

implementation and effectiveness to alter our proposed determination that efforts being made to protect the Oregon Coast coho ESU do not substantially mitigate the assessed level of extinction risk.

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>.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: June 14, 2005.

William T. Hogarth,

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

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 040525161-5159-04; I.D. 052104F]

Endangered and Threatened Species: 6-month Extension of the Final Listing Determinations for Ten Evolutionarily Significant Units of West Coast *Oncorhynchus mykiss*

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

ACTION: Proposed rule; 6-month extension of the deadline for final listing determinations.

SUMMARY: In June 2004, we (NMFS) proposed that ten Evolutionarily Significant Units (ESUs) of West Coast *Oncorhynchus mykiss* (*O. mykiss*, which includes anadromous steelhead and resident rainbow trout) be listed as endangered or threatened species under the Endangered Species Act (ESA). In April-May 2005, we received three independent scientific reports containing information on the relationship of anadromous and resident *O. mykiss* and on the viability of ESUs containing a diversity of types of populations. In June 2005, we received a letter from the U.S. Fish and Wildlife Service (FWS), stating its concerns about the basis for final listing determinations for the ten *O. mykiss* ESUs and specifying three issues regarding the relationship between anadromous and resident *O. mykiss*, over which there is substantial disagreement about the underlying data.

We are extending the deadline for final listing determinations for the ten *O. mykiss* ESUs for 6 months to analyze the three reports, to work with FWS to resolve the disagreements about the data relevant to its issues of concern, and to solicit additional information from scientific studies and other newly available data. Additionally, we are soliciting comments and information from the public regarding the reports, the issues raised by FWS, and about resident and anadromous *O. mykiss* generally. This extension will enable us to make a final listing determination based upon the best available scientific information.

DATES: All comments must be received no later than 5 p.m. Pacific standard time on July 28, 2005.

ADDRESSES: You may submit comments, using a document identifier "*O. mykiss* Issues" in the subject line or cover letter, on the *O. mykiss* reports and FWS' issues and any other relevant information by any of the following methods:

- E-mail: OmykissIssues.nwr@noaa.gov.
- Mail: You may submit written comments and information to Chief, NMFS, Protected Resources Division, 1201 NE Lloyd Boulevard, Suite 1100, Portland, OR 97232.
- Hand Delivery/Courier: You may hand deliver written comments and information to NMFS, Protected Resources Division, 1201 NE Lloyd Boulevard, Suite 1100, Portland, OR 97232. Business hours are 8 a.m. to 5 p.m., Monday through Friday, except Federal holidays.
- Fax: 503-230-5441.
- Federal e-Rulemaking Portal: <http://www.regulations.gov>.

Copies of the **Federal Register** notices cited herein and additional salmon-related materials are available on the Internet at <http://www.nwr.noaa.gov>.

FOR FURTHER INFORMATION CONTACT: Scott Rumsey, NMFS, Northwest Region, Protected Resources Division by phone at (503) 872-2791.

SUPPLEMENTARY INFORMATION:

Background

In 1996, we completed a comprehensive status review of West Coast steelhead (Busby *et al.*, 1996) that resulted in proposed listing determinations for ten steelhead ESUs, five as endangered and five as threatened species (61 FR 41541; August 9, 1996). On August 18, 1997, we listed five of the ESUs, two as endangered and three as threatened (62 FR 43937) and announced a 6-month extension of final listing determinations for the other five

ESUs, pursuant to section 4(b)(6)(B)(i) of the ESA (62 FR 43974). On March 10, 1998, we proposed to list two additional steelhead ESUs as threatened (63 FR 11798). On March 19, 1998, we listed as threatened two of the steelhead ESUs that were deferred in August 1997 and designated the other three proposed ESUs as candidate species (63 FR 13347). On March 25, 1999, we listed as threatened the two ESUs proposed in March 1998 (64 FR 14517). On February 11, 2000, we proposed to list the Northern California steelhead ESU as threatened (65 FR 6960) and listed that ESU as threatened on June 7, 2000 (65 FR 36074). Under these listing decisions, there are currently ten listed steelhead ESUs, two endangered and eight threatened.

In our initial steelhead listings, we noted uncertainties about the relationship of resident and anadromous *O. mykiss*, yet concluded that the two forms are part of a single ESU where the resident and anadromous *O. mykiss* have the opportunity to interbreed (62 FR at 43941). FWS disagreed that resident *O. mykiss* should be included in the steelhead ESUs and advised that the resident fish not be listed (62 FR at 43941). Accordingly, we decided to list only the anadromous *O. mykiss* at that time (62 FR at 43951). That decision was followed in each of the subsequent steelhead listings described in the preceding paragraph.

Section 3 of the ESA defines the term species 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." In our listing determinations for Pacific salmonids, we treat an ESU as constituting a distinct population segment (DPS), and hence a "species," under the ESA (56 FR 58612; November 20, 1991). In past listing determinations, hatchery fish considered to be part of an ESU were generally not included as part of a listing, unless it was determined that they were "essential for recovery" (58 FR 17573; April 5, 1993).

In 2001, the U.S. District Court in Eugene, Oregon, set aside the 1998 threatened listing of the Oregon Coast coho ESU (*Alesea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, D. Or. 2001) (Alease decision). In the Oregon Coast coho listing (63 FR 42587; August 10, 1998), we did not include in the listing ten hatchery stocks determined to be part of the Oregon Coast coho ESU. The court ruled that the ESA does not allow listing a subset of a DPS and that we had improperly excluded hatchery stocks from listing that were otherwise determined to be part of the ESU. In

response to the *Alesea* decision and several listing and delisting petitions, we announced that we would conduct an updated status review of 27 West Coast salmonid ESUs, including the ten listed steelhead ESUs (67 FR 6215, February 11, 2002; 67 FR 48601, July 25, 2002; 67 FR 79898, December 31, 2002).

