

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

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I.D.070303A]

RIN 0648-AQ77

Endangered and Threatened Species: Advance Notice of Proposed Rulemaking to Designate Critical Habitat for 20 Listed Evolutionarily Significant Units of Pacific Salmon and Steelhead**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.**ACTION:** Advance Notice of Proposed Rulemaking; request for information.**SUMMARY:** The National Marine Fisheries Service (NMFS) will be preparing critical habitat designation proposals for five species of Pacific salmon and steelhead (*Oncorhynchus* spp.) listed under the Endangered Species Act (ESA). The designations will address 20 evolutionarily significant units (ESUs) of these species in the states of WA, OR, ID, and CA. This advance notice of proposed rulemaking (ANPR) identifies issues for consideration and evaluation, and solicits comments regarding these issues as well as information regarding the areas and species under consideration.**DATES:** Comments and information regarding the suggested designation process and areas being considered for designation may be sent to the appropriate address or fax number (See **ADDRESSES**), no later than 5 p.m. on November 13, 2003.**ADDRESSES:** Comments may be sent to Chief, Protected Resources Division, NMFS, 525 NE Oregon Street - Suite 500, Portland, OR 97232. Comments may also be sent via facsimile (fax) to 503 230-5435 or submitted on the Internet at <http://www.nmfs.noaa.gov/ibrm>.**FOR FURTHER INFORMATION CONTACT:** Steve Stone, NMFS Northwest Region (WA, OR, and ID), 503/231-2317; Craig Wingert, NMFS Southwest Region (CA), 562/980-4021; or Lamont Jackson, NMFS Office of Protected Resources, Silver Spring, MD, 301/713-1401.**SUPPLEMENTARY INFORMATION:****Rulemaking Background**

NMFS is responsible for determining whether species, subspecies, or distinct

population segments of Pacific salmon and steelhead are threatened or endangered and which areas constitute critical habitat for them under the ESA (16 U.S.C. 1531 *et seq.*). To be considered for listing under the ESA, a group of organisms must constitute a "species," which is defined in section 3 to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." The agency has determined that a group of Pacific salmon or steelhead populations qualifies as a distinct population segment if it is substantially reproductively isolated and represents an important component in the evolutionary legacy of the biological species. A group of populations meeting these criteria is considered an "evolutionarily significant unit" (ESU) (56 FR 58612, November 20, 1991). In its ESA listing determinations for Pacific salmon and steelhead, NMFS has treated an ESU as a "distinct population segment." To date NMFS has identified 26 ESUs as threatened or endangered under the ESA (*see* 50 CFR 223.203 and 224.101).

Section 4(b)(2) of the ESA requires NMFS to designate critical habitat for threatened and endangered species "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." This section grants the Secretary [of Commerce] discretion to exclude any area from critical habitat if he determines "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." The Secretary's discretion is limited, as he may not exclude areas if it "will result in the extinction of the species."

The ESA defines critical habitat under section 3(5)(A) as:

"(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species."

Once critical habitat is designated, section 7 of the ESA requires federal agencies to ensure they do not fund, authorize or carry out any actions that will destroy or adversely modify that habitat. This requirement is in addition

to the section 7 requirement that federal agencies ensure their actions do not jeopardize the continued existence of listed species.

On February 16, 2000, NMFS published a final rule designating critical habitat for 19 ESUs of west coast salmon and steelhead (65 FR 7764). The designations included more than one hundred and fifty river subbasins in WA, OR, ID, and CA. Within each occupied subbasin, NMFS designated as critical habitat those lakes and river reaches accessible to listed fish along with the associated riparian zone, except for reaches on Indian land. Areas considered inaccessible included areas above long-standing natural impassable barriers and areas above impassable dams, but not areas above ephemeral barriers such as failed culverts.

In considering the economic impact, NMFS determined that the critical habitat designations would impose very little or no additional requirements on federal agencies beyond those already imposed by the listing of the species themselves. The ESA's prohibition against adversely modifying critical habitat applies only to federal agencies, which are also prohibited from jeopardizing the continued existence of listed species. NMFS reasoned that since it was designating only occupied habitat, there would be few or no actions that adversely modified critical habitat that also did not jeopardize the continued existence of the species. Therefore, there would be no economic impact as a result of the designations (65 FR 7764, 7765, February 16, 2000).

