



Frequently Asked Questions

Notice of Violations for the Killing of Watercress Darters

Updated: June 2010

Q1: What is a watercress darter?

A1: The watercress darter is a small fish, a little less than two inches long when mature. It lives among aquatic vegetation in shallow spring ponds and spring runs. It is known to live in only five locations in the world, all in Jefferson County, Alabama, within the metropolitan area of Birmingham. Pursuant to the Endangered Species Act (ESA), it was listed as an endangered species in 1970. The danger of extinction of this species is very high. Prior to September 19, 2008, the Roebuck Springs population was thought to be the largest single population, with an estimated population of more than 20,000 individuals.

Q2: Why are they endangered?

A2: The watercress darter is endangered due to its small population size, restricted geographic distribution, specialized habitat requirements, and the persistence of threats to its habitat from point and non-point pollution, development, and chemical spill events.

Q3: How many fish died in the September 2008 incident? How did you come up with that number?

A3: Three days after the event, Dr. Bernard Kuhajda, an expert on the watercress darter from the University of Alabama, conservatively estimated 11,760 individual watercress darters died when the spring pool was dewatered. The estimation was based on a count of dead darters in a sample of the dewatered area. The entire dewatered area was measured and calculated by Dr. Paul Johnson and Michael Buntin of the Alabama Department of Conservation and Natural Resources (ADCNR). Using these two pieces of information, the total number of dead watercress darters was calculated.

Q4: How were the remaining fish in the pond affected by the dewatering event?

A4: Their habitat was severely modified and degraded by the killing or scouring-out of aquatic vegetation and a flushing-out of detritus that the fish depend upon for food and shelter, and they were forced into a much smaller volume of aquatic habitat, where they were preyed upon by an exotic crayfish that had been allowed to inhabit the pond. As a result, more fish were probably killed and reproduction was severely depressed in the species for most of a year.

Q5: What is the basic charge against the City?

A5: The U.S. Fish and Wildlife Service (Service) alleges that the City knowingly violated the prohibition in the ESA of “take” of an endangered species. In this case, the Service alleges that the City committed “takes” of all of the darters in the pond (over 20,000), because “take,” as defined in the ESA, includes not only the killing, but the harming or harassing an endangered species.

Q6: What does the ESA mean by “harm” or “harass?”

A6: The Service’s regulations, which were upheld by the Supreme Court in 1995, define “harm” to mean “...an act which actually kills or injures wildlife. Such act may include significant habitat

modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”

Similarly, “harass” means an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering....”

Q7: What is the current status of the watercress darter at Roebuck Springs?

A7: The population is recovering, but it is not fully recovered. The population remains very vulnerable to pollution from the surrounding city streets, storm sewers, parking lots, golf course, neighborhoods and businesses.

Q8: Why are you seeking a civil penalty from the City of Birmingham?

A8:

The watercress darter is on the brink of extinction. It’s the job of the U.S. Fish and Wildlife Service to protect these highly endangered fish. The multiple killings of this endangered species destroyed more than half of the largest known population and made life very difficult for the survivors. This has complicated and may compromise full recovery of the species to its former population size. It may also leave it more vulnerable to diseases, due to loss of genetic diversity. The severe impact of these violations to the species calls for a large civil penalty. Although the City accepted responsibility for breaching the dam, installed a permanent water-control structure to restore the pond, and placed signs to warn people not to harm the fish or its habitat, the City has declined requests by the Service to perform a number of additional actions that would help the species recover and protect the species from additional risks of harm at Roebuck Springs. Our ultimate goal is to conserve this fish. An appropriate civil penalty should deter future violations.

Q9: What is a Notice of Violations?

A9: The Notice of Violations informs the alleged violator of what laws or rules were allegedly broken and includes a proposed civil penalty. It serves to initiate a civil penalty proceeding.

Q10: How much is the proposed penalty for Birmingham and how did you come up with that figure?

A10: The Service is seeking a civil penalty of \$200 for each fish killed by the City (\$2,352,000) and \$70 for each additional fish harmed by the City’s actions (\$623,000) for a total proposed penalty of \$2,975,000. This figure is broken down in pages 5-8 in the Notice of Violations. It is important to understand that this proposed penalty is subject to adjustment up or down through the civil penalty hearings process. The process is governed by rules at 50 CFR Part 11.

Q11: What happens if the City doesn’t agree with the proposed penalty?

A11: The City has 45 days to either pay the proposed civil penalty, undertake informal discussions with the Service (negotiations), or to file a Petition for Relief under the rules at 50 CFR 11.12. If the matter is not settled, the Service, through the Field Solicitor in Knoxville, Tennessee, will issue a final assessment. The City can then pay the assessed civil penalty or, within 45 days, ask for a hearing before an administrative law judge (ALJ) in the Office of Hearings and Appeals (OHA) of the Department of the Interior. The ALJ will hold a trial-type hearing in Birmingham at a date determined by the ALJ, in consultation with the parties. The hearing process may take anywhere from a few months to a year. Any decision by the ALJ can be appealed to a board of appeals within OHA. The board’s decision will be final for the Service, but the City will have the right to appeal if it is assessed a penalty and does not agree with the decision. If, after the conclusion of the litigation, a civil penalty is owed, the City will have to pay it.

Q12: How will the money be used?

A12: Collected civil penalty money must be deposited in the United States Treasury, where it is placed into a special fund used for rewards to informants, taking care of live wildlife and plants seized from violators, and for distribution to the states for endangered species programs under cooperative agreements with the Service. It cannot be used directly for restoration of the watercress darter population without further Congressional appropriation. However, the ADCNR could, possibly, receive a grant from the fund for helping the watercress darter through its endangered species cooperative agreement with the Service.

Q13: What has the City done to restore watercress darter habitat at Roebuck Springs?

A13: At the request of the Service, immediately following the dewatering event, the City began cooperative efforts to restore the habitat in the Roebuck Springs pool. These efforts included construction of a temporary sandbag dam, initiation of water quality monitoring, installation of an aerator to improve oxygen levels in the pool, and design and installation of a permanent water control structure. The City has installed signs around the spring pool and along the spring run denoting the presence of endangered species habitat which has allowed for the development of a vegetative buffer.

Q14: What demands have the City not met?

A14: Some of the unmet demands the Service made to the City include the identification of the recharge area for Roebuck Springs and a program of real estate acquisitions or regulatory actions to protect the recharge water from pollution; some combination of purchases and permanent protections of watercress darter habitat; the establishment of a darter conservation fund; establishment of a public education program regarding the darter; and addressing concerns at Roebuck Springs about water pollution from storm sewers and parking lot runoff. Under the criteria determining the size of a civil penalty, the more the City does to protect and restore the darter habitat and population on its own, the more the Service can reduce the size of the civil penalty.