On June 14, 2004, we proposed to list the ten *O. mykiss* ESUs (including the resident fish that co-occur with the anadromous form), one as endangered and nine as threatened (69 FR 33102). In the proposed rule, we noted that the *Alesea* decision required listing of an entire ESU, in contrast to our prior steelhead-only listings, and stated the scientific principles and working assumptions we used to determine whether particular resident groups were part of an *O. mykiss* ESU that included anadromous steelhead (69 FR at 33113). Following an initial public comment period of 90 days, the public comment period was extended twice for an additional 36 and 22 days (69 FR 53031, August 31, 2004; 69 FR 61348, October 18, 2004), respectively. During the comment period, we received numerous comments disagreeing with our proposals (generally and for specific resident populations) to include resident *O. mykiss* in various ESUs and criticizing how we considered resident *O. mykiss* in evaluating the risk to the continued existence of the whole ESU.

On June 7, 2005, FWS wrote to NMFS (FWS, 2005), stating its concerns about the factual and legal bases for our final listing determinations for the ten proposed *O. mykiss* ESU listings. FWS suggested that we invoke the ESA 4(b)(6)(B)(i) provision for extending the final *O. mykiss* listing determinations "to allow for further scientific evaluation, data gathering, and debate among the scientific experts within FWS and NMFS"

The specific areas that FWS identified where there is substantial disagreement regarding the sufficiency or accuracy of available data on which to make final listing decisions are: (1) the determination of the *O. mykiss* ESUs, in particular whether resident and anadromous fish in a region are in a single ESU; (2) the relatedness of co-occurring resident and anadromous *O. mykiss*, including whether they form single, routinely interbreeding populations, and whether resident *O. mykiss* produce the anadromous life form and vice versa; and (3) assessment of the risk of extinction of ESUs containing both resident and

anadromous *O. mykiss*, including the contributions of both types of populations to the stability of the ESU.

In the last two months, we have received three reports from independent scientific panels that bear directly on these areas of disagreement raised by FWS. (1) On April 8, 2005, the Independent Scientific Advisory Board hosted by the Northwest Power Planning Council issued a report, in response to five questions from NMFS' Northwest Fisheries Science Center, entitled "Viability of ESUs Containing Multiple Types of Populations" (ISAB, 2005). (The report is available at <http://www.nwppc.org/library/isab/isab2005-2.htm>). (2) On May 5, 2005, the Recovery Science Review Panel hosted by the Northwest Fisheries Science Center issued a report on its December 2004 meeting on the relation between anadromous and resident forms of *O. mykiss* and how life form diversity affects the viability of *O. mykiss* ESUs (RSRP, 2005). (The report is available at http://www.nwfsc.noaa.gov/trt/rsrp_docs/rsrpreportdec04finalwbios.pdf). (3) On May 16, 2005, an independent scientific panel convened by the Northwest and Southwest Fisheries Science Centers issued a report entitled "Considering Life History, Behavioral, and Ecological Complexity in Defining Conservation Units for Pacific Salmon" (Hey *et al.*, 2005). We are considering the concepts and the scientific information presented in these reports, both of which bear on the relationship of anadromous and resident *O. mykiss*.

In addition, we are aware of ongoing genetic *O. mykiss* research by NMFS and state wildlife agencies in Washington, Oregon, California, and Alaska on the ability of resident fish to adopt an anadromous life history and the degree of reproductive isolation between resident and anadromous populations. This research specifically includes studies of the Snake River Basin and Middle Columbia River *O. mykiss* ESUs, and pertains generally to the issues of concern to FWS for all ten of the *O. mykiss* ESUs proposed for listing.

Extension of Final Listing Determination

Section 4(b)(6) requires that we take one of three actions within one year of a proposed listing: (1) finalize the proposed listing; (2) withdraw the proposed listing; or (3) extend the final determination by not more than 6

months. Section 4(b)(6)(B)(i) allows a 6-month extension of the 1-year deadline for a final listing determination if "there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination ... for the purposes of soliciting additional data." In light of the concerns raised by FWS and commenters on the proposed listings regarding the sufficiency and accuracy of the data that will form the basis of our final *O. mykiss* listings, and of the three recent independent scientific reports related to these issues, we conclude that a 6-month extension of the final listing determination for the ten *O. mykiss* ESUs is warranted. The 6-month extension will afford us the opportunity to discuss these issues and exchange information with FWS, to review and assimilate the recent scientific panels' reports, to solicit an additional year's data from the ongoing genetic studies, and to consider additional information submitted by the public.

Information Solicited

We solicit public comment on the issues of concern raised by FWS and seek information that may help resolve those issues. Specifically, we request information about: the relationship between co-occurring resident and anadromous *O. mykiss* populations; the range, distribution, and habitat-use patterns of resident populations; the abundance, density, and presence/absence of resident *O. mykiss*; genetic or other relevant data indicating the amount of exchange and the degree of historic and current relatedness between anadromous and resident *O. mykiss* life forms; the existence of natural and artificial barriers to anadromous populations; and the relationship of resident *O. mykiss* located above impassible barriers to anadromous and resident populations below such barriers.

References

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Authority: 16 U.S.C. 1531 *et seq.*

Dated: June 14, 2005.

William T. Hogarth,

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