

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 223**

[Docket No. 060124013-6013-01; I.D. 052104F]

RIN 0648-AU18

**Endangered and Threatened Species: Final Protective Regulations for Threatened Upper Columbia River Steelhead**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final listing determination.

**SUMMARY:** We, NOAA's National Marine Fisheries Service (NMFS), are applying the protective regulations for threatened West Coast salmon and steelhead to Upper Columbia River steelhead. Upper Columbia River steelhead were previously listed as endangered in 1997 and were thereby afforded protections against "take" under the Endangered Species Act (ESA). On January 5, 2006, the listing status of Upper Columbia River steelhead was changed to threatened. We have determined that the existing protective regulations for threatened West Coast salmonids are necessary and advisable for the conservation of Upper Columbia River steelhead.

**DATES:** This final determination is effective March 3, 2006.

**ADDRESSES:** NMFS, Protected Resources Division, 1201 NE Lloyd Boulevard, Suite 1100, Portland, OR 97232.

**FOR FURTHER INFORMATION CONTACT:** Dr. Scott Rumsey, NMFS, Northwest Region, Protected Resources Division, at (503) 872-2791, and Marta Nammack, NMFS, Office of Protected Resources, at (301) 713-1401. Reference materials regarding the protective regulations for threatened salmonids are available upon request or on the Internet at <http://www.nwr.noaa.gov>.

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

ESA section 9(a)(1) (16 U.S.C. 1538(a)(1)) prohibits the import/export and "take" of, and commercial transactions involving all species listed as endangered. The term "take" is defined under the ESA as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct" (Section 3(19), 16 U.S.C. 1532 (19)). In the case

of threatened species, section 4(d) of the ESA leaves it to the discretion of the Secretary of Commerce (Secretary) whether, and to what extent, to apply the statutory 9(a)(1) take and other prohibitions, and directs the agency to issue regulations it deems necessary and advisable for the conservation of the species. The 4(d) protective regulations may prohibit, with respect to threatened species, some or all of the acts which section 9(a)(1) of the ESA prohibits with respect to endangered species. These 9(a)(1) prohibitions and 4(d) regulations apply to all individuals, organizations, and agencies subject to U.S. jurisdiction.

Since 1997 we have promulgated a total of 29 "limits" to the ESA section 9(a) "take" prohibitions for 19 threatened salmon and steelhead Evolutionarily Significant Units (ESUs) (62 FR 38479, July 18, 1997; 65 FR 42422, July 10, 2000; 65 FR 42485, July 10, 2000; 67 FR 1116, January 9, 2002). On June 28, 2005, as part of the final listing determinations for 16 ESUs of West Coast salmon, we amended and streamlined the previously promulgated 4(d) protective regulations for threatened salmon and steelhead (70 FR 37160). We finalized an amendment to provide the necessary flexibility to ensure that fisheries and artificial propagation programs are managed consistently with the conservation needs of threatened salmon and steelhead. Under this change the section 4(d) protections apply to natural and hatchery fish with an intact adipose fin, but not to listed hatchery fish that have had their adipose fin removed prior to release into the wild. Additionally, we made several simplifying and clarifying changes to the 4(d) protective regulations including updating an expired limit (§ 223.203(b)(2)), providing a temporary exemption for ongoing research and enhancement activities, and applying the same set of 14 limits to all threatened salmon and steelhead. With respect to steelhead, the amended June 2005 4(d) rule applies to the steelhead ESUs previously listed as threatened: South-Central California, Central California Coast, California Central Valley, Northern California, Upper Willamette River, Lower Columbia River, Middle Columbia River, and Snake River Basin steelhead.

On August 18, 1997, Upper Columbia River steelhead were listed as an endangered species, and subject to the section 9(a)(1) take prohibitions (62 FR 43937). After conducting an updated status review of listed West Coast steelhead, we proposed in June 2004 to list Upper Columbia River steelhead as threatened (69 FR 33102; June 14, 2004). As part of the proposed listing

determination we proposed applying the amended 4(d) protective regulations to Upper Columbia River steelhead. On January 5, 2006, we issued a final determination listing the Upper Columbia River steelhead Distinct Population Segment (DPS) as threatened, and we announced that we would finalize the protective regulations in a subsequent **Federal Register** notice (71 FR 834). In this final rule we are applying the 4(d) protective regulations, as amended in June 2005 (70 FR 37160; June 28, 2005), to Upper Columbia River steelhead.

