



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
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BOARD OF FORESTRY AND FIRE PROTECTION

Dr. J. Keith Gillless
Chair
State Board of Forestry and Fire Protection
P.O. Box 944246
Sacramento, California 94244-2460

Dear Dr. Gillless:

NOAA's National Marine Fisheries Service (NMFS) is requesting the State of California's Board of Forestry and Fire Protection (Board) consider rule-making to revise certain provisions of the California Forest Practice Rules (FPRs) related to protection of anadromous salmonids listed under the federal Endangered Species Act (ESA) of 1973, as amended.

NMFS is responsible for implementation of the ESA for federally listed anadromous fish in California, including five Distinct Population Segments (DPSs) of steelhead (*Oncorhynchus mykiss*), two Evolutionarily Significant Units (ESUs) of coho salmon (*O. kisutch*), and three ESUs of Chinook salmon (*O. tshawytscha*). In July 2014, NMFS released a final recovery plan for Central Valley (CV) salmon and steelhead (salmonids). In the recovery plan, NMFS concluded that listed salmonids were adversely impacted by numerous limiting factors including barriers (such as large dams) which block access to approximately 80 percent of the historical spawning and rearing habitats in the Central Valley. NMFS determined that reintroductions above some dams, to historically occupied and currently suitable habitat, is necessary to ensure their survival and recovery (NMFS 2014). Some of these historical spawning and rearing habitats are located on privately owned land zoned for timber production.

Concerns have been raised that reintroduction efforts above permanent barriers (such as large dams) would result in an expansion of the Board's FPRs for Anadromous Salmonid Protection (ASP) to areas with reintroduced populations. Currently, the ASP rules do not apply to areas above permanent barriers. To address concerns over reintroductions, NMFS is requesting the Board revise FPR language to clarify that the ASP rules do not apply to areas above these barriers and to include a provision that specifically excludes listed populations of salmonids which are designated as "experimental" pursuant to section 10(j) of the ESA and for which a rule, under ESA section 4(d), has been promulgated for populations introduced into areas above permanent barriers.

NMFS has worked with the Board for many years following the federal listings of salmonids and commends the Board for successfully implementing significant changes to the FPRs to minimize impacts to these fish. We look forward to working with the Board on our proposal because we believe these actions are necessary for the conservation and recovery of anadromous salmonids in California.



Background – ESA Section 10(j)

The ESA recognizes that fish, wildlife and plant species have aesthetic, ecological, educational, historical, recreational and scientific value and provides a means to conserve the ecosystems upon which endangered or threatened species depend. Section 10(j) authorizes the Secretaries of Commerce and Interior to release an “experimental population” of a listed species outside the species’ current range when doing so furthers the conservation of the species.

When Congress enacted the ESA, it intended that federal agencies would cooperate with states and other interested parties to develop and maintain conservation programs and to resolve water resource issues in concert with the conservation of listed species (16 USC 1531(5)(c)(2); (16 USC 1535(a)). As enacted, the ESA provided the Secretaries authority to release populations of listed species outside of their current range in order to foster the conservation and recovery of the species. However, local opposition to reintroduction efforts from parties concerned about potential restrictions and liability under the ESA reduced the use of such reintroduction authorities by both NMFS and the U.S. Fish and Wildlife Service.

In response to these concerns, Congress added section 10(j) in 1982 to encourage recovery of species through population re-establishment, in cooperation with state and local entities, while providing federal agencies with more flexibility and discretion in managing reintroduced populations (H.R. Rep. No. 97-567 at 34 (1982)). The legislative history indicates that a rule issued for a designated experimental population “should be viewed as an agreement among the federal agencies, the state fish and wildlife agencies, and any landowners involved” (H.R. Rep. No. 97-567, at 34 (1982)).

Once established by regulation, an experimental population is treated as a separate threatened species regardless of the ESA status (threatened or endangered) of the donor species from which it was derived. If the experimental population is determined to be essential, it is treated as a threatened species for purposes of section 7 consultation and critical habitat can be designated for the population. In contrast, if the experimental population is determined to be non-essential, then it is treated as a species proposed to be listed for purposes of section 7 consultation and critical habitat cannot be designated for the population. Because an experimental population is treated as a threatened species for all other purposes, the Secretary may promulgate protective regulations under section 4(d) of the ESA for the population regardless of whether or not it is determined to be essential or non-essential. Such regulations may allow persons to take members of the listed species without violating the take prohibition contained in section 9 of the ESA. For example, NMFS has recently promulgated protective 4(d) regulations for the reintroduction of an experimental population of CV spring-run Chinook (*O. tshawytscha*) into the San Joaquin River below Friant Dam (78 FR 79622). In this case, unintentional take of CV spring-run Chinook salmon, in the experimental population area, that is caused by otherwise lawful activities is excepted from the take prohibitions under ESA section 9. Examples of otherwise lawful activities included, but were not limited to, recreation, agriculture, municipal usage, flood control, water management, and other similar activities which are carried out in accordance with Federal, State, and local laws and regulations.

