

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 17

RIN 1018-AF71

**Endangered and Threatened Wildlife and Plants; Notice of Intent to Prepare a Proposed Special Rule Pursuant to Section 4(d) of the Endangered Species Act for the Bull Trout****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), are considering proposing additional special regulations under the authority of section 4(d) of the Endangered Species Act (Act) of 1973, as amended, that would promote the conservation of bull trout (*Salvelinus confluentus*). The Act prohibits take of species that are listed as endangered, except where authorized by permit. We have extended the Act's take prohibition to species that are listed as threatened under the authority of the Act. For some threatened species, we have issued special rules that exempt from the take prohibition certain activities that are consistent with conservation of the species. Published elsewhere in today's **Federal Register** is the final rule listing bull trout within the coterminous United States as threatened. In the final listing rule we have included a special rule that exempts from the take prohibition fishing activities authorized under State, National Park Service, or Native American Tribal laws and regulations and take for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act.

We are considering amending this special rule to also exempt two categories of activities affecting bull trout: Habitat restoration; and other land and water management activities that are governed by enforceable regulations that provide substantial protection for bull trout.

Habitat restoration activities designed to enhance riparian and stream habitat conditions for salmonids can provide major contributions to the conservation of bull trout. However, some of these activities may cause short-term impacts, such as sediment entering streams from culvert removal or bank restoration, that result in take of bull trout. We are considering amending the special rule to exempt such activities, both Federal

and non-Federal, from the take prohibitions of the Act, where the activities meet criteria for minimizing adverse impacts to bull trout. We would require some, as yet to be defined, minimal annual level of reporting to help us monitor restoration efforts and accomplishments.

We are also considering amending the special rule to exempt other land and water management activities from the take prohibitions of the Act when they are conducted in accordance with enforceable regulations that provide substantial protection for bull trout. Activities considered for coverage under the amended special rule would be non-Federal activities, and would be implemented under locally prepared, Service-approved, Conservation Enhancement Plans (CEPs). Activities that would be exempted under a special rule could involve some level of impact, but would have to fall within an overall framework that would contribute to the conservation of the species.

**DATES:** Send your comments to reach us on or before December 16, 1999.

**ADDRESSES:** You should send your comments to the U.S. Fish and Wildlife Service, Western Washington Office, 510 Desmond Drive, Lacey, Washington 98503.

**FOR FURTHER INFORMATION CONTACT:** Gerry Jackson, Supervisor, Western Washington Office, (see **ADDRESSES** section) (telephone 360/753-9440; facsimile 360/753-9405).

**SUPPLEMENTARY INFORMATION:****Background**

Recent listings of several salmon species in Oregon and Washington have raised concern for the status of salmon and related fish species such as bull trout (*Salvelinus confluentus*) in the Northwest. State agencies and local governments have been working with us, the National Marine Fisheries Service, and other Federal agencies to develop strategies to protect and recover salmon species in the Pacific Northwest. Some of these efforts include the development of conservation strategies for bull trout.

We are responding to the need to conserve the bull trout throughout its range by promoting activities that contribute to the conservation of species. Restoration activities that clearly enhance the quantity and quality of habitat required by bull trout can provide major contributions toward its conservation. However, restoration activities that cause short-term sedimentation of a stream, such as culvert removal or bank restoration, may result in take of bull trout. An amended

special rule would exempt such activities from the take prohibitions of the Act where the activities meet criteria for minimizing adverse impacts and provide conservation benefits to bull trout. We would require some, as yet to be defined, minimal annual level of reporting to help us monitor restoration efforts and accomplishments.

We see an opportunity for State agencies and county and local governments (collectively referred to as the Jurisdictions) to provide substantial protection for bull trout. Jurisdictions would be able gain exemptions from the Act's prohibitions against incidental take for thousands of their citizens, including small landowners. Jurisdictions could utilize their authorities to implement existing regulations, or promulgate new regulations that comply with the provisions of the Act. The Jurisdictions would enforce those regulations covering a variety of land and water management activities. A few of these existing authorities include growth management acts, shoreline management acts, State environmental policy acts, timber harvest regulations, and instream construction and water discharge permits. The benefit of an amended 4(d) rule to these Jurisdictions is that it provides an expedient process for obtaining generic approval in advance of ongoing and proposed actions requiring compliance with the take prohibitions of the Act. The amended 4(d) rule would provide take coverage and cost savings to thousands of small land owners, and others, who are conducting activities that may take bull trout. Once established, it is anticipated that Jurisdictions could obtain generic Service approval for State and local regulated activities faster than through the section 10(a)(1)(B) process for habitat conservation plans (HCPs). Section 10(a)(1)(B) requires applicants to prepare a HCP, and some applicants must also prepare either an environmental assessment or environmental impact statement to comply with the National Environmental Policy Act (NEPA). This can be costly and time consuming, thus an amended 4(d) rule could be a preferred alternative for many individuals whose activities may incidentally take bull trout. Additionally, a Jurisdiction may already be undertaking efforts to protect salmon and bull trout habitat (see examples below), that may qualify as a CEP without additional efforts on its part. This would prove to be a more expedient and cost-effective means of obtaining compliance with the Act than

the 10(a)(1)(B) permitting process. All benefits to the bull trout derived from conservation contributions as a result of an amended 4(d) rule would expedite its recovery and advance the time at which the protective measures of the Act are no longer required.