The National Association of Homebuilders (NAHB) challenged the designations in District Court in Washington, D.C. as having inadequately considered the economic impacts of the critical habitat designations (*National Ass'n of Homebuilders v. Evans*, 2002 WL 1205743 No. 00-CV-2799 (D.D.C.)). NAHB also challenged NMFS' designation of Essential Fish Habitat (EFH) (Pacific Coast Salmon Fishery Management Plan, 2000). While the NAHB litigation was pending, the Court of Appeals for the 10th Circuit issued its decision in *New Mexico Cattlegrowers' Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001) (NMCA). In that case, the Court rejected the U.S. Fish and Wildlife Service's (FWS) approach to economic analysis, which was similar to the approach taken by NMFS in the final rule designating critical habitat for 19 ESUs of west coast salmon and steelhead. The Court ruled that "Congress intended that the FWS conduct a full analysis of all of the economic impacts of a critical habitat

designation, regardless of whether those impacts are attributable co-extensively to other causes." Subsequent to the 10th Circuit decision, NMFS entered into and sought judicial approval of a consent decree resolving the NAHB litigation. That decree provided for the withdrawal of critical habitat designations for the 19 salmon and steelhead ESUs and dismissed NAHB's challenge to the EFH designations. The District Court approved the consent decree and vacated the critical habitat designations by Court order on April 30, 2002 (*National Ass'n of Homebuilders v. Evans*, 2002 WL 1205743 (D.D.C. 2002)).

Related Rulemaking and Litigation

At the same time NAHB was challenging the critical habitat designations, other plaintiffs were challenging NMFS' listing decision for Oregon Coast coho salmon. In *Alesea Valley Alliance v. Evans* (143 F. Supp. 2d 1154 (D. Ore. 2001)) (Alesea), the U.S. District Court in Eugene, OR, set aside NMFS' 1998 ESA listing of the Oregon Coast coho salmon ESU, and ruled that NMFS' treatment of hatchery populations within this ESU was arbitrary and capricious. Specifically, the Court found that NMFS' 1998 listing of Oregon Coast coho salmon made improper distinctions below the level of an ESU by excluding hatchery populations from listing protection even though they were determined to be part of the same ESU as the listed naturally spawned populations. NMFS subsequently acceded to the District Court's decision and did not appeal the ruling. However, on December 14, 2001, the U.S. Court of Appeals for the Ninth Circuit (Appeal No. 01-36071) granted intervenors-appellants an emergency motion to stay the district court judgment in the *Alesea* decision. Accordingly, the Oregon Coast coho salmon ESU remains listed as a threatened species pending final disposition of the appeal.

In light of the *Alesea* decision, NMFS announced it would reconsider its listing determinations for all salmon and steelhead ESUs affected by the ESA interpretive issues raised by the Court's decision (67 FR 6215, February 11, 2002; 67 FR 79898, December 31, 2002). The agency also accepted several petitions to reconsider its listing of other ESUs based on the *Alesea* decision (67 FR 6215, February 11, 2002; 67 FR 48601, July 25, 2001). NMFS' schedule for reconsidering these listing decisions anticipates proposing any revised listing determinations for all 26 listed ESUs (and one candidate ESU) by March 2004. Since NMFS also intends to list those hatchery populations that are part

of an ESU, many of the currently listed ESUs may be altered as a result of the ongoing status reviews, which could also affect the designation of critical habitat for such ESUs.

Issues for Consideration and Evaluation

Section 4(a)(3) of the ESA requires NMFS to designate critical habitat for threatened and endangered species. NMFS is currently in the information-gathering phase, compiling information to prepare critical habitat proposals for the 19 ESUs vacated by the Court in April 2002 as well as the Northern California steelhead ESU listed as threatened on June 7, 2000 (65 FR 36074). If new information warrants, the agency also may later revise, subject to appropriate regulatory procedures, existing critical habitat designations for six ESUs (Sacramento River winter-run chinook, Central California coast coho, Southern Oregon/Northern California coasts coho, Snake River sockeye, spring/summer chinook, and fall chinook salmon) that were not subject to the Court's decision in *National Ass'n of Homebuilders v. Evans*.

