DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 222

[Docket No. 980414094–9287–02; I.D. No. 091797A]

RIN 0648–AK55

Endangered and Threatened Wildlife and Plants; Definition of ''Harm''

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

ACTION: Final rule.

SUMMARY: This final rule defines the term ''harm'', which is contained in the definition of ''take'' in the Endangered Species Act (ESA). The purpose of this rulemaking is to clarify the type of actions that may result in a take of a listed species under the ESA. This final rule is not a change in existing law. It provides clear notification to the public that habitat modification or degradation may harm listed species and, therefore, constitutes a take under the ESA as well as ensuring consistency between NMFS and the Fish and Wildlife Service (FWS). This final rule defines the term ''harm'' to include any act which actually kills or injures fish or wildlife, and emphasizes that such acts may include significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife.

DATES: This rule is effective on December 8, 1999.

ADDRESSES: Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Chris Mobley, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, phone (301)713–1401 or Garth Griffin, NMFS, 525 NE Oregon St, Suite 500, Portland, OR 97232, phone (503)231–2005.

SUPPLEMENTARY INFORMATION:

Background

On May 1, 1998, NMFS published a proposed rule and request for comments. NMFS proposed to define the term ''harm'', which is contained in the definition of ''take'' in the Endangered Species Act (63 FR 24148). In that proposed rule, NMFS solicited public comments on the proposed definition. On June 11, 1998, NMFS announced the availability of, and solicited comments on, a draft Environmental Assessment on the proposed definition (63 FR 31962). This final rule takes into consideration the comments received in response to the proposed rule.

Section 9 of the ESA makes it illegal to take an endangered species of fish or wildlife. The definition of ''take'' is to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' (16 U.S.C. 1532(19)). The U.S. Fish and Wildlife Service (FWS) issued a regulation further defining the term ''harm'' to eliminate confusion concerning its meaning (40 FR 44412; 46 FR 54748). The FWS' definition of ''harm'' has been upheld by the Supreme Court as a reasonable interpretation of the term and supported by the broad purpose of the ESA to conserve endangered and threatened species (See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2418, 1995). With the listings of Pacific salmon and steelhead stocks, potentially affected parties have questioned whether NMFS also interprets harm to include habitat destruction. This final rule clarifies that NMFS' interpretation of harm is consistent with that of FWS.

Definitions and Source of Authority

NMFS interprets the term ''harm'' as an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering (Compare 50 CFR 17.3).

This rule is reasonable for the conservation of the habitats of listed species. Congress acknowledged these needs by stating in the ''Purposes'' subsection of the ESA: ''The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . .'' (16 U.S.C. 1531(b)). In addition to the text contained in the ''Purposes'' subsection, which indicates the broad goals of the ESA, the structure and legislative history of the ESA indicate Congressional intent to protect the habitats of listed species (*Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2418, 1995).

Summary of Comments Received in Response to the Proposed Rule

Fifty-three written comments were submitted in response to the proposed rule and 9 written comments were submitted in response to the draft Environmental Assessment prepared for the proposed rule. These comments and NMFS' responses are summarized here.

Comment 1: Explain what habitat or activities would be encompassed by ''spawning, rearing and migrating'' and how it is different from ''breeding, feeding or sheltering'' in the FWS' regulation. Is it different or similar or the same as ''essential behavioral patterns.''

Response: Including the terms ''spawning'', ''rearing'' and ''migrating'' in the NMFS definition of harm makes it clear that NMFS considers these behaviors to be ''essential behavioral patterns''. NMFS believes it is important to include these terms because they describe essential behavioral patterns for most species under NMFS jurisdiction. NMFS is particularly concerned with addressing harm caused by significant habitat modification or degradation to anadromous and migratory species. Habitat destruction may occur at times when migratory species are not present, but may nonetheless impair essential behavioral patterns when the animals return, resulting in sub-lethal or chronic injury or mortality.

For example, improperly sited aquaculture facilities and their attendant vessel traffic, fixed structures, noise pollution, artificial light, and human activity may obstruct marine mammal and turtle access to habitats of critical importance to their survival, such as haul out sites, breeding grounds and nesting beaches.

It should be noted that spawning is a specific term for fish breeding. Salmon require clean gravel beds for successful spawning. Sedimentation from timber harvest operations may plug the interstitial spaces in gravel spawning areas, resulting in reduced survival of salmon eggs during their incubation period.

Similarly, for species under NMFS jurisdiction, ''rearing'' and ''migration'' should be broadly interpreted to include many of the behavioral patterns associated with ''feeding'' and ''sheltering''. For example, in order to successfully rear and migrate, juvenile salmonids must successfully feed, and also must find adequate shelter in the form of large woody debris and other instream structures in order to avoid predation. Excessive squid and pollock harvest near Steller sea lion rookeries may impair feeding and rearing of juvenile Steller sea lions by reducing their available food supply.

''Migration'' is a particularly important behavioral pattern in the anadromous life history and, therefore,

merits specific mention in the definition. Juveniles must be able to pass downstream from spawning grounds to the open ocean, and adults must be able to return from the ocean to spawning grounds. Human-made barriers to adult migration (thermal barriers, other water quality barriers, and physical barriers) that significantly impede spawning success, or result in significantly increased rates of juvenile injury or mortality would be considered by NMFS to be within the NMFS definition of ''harm'' under the ESA.

