

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 *Alsea Valley Alliance v. Evans* (143 F. Supp. 2d 1154 (D. Ore. 2001)) (*Alsea*), 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 *Alsea* decision. Accordingly, the Oregon Coast coho salmon ESU remains listed as a threatened species pending final disposition of the appeal.

In light of the *Alsea* 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 *Alsea* 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.