Sections 3, 4(a) and 4(b) of the ESA suggest a number of questions the agency should consider when designating critical habitat for Pacific salmon and steelhead:

What areas were occupied by the species at the time of listing?

What physical and biological features are essential to the species' conservation?

Are those essential features ones that may require special management considerations or protection?

Are areas outside those currently occupied "essential for conservation"?

What are the benefits to the species of critical habitat designation?

What economic and other relevant impacts would result from a critical habitat designation, even if coextensive with other causes such as listing?

What is the appropriate geographic scale for weighing the benefits of exclusion and benefits of designation?

What is the best way to determine if the failure to designate an area as critical habitat will result in the extinction of the species concerned?

Answering these questions involves a variety of biological and economic considerations. Because these considerations are complex and there is considerable controversy surrounding critical habitat designations in general, NMFS is issuing this Advance Notice of Proposed Rulemaking to solicit information before issuing a proposed rule. During the information-gathering phase, NMFS is seeking public input and information (see "Information

Solicited" below) and will gather and analyze the best available scientific data to support critical habitat designations. NMFS will continue to meet with comanagers and other stakeholders to review this information and the overall designation process. NMFS will then initiate rulemaking with the publication of a proposed designation of critical habitat, opening a period for public comment and the opportunity for public hearings. Information derived from NMFS' ongoing reconsideration of the listing determinations will also be important for defining the status of the relevant ESUs and informing the future critical habitat designations. NMFS is also undertaking recovery planning for the currently listed ESUs. Information developed in the recovery planning process will also inform any proposed critical habitat designations for the 20 ESUs.

Pacific Salmon and Steelhead Biology and Habitat Use

Pacific salmon and steelhead are anadromous fish, meaning adults migrate from the ocean to spawn in freshwater lakes and streams where their offspring hatch and rear prior to migrating back to the ocean to forage until maturity. The migration and spawning times vary considerably between and within species and populations (Groot and Margolis, 1991). At spawning, adults pair to lay and fertilize thousands of eggs in freshwater gravel nests or "redds" excavated by females. Depending on lake/stream temperatures, eggs incubate for several weeks to months before hatching as "alevins" (a larval life stage dependent on food stored in a yolk sac). Following yolk sac absorption, alevins emerge from the gravel as young juveniles called "fry" and begin actively feeding. Depending on the species and location, juveniles may spend from a few hours to several years in freshwater areas before migrating to the ocean. The physiological and behavioral changes required for the transition to salt water result in a distinct "smolt" stage in most species. On their journey juveniles must migrate downstream through every riverine and estuarine corridor between their natal lake or stream and the ocean. For example, smolts from Idaho will travel as far as 900 miles from their inland spawning grounds. En route to the ocean the juveniles may spend from a few days to several weeks in the estuary, depending on the species. The highly productive estuarine environment is an important feeding and acclimation area for juveniles preparing to enter marine waters.

Juveniles and subadults typically spend from one to five years foraging over thousands of miles in the North Pacific Ocean before returning to spawn. Some species, such as coho and chinook salmon, have precocious life history types (primarily male fish) that mature and spawn after only several months in the ocean. Spawning migrations known as "runs" occur throughout the year, varying by species and location. Most adult fish return or "home" with great fidelity to spawn in their natal stream, although some do stray to non-natal streams. Salmon species die after spawning, while steelhead may return to the ocean and make repeat spawning migrations.

This complex life cycle gives rise to complex habitat needs, particularly during the freshwater phase (*see review by Spence et al., 1996*). Spawning gravels must be of a certain size and free of sediment to allow successful incubation of the eggs. Eggs also require cool, clean, and well-oxygenated waters for proper development. Juveniles need abundant food sources, including insects, crustaceans, and other small fish. They need places to hide from predators (mostly birds and bigger fish), such as under logs, root wads and boulders in the stream, and beneath overhanging vegetation. They also need places to seek refuge from periodic high flows (side channels and off channel areas) and from warm summer water temperatures (coldwater springs and deep pools). Returning adults generally do not feed in fresh water but instead rely on limited energy stores to migrate, mature, and spawn. Like juveniles, they also require cool water and places to rest and hide from predators. During all life stages salmon and steelhead require cool water that is free of contaminants. They also require migratory corridors with adequate passage conditions (timing, water quality, and water quantity) to allow access to the various habitats required to complete their life cycle.