Jurisdictions would develop CEPs to be approved by us for coverage under the special rule. Regulations or other protective measures may be incorporated in whole or in part in a CEP. In general, the CEPs would address baseline conditions and current and projected impacts to bull trout within the vicinity of activities to be covered under the special rule. The Jurisdictions would identify future actions and protective measures to be undertaken to protect or enhance bull trout populations. We would require the Jurisdictions to ensure that their CEPs have a high level of certainty of implementation, and that they include a comprehensive monitoring program and an adaptive management component with the flexibility to respond to new scientific knowledge. We would authorize activities under the CEP as long as the provisions of the special rule are met and the protective measures undertaken contribute to the long-term survival and recovery of the bull trout in the wild.

Currently, the Jurisdictions have three options for compliance with the Act—the avoidance of all take, incidental take authorization under section 7, or incidental take authorization through an HCP under section 10(a)(1)(B) of the Act. We envision that an amended special rule for bull trout would provide a fourth option for the Jurisdictions to ensure that their land and water management activities comply with the Act. The Jurisdictions could attain compliance with the Act through the adoption of approved CEPs for the bull trout. Once established, it is anticipated that this regulatory process would proceed faster in obtaining our approval for State and local regulated activities than the section 10(a)(1)(B) process for HCPs. Although a 4(d) rule offers a single species approach for compliance under the Act, approved activities may provide the basis for a broader, more comprehensive multi-species HCP for listed and unlisted species. Therefore, a 4(d) rule may, in some instances, serve as a bridge to producing a comprehensive, watershed-based HCP.

As an example of a Jurisdiction benefitting from an amended 4(d) rule, the Washington State Forest Practices Board is currently developing regulations for State and private timber harvest that would also protect salmon and bull trout habitat along streams.

Once the Board develops and adopts these regulations, they may be presented to us in the form of a CEP for coverage under the 4(d) rule. Non-Federal timber harvest activities would be in compliance with the Act as long as the activities approved by us under the CEP are conducted in accordance with State Forest Practices Regulations.

As another example of a potential application of the 4(d) rulemaking process and the benefits derived from an amended 4(d) rule, the Tri-Counties of King, Pierce and Snohomish, in Washington (including the cities and municipalities within these counties) have formed a coalition to develop conservation strategies for listed salmonids, including bull trout. These conservation strategies will address critical area ordinances, herbicide and pesticide use, shoreline management, storm water management, road maintenance, and watershed planning. Once developed, these strategies would be implemented through the use of existing authorities, such as the State Environmental Policy Act, Shoreline Protection Act and the Growth Management Act, and through administrative permitting authorities, including grading and building permits, tree permits and other permits. Here again, an amended 4(d) rule governing specific activities that, while part of an overall protective framework, may result in take of bull trout would provide compliance under the Act when conducted under an approved CEP that is regulated and enforced by the Jurisdictions.

We would require CEPs to appropriately address relevant effects of activities under the control of the non-Federal landowner or Jurisdiction as they relate to the following threats identified in the final listing rule for the bull trout:

- (1) Introduction of non-native fish species that compete with, hybridize with, or prey on bull trout;
- (2) Dredging, channelization, diversion, instream vehicle operation or rock removal, or other activities that destroy or significantly alter cover, channel stability, substrate composition or temperature in areas used by the bull trout for foraging, cover, migration or spawning;
- (3) Discharging or dumping toxic chemicals, silt, or other pollutants into waters or onto land in a manner that would allow these substances to enter into waters supporting bull trout;
- (4) Recreational activities, timber harvest, grazing, mining, hydropower development, or other developmental activities that destroy or significantly alter cover, channel stability, substrate

composition, or temperature in areas used by the bull trout for foraging, cover, migration or spawning;

(5) Instream or shoreline recreational and commercial activities that significantly disrupt behavioral patterns and harass migrating or spawning bull trout.

We would announce in the **Federal Register** and solicit public comment on CEPs prior to any approval. We will comply with NEPA in implementing the provisions of the proposed special rule. Since some States require a NEPA like review, a CEP may have an associated environmental review document already prepared by the Jurisdiction. In these cases, we will consider this information in our NEPA review; however, a review from a national perspective rather than a local review may be needed to fully comply with the requirements of NEPA.

We request comments on whether we should propose special regulations that would provide the opportunity for the Jurisdictions to attain compliance under the Act through their authorities to regulate and enforce land and water management activities. In addition, we request specific information and comment from Federal and State agencies, local municipalities and private individuals or organizations on the following:

#### *Habitat Restoration Activities*

(1) The types of habitat restoration activities we should address under an amendment to the special rule;

(2) The standards or criteria for habitat restoration activities that must be met in order to be exempted from take prohibitions; and

(3) Comments on the nature and scope of minimal monitoring and reporting programs for habitat restoration activities.

#### *Regulated Activities*

(1) The types of regulated activities we should address in an amendment to the special rule;

(2) The standards or criteria for regulated activities that must be met in order to be exempted from the take prohibitions;

(3) The appropriate components of a CEP or similar plan;

(4) Appropriate monitoring and reporting programs for regulated activities; and

(5) Information on how habitat for the bull trout should be identified and how it should be protected or enhanced.

Dated: September 1, 1999.

**John G. Rogers,**

*Director, Fish and Wildlife Service.*

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