

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 040525161-5156-03; I.D. 020105C]

Endangered and Threatened Species: 6-month Extension of the Final Listing Determination for the Oregon Coast Evolutionarily Significant Unit of Coho Salmon

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

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

SUMMARY: In June 2004, we (NMFS) proposed that the Oregon Coast coho Evolutionarily Significant Unit (ESU) (*Oncorhynchus kisutch*) be listed as a threatened species under the Endangered Species Act (ESA). In March 2005, the State of Oregon released a draft Oregon Coastal Coho Assessment (draft assessment) of the viability of the Oregon Coast coho ESU and the contributions of the Oregon Plan for Salmon and Watersheds (OPSW) to conserving the Oregon Coast coho ESU. The draft assessment concluded that the Oregon Coast coho ESU is viable. On February 9, 2005, we announced in a **Federal Register** notice that we would consider the information presented by Oregon in determining the final listing status for the ESU, and we solicited public comment on the draft assessment. The comments received by NMFS and Oregon raised a number of concerns regarding the sufficiency and adequacy of the data and analyses used in the draft assessment. On May 6, 2005, Oregon released a final Oregon Coastal Coho Assessment (final assessment) that incorporates and responds to the comments received and includes several substantive changes in response, regarding the sufficiency and adequacy of the draft assessment.

We are extending the deadline for the final listing determination for the Oregon Coast coho ESU by 6 months to analyze Oregon's final assessment in light of the comments received on the draft assessment. This extension will enable NMFS to make a final listing determination based upon the best available scientific information. Additionally, we are soliciting additional information regarding the sufficiency and adequacy of the final assessment.

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

ADDRESSES: Copies of the final Oregon Coastal Coho Assessment are available on the Internet at: <http://www.oregon-plan.org>, or upon request (see **FOR FURTHER INFORMATION CONTACT**, below).

You may submit comments, using a document identifier "Oregon's Final Coastal Coho Assessment" in the subject line or cover letter, on the final assessment and any other relevant information by any of the following methods:

- E-mail: FinalCohoAssessment.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.
- Federal e-Rulemaking Portal: <http://www.regulations.gov>.
- 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.

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 1995, we completed a comprehensive status review of West Coast coho salmon (Weitkamp *et al.*, 1995) that resulted in proposed listing determinations for three coho ESUs, including a proposal to list the Oregon Coast coho ESU as a threatened species (60 FR 38011; July 25, 1995). On October 31, 1996, we announced a 6-month extension of the final listing determination for the ESU pursuant to section 4(b)(6)(B)(i) of the ESA, noting substantial disagreement regarding the sufficiency and accuracy of the available data relevant to the assessment of extinction risk and the evaluation of protective efforts (61 FR 56211). On May 6, 1997 (62 FR 24588), we withdrew our proposal to list the Oregon Coast coho ESU as threatened, based in part on conservation measures contained in the Oregon Coastal Salmon Restoration Initiative (Oregon Plan) and an April 23, 1997, Memorandum of Agreement

(MOA) between NMFS and the State of Oregon which further defined Oregon's commitment to salmon conservation. We concluded that the implementation of harvest and hatchery reforms, and habitat protection and restoration efforts under the Oregon Plan and the MOA substantially reduced the risk of extinction faced by the Oregon Coast coho ESU. On June 1, 1998, the Federal District Court for the District of Oregon issued an opinion finding that our May 6, 1997, determination to not list Oregon Coast coho was arbitrary and capricious (*Oregon Natural Resources Council et al. v. Daley*, 6 F. Supp. 2d 1139 (D. Or. 1998)). The court vacated our determination to withdraw the July 25, 1995, proposed rule (60 FR 38011) to list the Oregon Coast coho ESU and remanded the case to us for further consideration. The court held that the ESA does not allow us to consider the biological effects of future or voluntary conservation measures, and that we could give no weight to such measures in making a listing determination. We appealed the decision, and the District Court and the Ninth Circuit Court of Appeals declined to stay the District Court's order, thus requiring us to make a new determination. On August 10, 1998, we issued a final rule (63 FR 42587) listing the Oregon Coast coho ESU as threatened, basing the determination solely on the information and data contained in the 1995 status review (Weitkamp *et al.*, 1995) and the May 6, 1997, proposed rule (62 FR 24588).

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 previous 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 (*Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, D. Or. 2001) (*Alsea* decision). In the 1998 listing, 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 Oregon Coast coho ESU (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 Oregon Coast coho ESU as a threatened species (69 FR 33102). In the proposed rule, we noted that Oregon was initiating a comprehensive assessment of the viability of the Oregon Coast coho ESU and of the adequacy of actions under OPSW for conserving Oregon Coast coho. 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.