The homing fidelity of salmon and steelhead has created a meta-population structure with discrete populations distributed among watersheds (McElhany *et al.*, 2000). Low levels of straying result in regular genetic exchange among populations, creating genetic similarities among populations in adjacent watersheds. Maintenance of the meta-population structure requires a distribution of populations among watersheds where environmental risks (e.g., from landslides or floods) are likely to vary. It also requires migratory connections among the watersheds to allow for periodic genetic exchange and alternate spawning sites in the case that

natal streams are inaccessible due to natural events such as a drought or landslide.

Areas Occupied by the Species at the Time of Listing

As described in ESA section 3(5)(A)(i), the agency will assemble the best available information to identify those "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features . . . (I) essential to the conservation of the species and (II) which may require special management considerations or protection."

The ESA specifies that critical habitat is that habitat occupied by the species "at the time it is listed" (ESA section 3(5)(A)(i)). Due to their anadromous, highly migratory life cycle and the presence of multiple year classes or "cohorts," fish from a particular ESU are widely distributed at the time of listing. For example, at the time an ESU is listed the eggs from one cohort may be incubating in stream gravel while older cohorts are rearing in an estuary and still others are foraging in the North Pacific Ocean. Thus, the geographic area occupied is a vast and diverse array of habitats occupied simultaneously by various cohorts and life stages. NMFS' ESA regulations relevant to describing a "geographical area" and "specific areas" state that "each critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area" (50 CFR 424.12). These regulations require that NMFS also identify the state(s), county(ies), or other local governmental units within which all or part of the critical habitat is located. However, the regulations note that such political units typically would not constitute the boundaries of critical habitat. In addition, the regulations state that ephemeral reference points (e.g., trees, sand bars) shall not be used in defining critical habitat. Distribution information for Pacific salmon and steelhead is available in three general formats: (1) maps and databases identifying specific river segments (i.e., data mapped as line segments); (2) maps and databases identifying entire watersheds (i.e., data mapped as polygons); and (3) textual descriptions. During the information-gathering phase, NMFS is seeking information in all available formats.

NMFS will seek the best scientific information available to make the designations as precise as practicable. Most of the data sources that NMFS has reviewed to date indicate that fish distribution can be mapped for most

watersheds at a scale of 1 to 100,000 or greater (*see StreamNet, 2003*). At this coarse scale, numerous streams and stream reaches that may contain physical and biological features essential to conservation do not appear (Roni *et al.*, 1997; *StreamNet, 2003*). Also, fish distribution maps are often based on a mix of empirical data (i.e., fish observations) and best professional judgement, and may not reflect the species' actual distribution in many stream reaches that have never been or have only occasionally been surveyed. During the information-gathering phase, NMFS is seeking information that will allow it to map specific river reaches, using reference points and lines as found on standard topographic maps, that (1) are currently occupied by the species and (2) contain essential physical and biological features. NMFS will seek input as to the accuracy and suitability of this approach, and the applicability of other approaches.

NMFS has not designated marine areas in previous critical habitat designations for salmon, except in the case of Puget Sound chinook salmon and Hood Canal summer-run chum salmon. This exclusion was due to the lack of identifiable special management considerations affecting marine habitat features (65 FR 7764, 7771, February 16, 2000). However, in the February 2000 rulemaking the agency noted that it would be re-evaluating this issue, especially in light of the recent marine area designations of EFH for Pacific salmon (Pacific Coast Salmon Fishery Management Plan, 2000). This notice seeks information on habitat in marine as well as freshwater areas.

Physical and Biological Features Essential for Conservation

Joint NMFS/FWS regulations for listing endangered and threatened species and designating critical habitat at section 50 CFR 424.12(b) state that the agency "shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection (hereafter also referred to as "Essential Features"). Pursuant to the regulations, such requirements include, but are not limited to the following: (1) Space for individual and population growth, and for normal behavior; (2) Food, water, air, light, minerals, or other nutritional or physiological requirements; (3) Cover or shelter; (4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally; (5) Habitats that are protected from disturbance or are representative of the historic

geographical and ecological distributions of a species. These regulations go on to emphasize that the agency shall focus on essential features within the specific areas considered for designation. These features “may include, but are not limited to, the following: spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, geological formation, vegetation type, tide, and specific soil types.”