Application of ESA section 10(j)

NMFS has implemented section 10(j) for three populations of salmonids in recent years; (1) Mid-Columbia River steelhead above Pelton Dam on the Deschutes River (Oregon), (2) Upper Columbia River spring-run Chinook salmon in the Okanogan River (Washington), and as discussed above (3) CV spring-run Chinook salmon in the San Joaquin River below Friant Dam (California). The United States Fish and Wildlife Service has used 10(j) for at least 60 populations of vertebrates (including fish) and invertebrates and has developed implementing regulations to guide their case-by-case designation of experimental populations.

Role of ESA section 10(j) in Salmonid Recovery and Landowner Concerns

In NMFS's Central Valley salmonid recovery plan (NMFS 2014), one of the primary recovery strategies includes reintroduction of salmonids into historical, but currently unoccupied, habitats above large barrier dams. We recognize it may be difficult to gain support for some recovery efforts, particularly reintroduction of listed salmonids above large dams, due to landowner concerns over increased regulatory burdens. However, as provided under section 10(j), individuals of an experimental population shall be treated as threatened species, and NMFS may establish protective regulations under section 4(d) of the ESA with respect to such populations. NMFS can tailor these regulations to provide exceptions to take prohibitions under the ESA as appropriate for unintentional taking of individuals of an experimental population as a result of otherwise lawful activities. By addressing these issues on a case-by-case basis, we believe we will overcome a major hurdle in recovery implementation.

We understand that some forest landowners are concerned as to whether the Board's FPRs for ASP would apply to the areas where listed populations are reintroduced above barrier dams. The Board has previously opined it does not believe that the ASP rules would apply to these areas. Nonetheless, landowner concern exists over whether that opinion could be challenged. NMFS recognizes this concern and, after consultation with landowners, Board staff, and California Department of Fish and Wildlife, we believe this issue could be addressed through revision of existing language in the FPRs.

NMFS' Proposal

The following is a proposed change in the definitions section of the Forest Practice Rules (14 CCR § 895.1) outlined below in underline:

Watersheds with Listed Anadromous Salmonids means any planning watershed where populations of anadromous salmonids that are listed as threatened, endangered, or candidate under the State or Federal Endangered Species Acts are currently present or can be restored. This definition does not apply to those portions of watersheds that meet either of the following criteria:

1. Those areas upstream of barriers including large dams (where removal and/or fishway construction has been determined by NMFS and CDFW¹ to not be feasible) and natural barriers such as long term bedrock falls or large static ancient slides with high-gradient or high-velocity barriers that NMFS and CDFW have determined are permanent and preclude anadromous fish passage.
2. Where anadromous salmonid populations, introduced to areas outlined in (1) above, are designated as an Experimental Population under Section 10(j) of the Federal Endangered Species Act, and corresponding regulations under Section 4(d) of the Federal Endangered Species Act for these populations provide an exception from take prohibitions under the Federal Endangered Species Act for activities subject to the California Forest Practice Rules.

The following is a proposed change to Special Conditions Requiring Disapproval of Plans provision in the Forest Practices Rule (14 CCR § 898.2):

The Director shall disapprove a plan as not conforming to the rules of the Board if any one of the following conditions exist:

* * *

(d) Implementation of the plan as proposed would result in either a "taking" or finding of jeopardy of wildlife species listed as rare, threatened or endangered by the Fish and Game Commission, the National Marine Fisheries Service, or Fish and Wildlife Service, or would cause significant, long-term damage to listed species. The Director is not required to disapprove a plan under either of the following circumstances:

1. *Which would result in a "taking" if the "taking" is incidental and is authorized by a wildlife agency acting within its authority under state or federal endangered species acts.*
2. *Where anadromous salmonid populations are designated as an Experimental Population under Section 10(j) of the Federal Endangered Species Act, and corresponding regulations under Section 4(d) of the Federal Endangered Species Act for those populations provide an exception from take prohibitions under the Federal Endangered Species Act for activities subject to the California Forest Practice Rules, and federal and state agencies determine no further take authorizations are necessary, under the Federal Endangered Species Act or the California Endangered Species Act.*

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¹ California Department of Fish and Wildlife

Thank you for consideration of our proposal. We look forward to working with the Board on this issue. If you have any questions or concerns, please contact Jonathan Ambrose of my staff at jonathan.ambrose@noaa.gov or (916) 930-3717.

Sincerely,



Maria Rea
Assistant Regional Administrator
California Central Valley Office

Copy to File: ARN 1514-05-WCR2015-SA00001
cc: Stafford Lehr, CDFW, 830 S Street, Sacramento, CA 95811
Bill Condon, CDFW, 1416 9th Street, Sacramento, CA 95814

References Cited

- 78 FR 79622. 2013. Endangered and Threatened Species: Designation of a Nonessential Experimental Population of Central Valley Spring-Run Chinook Salmon Below Friant Dam in the San Joaquin River, CA. Federal Register 78: 79622-79633.
- National Marine Fisheries Service. 2014. Recovery Plan for Evolutionarily Significant units of Sacramento River Winter-run Chinook Salmon and Central Valley Spring-run Chinook Salmon and the Distinct Population Segment of California Central Valley Steelhead. California Central Valley Area Office. July 2014.