In January 2005, Oregon made publicly available its draft assessment of the ESU's viability. The draft assessment also evaluated the certainty of implementation and effectiveness of OPSW measures in mitigating the risk of extinction for the Oregon Coast coho ESU, consistent with the joint NMFS/U.S. Fish and Wildlife Service Policy on Evaluating Conservation Efforts (68 FR 15100; March 28, 2003). The draft assessment concluded that: the Oregon Coast coho ESU is biologically viable; conservation measures under the OPSW have stopped, if not reversed, the deterioration of Oregon Coast coho habitats; and it is highly likely that existing monitoring efforts will detect any significant future deterioration in ESU viability, or degradation of environmental conditions, allowing a timely and appropriate response to conserve the ESU. On February 9, 2005, we published a notice of availability of the draft assessment for public review and comment in the **Federal Register** (70 FR 6840) and noted that information presented in the draft and final assessments would be considered in developing the final listing determination for the Oregon Coast coho ESU. The public comment period on the draft assessment extended through March 11, 2005.

We received 15 comments on Oregon's draft assessment (copies of the comments are available on the Internet at: http://www.nwr.noaa.gov/occd/DraftCohoReportComments/Comments_Index.html). On March 18, 2005, we forwarded these comments, as well as NMFS' technical review, for Oregon's consideration in developing their final assessment (NMFS, 2005).

The public comments and our review highlighted areas of uncertainty or disagreement regarding the sufficiency and accuracy of the draft assessment including: the assumption that Oregon Coast coho populations are inherently resilient at low abundance and that this compensatory response will prevent extinction during periods of low marine survival; the reduced importance of abundance as a useful indicator of extinction risk; uncertainty in abundance and hatchery fraction data that may result in an underestimation of extinction risk; assumptions regarding the duration and severity of future periods of unfavorable marine and freshwater conditions; the ability of monitoring and adaptive management efforts to detect population declines or habitat degradation and to identify and implement necessary protective measures; and the ability of OPSW measures to halt or reverse habitat degradation once detected.

On May 13, 2005, Oregon issued its final assessment. The final assessment includes a summary of, and response to, the comments received on the draft assessment, and includes several substantive changes intended to address concerns raised regarding the sufficiency and accuracy of the draft assessment. The final assessment concludes that: (1) the Oregon Coast coho ESU is viable under current conditions and should be sustainable through a future period of adverse environmental conditions; (2) given the assessed viability of the ESU, the quality and quantity of habitat is necessarily sufficient to support a viable ESU; and (3) the integration of laws, adaptive management programs, and monitoring efforts under the OPSW will conserve and improve environmental conditions and the viability of the ESU into the foreseeable future.

Extension of Final Listing Determination

ESA section 4(b)(6) requires that we take one of three actions within 1 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 Oregon's draft assessment, the concerns raised by commenters and our own review regarding the sufficiency and accuracy of the draft assessment, and

the substantive changes made in Oregon's final assessment to address these concerns, we conclude that a 6-month extension of the final listing determination for the Oregon Coast coho ESU is warranted. For the final listing determination to be made solely on the basis of the best available scientific and commercial information, it is essential to resolve the substantial disagreement regarding the data and analyses supporting Oregon's conclusion that the ESU is biologically viable. Furthermore, an evaluation of protective efforts under OPSW must be made in the context of risks to the Oregon Coast coho ESU, and would be premature given the substantial disagreement regarding the sufficiency or accuracy of Oregon's extinction risk assessment. The 6-month extension will afford us the opportunity to solicit public comment regarding the validity of Oregon's final assessment (see "Information Solicited" section, below), to fully analyze Oregon's final assessment in light of the concerns raised with respect to the draft assessment, and to seek peer review of Oregon's final assessment consistent with the 1994 NMFS/U.S. Fish and Wildlife Service joint policy on peer review (59 FR 34270, July 1, 1994) and the Office of Management and Budget's Final Information Quality Bulletin for Peer Review (70 FR 2664; January 14, 2005).

Information Solicited

We are soliciting public comment on whether Oregon's final assessment adequately resolves the concerns raised regarding the sufficiency or accuracy of the data and analyses used in the draft assessment. The concerns raised are summarized in our review of the draft assessment, which is available on request (see **FOR FURTHER INFORMATION CONTACT**, above) or on the Internet at: http://www.nwr.noaa.gov/occd/DraftCohoReportComments/Comments_Index.html. Specifically, NMFS is soliciting public comment on whether Oregon's final assessment provides sufficient new information and analyses to alter our extinction risk assessment and proposed determination that the ESU is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (i.e., "threatened"). Additionally, we are soliciting comment on whether the final assessment presents information and analyses demonstrating, consistent with the joint NMFS/U.S. Fish and Wildlife Service's Policy on Evaluating Conservation Efforts (68 FR 15100; March 28, 2003), that the OPSW provides sufficient certainty of

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