The 20 ESUs under consideration comprise five species, each of which has unique life history characteristics and habitat requirements. However, these characteristics/requirements depend on a common set of physical and biological features that are essential to the conservation of each species. Information supporting the identification of essential features is contained in a robust body of scientific literature addressing salmonid life history and habitat characteristics (e.g., see Everest *et al.*, 1985; Bell, 1986; Groot and Margolis, 1991; FEMAT, 1993; Spence *et al.*, 1996). Also, NMFS is applying knowledge gained from over a decade’s experience with thousands of ESA section 7 consultations on listed salmonids to identify these features. NMFS has developed a decision matrix (NMFS, 1996) that describes general parameters and characteristics of most of the essential features now under consideration in critical habitat designations. During the information-gathering phase, NMFS seeks input on the following characterization of essential features.

Essential features for the listed ESUs of salmon and steelhead include sites essential to support one or more life stages of a population necessary to the conservation of the ESU. These sites in turn contain generic features that contribute to their conservation value for the ESU. Specific types of sites and their generic features include:

(1) Freshwater spawning sites with sufficient water quantity and quality and adequate substrate to support spawning, incubation and larval development;

(2) Freshwater rearing sites with sufficient water quantity and floodplain connectivity to form and maintain physical habitat conditions and allow salmonid development and mobility; sufficient water quality to support growth and development; food and nutrient resources such as terrestrial and aquatic invertebrates, and forage fish; and natural cover such as shade, submerged and overhanging large wood, log jams, beaver dams, aquatic vegetation, large rocks and boulders, side channels and undercut banks;

(3) Freshwater migration corridors free of obstruction and excessive predation, with adequate water quantity to allow for juvenile and adult mobility; cover, shelter and holding areas for juveniles and adults; and adequate water quality to allow for survival;

(4) Estuarine areas that provide uncontaminated water and substrates; food and nutrient sources to support growth and development; and connected shallow water areas and wetlands to cover and shelter juveniles; and

(5) Marine areas with sufficient water quality to support salmonid growth, development, and mobility; food and nutrient resources such as marine invertebrates and forage fish; and nearshore marine habitats with adequate depth, cover, and marine vegetation to provide cover and shelter.

The conservation value of a site depends on (1) the importance of the populations associated with a site to the ESU conservation, and (2) the contribution of that site to the conservation of the population either through demonstrated or potential productivity of the area.

Special Management Considerations or Protection

Coupled with the identification of essential features, during the information-gathering phase NMFS seeks input on whether the above essential features may require special management considerations or protection. For example, numerous special management considerations relate to fish passage conditions, including methods and procedures aimed at maintaining sufficient water flows and preventing or minimizing impacts from manmade barriers such as dams and culverts. Similarly, essential natural cover elements such as shade and large wood involve a variety of land management considerations. NMFS will document the special management considerations and protection associated with the essential features and expects to relate these to the factors affecting the species and/or critical habitat during formal rulemaking (see “Schedule and Contents of Rulemaking”).

Areas outside the Geographical Area Occupied by the Species

Section 3(5)(A)(ii) of the ESA defines critical habitat to include specific areas outside the geographical area occupied by the species only if the Secretary determines them to be essential for the conservation of the species. Section 3(3) of the ESA defines conservation as “the use of all methods and procedures

which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” NMFS’ ESA regulations at 424.12(e) state that the agency “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.” NMFS would thus include areas outside the occupied geographical area only if areas within the occupied geographical area were not adequate to support conservation. In the previous designations of critical habitat (65 FR 7764, February 16, 2000), NMFS did not consider designations for areas outside the geographical areas occupied by the species. The agency is also seeking information on the adequacy of the currently occupied habitat to support conservation of the listed ESUs, and whether areas that are unoccupied might be “essential for conservation.”