*Comments and Information Received in Response to the Proposed Rule*

We solicited public comment on the proposed listing determinations for West Coast salmon and steelhead, and the proposed amendments to the 4(d) protective regulations for a total of 268 days (69 FR 33102, June 14, 2004; 69 FR 53031, August 31, 2004; 69 FR 61348, October 18, 2004; 70 FR 6840, February 9, 2005; 70 FR 37219, June 28, 2005; 70 FR 67130, November 4, 2005). We held eight public hearings in the Pacific Northwest, and six public hearings in California, concerning the June 2004 West Coast salmon and steelhead proposed listing determinations and proposed amendments to the 4(d) protective regulations (69 FR 53031, August 31, 2004; 69 FR 54647, September 9, 2004; 69 FR 61348, October 18, 2004). Additionally, pursuant to the requirements of the National Environmental Policy Act (NEPA) of 1969, we conducted an Environmental Assessment (EA) analyzing the proposed amendments to the 4(d) protective regulations for threatened salmonids. As part of the proposed listing determinations and the proposed amendments to the 4(d) protective regulations, we announced that a draft of the EA was available from NMFS upon request (69 FR at 33172; June 14, 2004). Additionally, on November 15, 2004, we published notice of availability in the **Federal Register**, soliciting comment on the draft EA for an additional 30 days (69 FR 65582).

In response to the various requests for comments on the June 2004 proposed listing determinations and proposed 4(d) protective regulations, we received over 28,250 comments by fax, standard mail, and e-mail. The majority of the comments received were from interested individuals who submitted form letters or form e-mails and addressed general issues not specific to a particular ESU. Comments were also submitted by state and tribal natural resource agencies, fishing groups, environmental

organizations, home builder associations, academic and professional societies, expert advisory panels, farming groups, irrigation groups, and individuals with expertise in Pacific salmonids. The majority of respondents focused on the consideration of hatchery-origin fish in ESA listing determinations, with only a few comments specifically addressing the proposed amendments to the 4(d) protective regulations. We did not receive any comments specifically addressing the proposed application of the amended 4(d) protective regulations to Upper Columbia River steelhead. The reader is referred to the June 28, 2005, final rule for a summary of, and our response to, the public comments received regarding the proposed amendments to the 4(d) protective regulations (70 FR 37160 at 37166).

#### **Description of Protective Regulations Being Afforded Upper Columbia River Steelhead**

Consistent with the June 2005 amended 4(d) protective regulations, this final rule applies the ESA section 9(a)(1) take prohibitions (subject to the "limits" discussed below) to unmarked anadromous fish with an intact adipose fin that are part of the Upper Columbia River steelhead DPS. (The clipping of adipose fins in juvenile hatchery fish just prior to release into the natural environment is a commonly employed method for the marking of hatchery production). We believe this approach provides needed flexibility to appropriately manage the artificial propagation and directed take of threatened salmon and steelhead for the conservation and recovery of the listed species.

The June 2005 amended ESA 4(d) protective regulations simplified the previously promulgated 4(d) rules by applying the same set of 14 "limits" to all threatened salmon and steelhead. These limits allow us to exempt certain activities from the take prohibitions, provided that the applicable programs and regulations meet specific conditions to adequately protect the listed species. In this final rule we are applying this same set of 14 limits to Upper Columbia River steelhead. Comprehensive descriptions of each 4(d) limit are contained in "A Citizen's Guide to the 4(d) Rule" (available on the Internet at <http://www.nwr.noaa.gov>), and in previously published **Federal Register** notices (65 FR 42422, July 10, 2000; 65 FR 42485, July 10, 2000; 69 FR 33102; June 14, 2004; 70 FR 37160, June 28, 2005). These "limits" include: activities conducted in accordance with ESA section 10 incidental take authorization

(50 CFR 223.203(b)(1)); scientific or artificial propagation activities with pending permit applications at the time of rulemaking (§ 223.203(b)(2)); emergency actions related to injured, stranded, or dead salmonids (§ 223.203(b)(3)); fishery management activities (§ 223.203(b)(4)); hatchery and genetic management programs (§ 223.203(b)(5)); activities in compliance with joint tribal/state plans developed within *United States (U.S.) v. Washington* or *U.S. v. Oregon* (§ 223.203(b)(6)); scientific research activities permitted or conducted by the states (§ 223.203(b)(7)); state, local, and private habitat restoration activities (§ 223.203(b)(8)); properly screened water diversion devices (§ 223.203(b)(9)); routine road maintenance activities (§ 223.203(b)(10)); certain park pest management activities (§ 223.203(b)(11)); certain municipal, residential, commercial, and industrial development and redevelopment activities (§ 223.203(b)(12)); management activities on state and private lands within the State of Washington (§ 223.203(b)(13)); and activities undertaken consistent with an approved tribal resource management plan (§ 223.204).

Limit § 223.203(b)(2) exempts scientific or artificial propagation activities with pending applications for 4(d) approval. The limit was amended as part of the June 28, 2005, final rule to temporarily exempt such activities from the take prohibitions for 6 months, provided that a complete application for 4(d) approval was received within 60 days of the notice's publication (70 FR 37160). The deadlines associated with this exemption have expired. As we discussed in the proposed rule (69 FR 33102; June 14, 2004), we believe it is in the interest of the conservation and recovery of threatened salmon and steelhead to allow research and enhancement activities to continue uninterrupted while we process the necessary 4(d) approvals. Provided we receive a complete application by April 3, 2006, the take prohibitions will not apply to research and enhancement activities until the application is rejected as insufficient, 4(d) approval is issued, or until March 1, 2007, whichever occurs earliest. The length of this "grace period" is necessary because we process applications for 4(d) approval annually.

