

## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 226

[Docket No. 030716175-3187-02;  
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 10<sup>th</sup> Circuit issued its decision in *New Mexico Cattlegrowers' Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10<sup>th</sup> 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