Determining Conservation Value

Section 4(b)(2) of the ESA requires that the Secretary, before designating any particular area as critical habitat, weigh the benefit of excluding the area from designation against the benefit of including it in the designation. Accordingly, during the information-gathering phase, NMFS is seeking input on the benefit of designating areas as critical habitat. In particular, NMFS seeks information on the conservation value of potential critical habitat based on the quality and quantity of the essential feature(s) and on the difficulty of restoring the quality and quantity where those features have been limited or degraded. Federal agencies, states, tribes and others have already compiled a great deal of information on the historic and present importance of different areas to salmonid conservation. Some general types of information include stream habitat inventories, juvenile and spawning fish surveys, redd and dam counts, angler harvest records, and tagged fish recoveries. In some cases it may not be known whether an area was historically productive. Areas might also be considered to have a high potential if they possess characteristics of other highly productive areas.

NMFS will also gather analyses provided by the NMFS Technical Recovery Teams. These Teams have been formed for several recovery planning areas covering most of the presently listed ESUs. The Teams first identify the population structure of the ESU and provide guidance on what

constitutes recovery for each population. The Teams next provide guidance on the numbers and distribution of recovered populations that would constitute a healthy ESU, as well as guidance on the status of populations that will not be recovered but still have a role to play in overall ESU health.

NMFS also seeks input on the best methods for evaluating the conservation value of potential critical habitat areas. NMFS is interested in information relevant to monetizing the conservation value of an area, or to ranking the conservation benefits in an ordinal manner. Finally, NMFS is seeking input on what approaches would allow it to determine if excluding an area from designation will result in the extinction of the species.

Determining Economic and other Relevant Impacts

Section 4(b)(2) of the ESA requires the Secretary to consider the "economic impact, and any other relevant impact," of designating a particular area as critical habitat. During the information-gathering phase, NMFS seeks information regarding the economic benefits of excluding an area from the critical habitat designation and the economic benefits of including an area as part of the critical habitat designation. In keeping with the guidance provided by the Office of Management and Budget (2000, 2003), NMFS seeks information that would allow it to monetize these effects to the extent possible, as well as information on qualitative impacts to economic values. NMFS is also seeking information on any other impacts of designating critical habitat.

The Appropriate Geographic Scale for Weighing the Benefits of Exclusion and Benefits of Inclusion

There are thousands of miles of rivers and streams presently occupied by listed salmon and steelhead in OR, WA, ID, and CA. Before designating any "particular area" as critical habitat NMFS must balance the benefit of excluding that area against the benefit of including it in the designation (ESA section 4(b)(2)). To manage this task, streams and rivers must be grouped in a manner that allows for meaningful analysis. As discussed in more detail above, salmon populations tend to divide along watershed boundaries. Through the mapping efforts of the U. S Geological Survey (USGS), watersheds can be mapped across most of the salmon and steelhead range at a fairly fine scale, relative to the broad distribution of the species. NMFS seeks

input on the relevance of using watersheds as a unit of analysis for the balancing test. In some cases it may be useful to consider habitat units at a finer scale than the watershed, for example where an economic impact or a conservation benefit can be isolated to a stream or river segment. NMFS therefore also seeks input on approaches to isolating impacts of designation at a finer scale than the watershed.

Process and Schedule

In response to a complaint filed by the Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, the Center for Biological Diversity, the Oregon Natural Resources Council, the Pacific Rivers Council, and the Environmental Protection Information Center alleging NMFS's failure to timely designate critical habitat, NMFS recently filed with the D.C. District Court an agreement resolving that litigation and establishing a schedule for designation of critical habitat. The schedule provides for submission by June 30, 2004 to the **Federal Register** for publication the proposed rule(s) designating critical habitat for those of the 20 ESUs that are included on the list of threatened and endangered species as of June 30, 2004. Additionally, the schedule provides for submission by January 18, 2005 to the **Federal Register** for publication the final rule(s) designating critical habitat for the 20 ESUs that are included on the lists of threatened and endangered species as of January 18, 2005. The District Court approved the agreement on September 12, 2003.

As described in current agency regulations (50 CFR 424.16), NMFS anticipates that the proposed rulemaking will contain text detailing the proposal, a summary of the data used and its relationship to the proposal, a summary of factors affecting the species and/or critical habitat, citations of pertinent information sources, a map of the critical habitat, an economic report, and an explanation of a 4(b)(2) process and any areas proposed for exclusion. To the maximum extent practicable, the proposal will also include a brief description and evaluation of those activities (whether public or private) that, in the opinion of the Secretary, if undertaken, may adversely modify the critical habitat, or may be affected by the designation. Products to be made available to the public at this step also include access to maps depicting the areas proposed for designation and relevant agency biological and economic analyses supporting the rulemaking. NMFS also will provide the requisite comment

period and opportunity for public hearings on the proposed rule.

