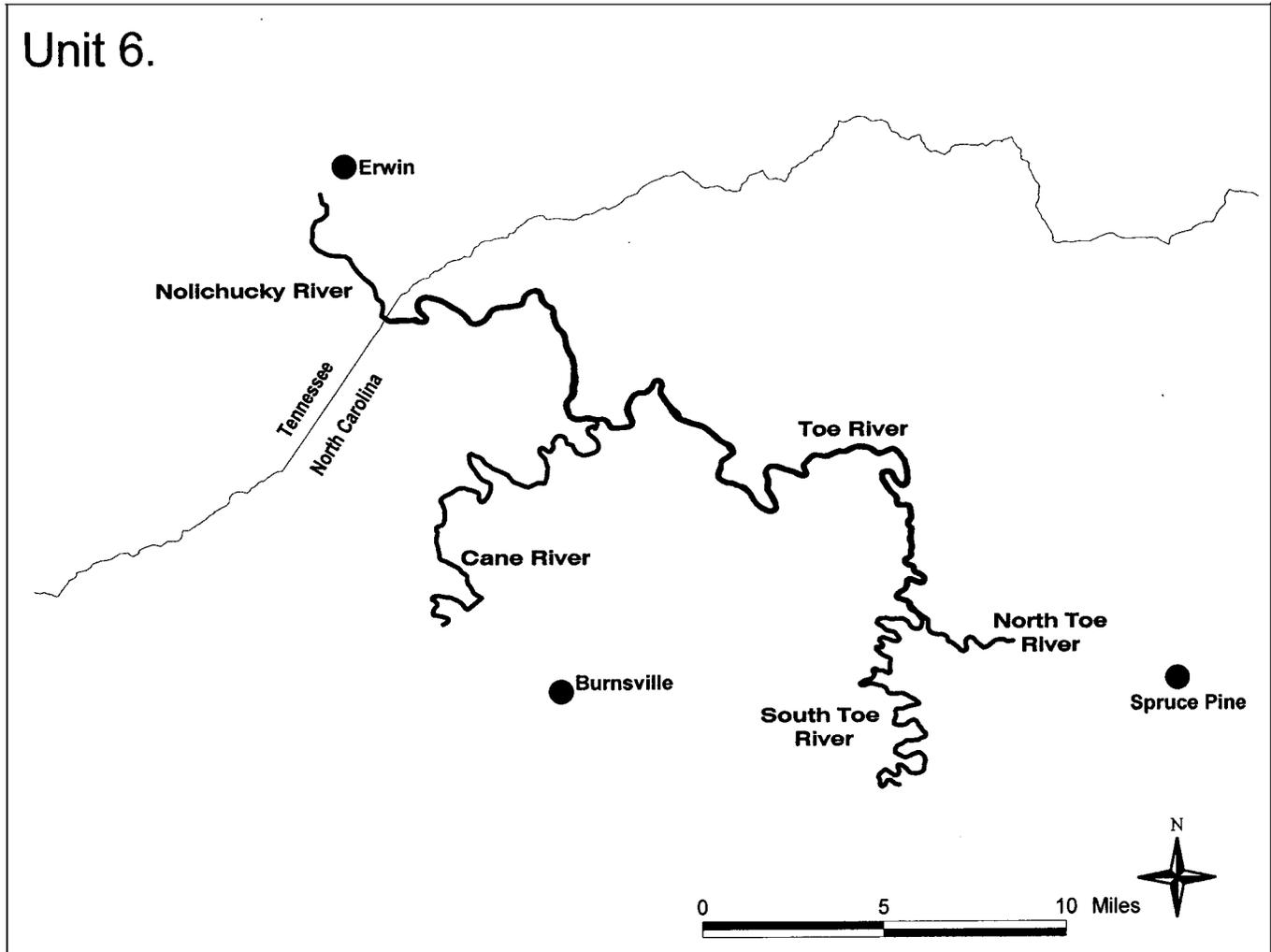
Unit 5.



Unit 6: Yancey County and Mitchell County, North Carolina, and Unicoi County, Tennessee—the main stem of the North Toe River, Yancey and Mitchell Counties, North Carolina, from the confluence of Big Crabtree Creek, downstream to the confluence of the South Toe River; the main stem of the South Toe River, Yancey County, North Carolina, from the N.C. State Route 1152 Bridge,

downstream to its confluence with the North Toe River; the main stem of the Toe River, Yancey and Mitchell Counties, North Carolina, from the confluence of the North Toe River and the South Toe River, downstream to the confluence of the Cane River; the main stem of the Cane River, Yancey County, North Carolina, from the N.C. State Route 1381 Bridge, downstream to

its confluence with the Toe River; and the main stem of the Nolichucky River from the confluence of the Toe River and the Cane River in Yancey County and Mitchell County, North Carolina, downstream to the U.S. Highway 23/19W Bridge southwest of Erwin, Unicoi County, Tennessee.



2. Within these areas, the primary constituent elements include:

- (i) Permanent, flowing, cool, clean water;
- (ii) Geomorphically stable stream and river channels and banks;
- (iii) Pool, riffle, and run sequences within the channel;

(iv) Sand, gravel, cobble, boulder, and bedrock substrates with no more than low amounts of fine sediment;

- (v) Moderate to high stream gradient;
- (vi) Periodic natural flooding; and
- (vii) Fish hosts, with adequate living, foraging, and spawning areas for them.

Dated: February 1, 2001.

Joseph E. Doddridge,
Acting Assistant Secretary for Fish and Wildlife and Parks.

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