#### **Classification**

##### *National Environmental Policy Act*

We conducted an Environmental Assessment (EA) under the NEPA

analyzing the proposed application of the amended 4(d) protective regulations to Upper Columbia River steelhead. We solicited comment on the EA as part of the proposed rule, as well as during a subsequent comment period following formal notice in the **Federal Register** of the availability of the draft EA for review. Informed by the comments received, we finalized the EA on June 14, 2005, and issued a Finding of No Significant Impact for the amended 4(d) protective regulations.

##### *Regulatory Flexibility Act*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule issued under authority of ESA section 4, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published with the proposed rule, and is not repeated here. No comments were received regarding that certification. As a result, no final regulatory flexibility analysis for applying the 4(d) protective regulations to Upper Columbia River steelhead contained in this final rule has been prepared.

##### *Executive Order (E.O.) 12866*

The extension of the ESA 4(d) protective regulations to Upper Columbia River steelhead addressed in this rule has been determined to be significant for the purposes of E.O. 12866. We prepared a Regulatory Impact Review which was provided to the Office of Management and Budget (OMB) with the publication of the proposed rule.

##### *E.O. 13084 – Consultation and Coordination with Indian Tribal Governments*

E.O. 13084 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments or the Federal government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. This final rule does not impose substantial direct compliance costs on the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13084 do not apply to this action. Nonetheless, we intend to inform potentially affected tribal governments and to solicit their input and coordinate on future management actions.

*E.O. 13132 - Federalism*

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this final rule. In fact, this notice provides mechanisms by which NMFS, in the form of 4(d) limits to the statutory take prohibitions, may defer to state and local governments where they provide adequate protections for threatened salmonids, including Upper Columbia River steelhead.

**References**

A complete list of all references cited herein is available upon request (see **ADDRESSES**), or can be obtained from the Internet at: <http://www.nwr.noaa.gov>.

**List of Subjects in 50 CFR Part 223**

Endangered and threatened species, Exports, Imports.

Dated: January 26, 2006.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

■ For the reasons set out in the preamble, 50 CFR part 223 is amended as follows:

**PART 223—THREATENED MARINE AND ANADROMOUS SPECIES**

■ 1. The authority citation for part 223 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543; subpart B, § 223.12 also issued under 16 U.S.C. 1361 *et seq.*

■ 2. In § 223.203, paragraphs (a), (b)(1) through (b)(13), and (c), the references in the sections listed in the first column below are revised according to the directions in the second and third columns:

Section	Remove	Add
§ 223.203(a)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(1)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(2)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(3)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(4)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(5)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(6)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(7)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(8)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(9)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(10)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(11)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(12)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(b)(13)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)
§ 223.203(c)	§ 223.102(a)(2) through (a)(21)	§ 223.102(a)

■ 3. In § 223.203, paragraph (b)(2) is revised to read as follows:

**§ 223.203 Anadromous fish.**

\* \* \* \* \*

(b) \* \* \*

(2) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102(a) do not apply to activities specified in an application for ESA 4(d) authorization for scientific purposes or to enhance the conservation or survival of the species, provided that the application has been received by the Assistant Administrator for Fisheries, NOAA (AA), no later than April 3, 2006. The prohibitions of this section apply to these activities upon the AA's rejection of the application as insufficient, upon issuance or denial of authorization, or March 1, 2007, whichever occurs earliest.

\* \* \* \* \*

[FR Doc. 06–929 Filed 1–31–06; 8:45 am]

**BILLING CODE 3510–22–S**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 229**

[Docket No. 030221039-6017-25; I.D. 012706A]

**Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan (ALWTRP)**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule.

**SUMMARY:** The Assistant Administrator for Fisheries (AA), NOAA, announces temporary restrictions consistent with the requirements of the ALWTRP's implementing regulations. These regulations apply to lobster trap/pot and anchored gillnet fishermen in an area totaling approximately 2,404 nm<sup>2</sup> (8,245 km<sup>2</sup>), southeast of Portland, ME, for 15 days. The purpose of this action is to

provide protection to an aggregation of northern right whales (right whales).

**DATES:** Effective beginning at 0001 hours February 3, 2006, through 2400 hours February 17, 2006.

**ADDRESSES:** Copies of the proposed and final Dynamic Area Management (DAM) rules, Environmental Assessments (EAs), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

**FOR FURTHER INFORMATION CONTACT:** Diane Borggaard, NMFS/Northeast Region, 978–281–9300 x6503; or Kristy Long, NMFS, Office of Protected Resources, 301–713–1401.

**SUPPLEMENTARY INFORMATION:****Electronic Access**

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at <http://www.nero.noaa.gov/whaletrp/>.