In addition to publication in the **Federal Register**, NMFS will provide the critical habitat proposal to, and invite comments from, affected states and counties (and equivalent jurisdictions) and scientific organizations as well as any federal agencies, tribal governments, local authorities, or private individuals or organizations known to be affected by the proposed rule. The agency will also publish a summary of the proposed rule in a newspaper of general circulation in affected areas. In accordance with a joint NMFS/FWS policy published on July 1, 1994 (59 FR 34270), NMFS will also seek the expert opinions of at least three appropriate and independent specialists. The purpose of such review is to ensure that the critical habitat designations are based on scientifically sound data, assumptions, and analyses. NMFS will send these peer reviewers copies of the proposed rule (and other documentation as needed) immediately following publication in the **Federal Register**. The agency will invite each peer reviewer to comment independently, during the public comment period, on the proposed designations and will specifically identify and address all peer review comments in the final rule.

In accordance with the Secretarial Order on American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act, NMFS will coordinate with Federally recognized American Indian Tribes on a Government-to-Government basis to determine how to make critical habitat assessments in areas that may impact Tribal trust resources.

NMFS will review all information received during the comment period as well as any new information identified after publishing the proposed designations. If changes are warranted, the agency will document the bases for the revisions and include this rationale as part of the administrative record for critical habitat designations.

Per current agency regulations at 50 CFR 424.18 and 424.19, NMFS anticipates that the final designations will be published in a **Federal Register** notice containing the complete text of the rule, a summary of the comments and recommendations received in response to the proposal (including input from public hearings and peer reviewers), summaries of the data on which the rule is based and the relationship of such data to the final rule, and a description of any conservation measures available under the rule. The final rule will: summarize

factors affecting the species; identify physical and biological features essential to the conservation of the species that may require special management considerations or protection; describe any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation; identify the probable economic and other relevant impacts of the designation upon proposed or ongoing activities; identify the areas where the benefits of exclusion outweigh the benefits of including such areas as critical habitat; and describe the boundaries and include a map of critical habitat. To the maximum extent practicable, the final rule will also include a brief description and evaluation of those activities (whether public or private) that might occur in the designated areas and which, in the opinion of the Secretary, may adversely modify critical habitat or be affected by such designation.

New information and public and peer reviewer comments may result in final designations that differ from the proposals.

Information Solicited

Past critical habitat designations have generated considerable public interest. Therefore, NMFS believes it is important to engage the public early and often in the rulemaking process. This advance notice is a key first step, and NMFS encourages all interested parties to submit comments regarding the issues raised in this notice. NMFS is also soliciting biological and economic information relevant to making critical habitat designations for the following 20 ESUs: (1) Puget Sound chinook salmon; (2) Lower Columbia River chinook salmon; (3) Upper Willamette River chinook salmon; (4) Upper Columbia River spring-run chinook salmon; (5) Central Valley Spring-run chinook salmon; (6) California coastal chinook salmon; (7) Oregon Coast coho salmon; (8) Hood Canal summer-run chum salmon; (9) Columbia River chum salmon; (10) Ozette Lake sockeye salmon; (11) Southern California steelhead; (12) South-Central California coast steelhead; (13) Central California Coast steelhead; (14) Central Valley California steelhead; (15) Upper Columbia River steelhead; (16) Snake River Basin steelhead; (17) Lower Columbia River steelhead; (18) Upper Willamette River steelhead; (19) Middle Columbia River steelhead; and (20) Northern California steelhead (see Figure 1).

In accordance with agency regulations at 50 CFR 424.13, the agency will

consult as appropriate with affected states, interested persons and organizations, other affected Federal agencies, and, in cooperation with the Secretary of State, with the country or countries in which the species concerned are normally found or whose citizens harvest such species from the high seas. Data reviewed may include, but are not limited to, scientific or commercial publications, administrative reports, maps or other graphic materials, information received from experts, and comments from interested parties. Specific data needs include:

(1) Information (including fish surveys, dam counts, historical accounts, etc., as geographically specific as possible) on the past and current numbers and distribution of listed salmon and steelhead;

(2) Information describing the quality and extent of marine, estuarine, and freshwater habitats for all life stages of listed salmon and steelhead, separately describing habitat occupied at the time of listing; currently occupied habitat; and habitat that is currently accessible but not occupied by listed salmon and steelhead;

(3) Within areas occupied by salmon and steelhead in listed ESUs, NMFS seeks information regarding the physical and biological features that are essential to the conservation of the ESUs. Such essential features may include, but are not limited to: a) freshwater spawning sites with sufficient water quantity and quality and adequate substrate to support spawning, incubation and larval development; b) freshwater rearing sites with sufficient water quantity and floodplain connectivity to form and maintain physical habitat conditions and allow salmonid development and mobility; sufficient water quality to support growth and development; food and nutrient resources such as terrestrial and aquatic invertebrates, and forage fish; and natural cover such as shade, submerged and overhanging large wood, log jams, beaver dams, aquatic vegetation, large rocks and boulders, side channels and undercut banks; c) freshwater migration corridors free of obstruction and excessive predation, with adequate water quantity to allow for juvenile and adult mobility; cover, shelter and holding areas for juveniles and adults; and adequate water quality to allow for survival; d) estuarine areas that provide uncontaminated water and substrates; food and nutrient sources to support growth and development; and connected shallow water areas and wetlands to cover and shelter juveniles; e) marine areas with sufficient water quality to support salmonid growth, development, and mobility; food and

nutrient resources such as marine invertebrates and forage fish; and nearshore marine habitats with adequate depth, cover, and marine vegetation to provide cover and shelter;

(4) Any special management considerations or protection currently associated with essential physical and biological features within areas occupied by the listed ESUs, such as a recorded easement or deed restriction, a state statute or comprehensive land use program; a federal regulatory limitation or a legally-binding federal land use plan; or a county ordinance or other binding local enactment;

(5) Whether there are any specific areas within the range of listed ESUs that should not be considered for critical habitat designation because they lack essential physical or biological features or may not require special management consideration or protections;

(6) Whether specific Indian lands should be considered essential for the conservation of the listed ESUs or whether conservation needs can be achieved by limiting the designations to other lands;

(7) Whether there are any specific areas outside the area occupied by listed ESUs that are essential for their conservation, and why;

(8) Whether there are any specific areas that should be excluded from critical habitat designation because the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat;

(9) Any current or planned activities in the range of listed ESUs and their possible impacts on areas that may qualify as critical habitat;

(10) Any economic or other relevant impacts that may result from designating critical habitat, regardless of whether those impacts are attributable co-extensively to other causes, in particular those impacts affecting small entities;

(11) Other benefits of excluding or designating a specific area as critical habitat;

(12) Whether the approach to critical habitat designation for hatchery fish should be the same as for naturally spawned fish and if not, what approach should be used; and

(13) Potential peer reviewers for proposed critical habitat designations, including persons with biological and economic expertise relevant to the designations.

NMFS seeks the above information as soon as possible but by no later than November 13, 2003.

As described in a joint NMFS/FWS policy on ESA information standards

published on July 1, 1994 (59 FR 34271), NMFS will rely on the best and most comprehensive technical information available; gather and impartially evaluate information that disputes official positions; document evaluation of information; use, retain, and reference primary and original sources of information; and conduct management-level review of documents to verify and assure the quality of the science used to make the critical habitat designations. NMFS will review all comments and information resulting

from this advanced notice of proposed rulemaking prior to making any proposed designations and will include such documents in the agency's public record. The public may review information submitted by contacting NMFS (*see* **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**) or via the internet at <http://www.nwr.noaa.gov>. The agency will continue to meet with comanagers and other stakeholders to review this information as well as the overall designation process prior to a proposed critical habitat designation.

References

The complete citations for the references used in this document can be obtained by contacting NMFS or via the Internet (*see* **ADDRESSES** and **FOR FURTHER INFORMATION CONTACT**).

Dated: September 24, 2003.

Rebecca Lent,

Deputy Assistant Administrator for Fisheries for Regulatory Programs, National Marine Fisheries Service.

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