Comment 2: One commenter opposed the use of ''spawning, rearing and migrating'' because interference with such activities will not in ''all cases result in injury to individual fish.''

Response: NMFS disagrees. While not all impacts to a species' habitat impair essential behavioral patterns, any habitat modification that significantly impairs spawning, rearing, or migrating does constitute harm to the species and is a take pursuant to the provisions of the ESA.

Comment 3: One commenter noted that the rule should only apply to ''significant habitat modification'' which ''results in demonstrated impairment of essential behaviors.'' Another commenter stated that NMFS must clarify that impairment of essential behavior patterns is not ''injury'' in and of itself but a means to injury—these are two separate elements in establishing harm.

Response: NMFS disagrees. An injury is demonstrated if the habitat modification significantly impairs the listed species' ability to feed, breed, rear, migrate or any other behavior essential to its biological processes and behavioral patterns. ''Significant'' impairment of essential behavioral patterns constitutes injury; therefore, establishing the former with respect to listed species establishes harm.

Comment 4: Several commenters stated that the public needs clear prospective guidance on activities that could constitute a prohibited take. Commenters sought greater specificity on likely results of water withdrawals and streambed or land clearing activities. Some commenters expressed concern that NMFS is relying on ''probabilistic data'' and not empirical evidence in determining ''harm.''

Response: The list of examples provided in this final rule (see ''Activities That May Constitute A Take'') as well as in the proposed rule is intended to provide general guidance to the public on the types of habitat-modifying activities that could result in injury to fish or wildlife. While not exhaustive, this list was developed based on direct experience with managing populations in their natural environment, and from the scientific literature. NMFS cannot provide further detailed guidance in this definition, since the actual impacts of a given act depend on situation-specific conditions. Individuals conducting activities similar to those listed in the examples in areas in or near listed species and their habitat should consult with NMFS for more specific guidance.

In order to determine ''harm,'' the regulation requires that a causal link or relationship between a specific activity or series of activities and the injury or death of listed species be demonstrated. Injury may be shown through a variety of methods and types of evidence. These include, but are not limited to, field surveys and assessments, population studies, laboratory studies, model based procedures, information and data in the scientific literature, or expert witness testimony consisting of inferences or opinions drawn from facts pertaining to a given act(s) of habitat modification or degradation. In some instances, the effect of an activity will be measurable using physical evidence and scientific instruments. For example, the introduction of toxic chemicals can be evaluated through chemical analysis of water samples. Analysis of sedimentation patterns by the Monitoring Study Group of the California State Board of Forestry has demonstrated that timber-harvest roads and their associated watercourse crossings are among the largest contributors to sedimentation of fish-bearing streams. Mass landslides and other failures typically related to road-building and maintenance activities, produced the highest sediment delivery to streams when compared to other erosion processes.

Regardless of the types of evidence used, in all cases, the regulation requires that the causal link(s) between the habitat modification and the injury to listed species be shown.

Comment 5 : Another commenter stated that it is very difficult to determine when and whether modifications to aquatic habitat will injure fish. Sometimes it is activities occurring upstream from the apparent injury and sometimes it is simply cumulative degradation of the fish habitat.

Response: NMFS agrees that sometimes it is difficult to isolate factors causing injury to listed species. All factors that reasonably could have caused the habitat modification or the injury itself must be carefully examined. Whenever an action alone or in combination with,or in concert with other actions is reasonably certain to injure or kill listed species, it will constitute a take. An action which contributes to injury can be a ''take'' even if it is not the only cause of the injury. This concept includes actions reasonably certain to contribute to the death or injury of listed species by significantly impairing the essential behavioral patterns of listed species.

Comment 6: ''Significant modification'' should be defined or explained. Another commenter noted that NMFS must connect the maintenance of existing roads and structures or minor alterations of rock, gravel and soil to actual harm to listed species.

Response: In order for a modification to be significant, it must be capable of resulting in the death or injury of fish or wildlife. Habitat modification or degradation may be considered significant even if it is of limited physical extent, if it causes injury or death to fish or wildlife. Assessing the significance of a given act of habitat modification or degradation will depend on an evaluation of all the available evidence of a specific situation or action(s), and will most often be determined on a case-by-case basis.

Comment 7: The regulation is overly focused on land based activities compared to harvest and hatchery activities with the effect that the rule excludes entire industries that directly cause harm and kill listed fish.

Response: Take due to harvest and hatchery activities is covered by other terms in the statutory definition of ''take,'' including ''wound, kill, * * * capture, or collect.'' The primary focus of this regulation is death or injury to listed fish or wildlife from acts that significantly modify or degrade habitat.

Moreover, hatchery and harvest activities also impact listed fish through significant habitat modification or degradation. For example, hatchery waste discharges could degrade instream water quality and result in the actual injury or death of fish if not properly managed. Artificially produced fish competing with listed species for food, shelter, space or opportunities in the migration corridor may, thus, impair essential behavioral patterns. NMFS notes that example 6 in ''Activities That May Constitute A Take'' concerning the introduction of artificially produced individuals may cause harm within the scope of this definition. Excessive trawl impacts to estuarine bottom habitat could significantly degrade juvenile rearing habitat, and over-harvest of prey species such as small bait fish could cause harm if feeding rates were thereby

reduced enough to cause the actual injury or death of listed fish or wildlife.

Comment 8: One commenter noted that it is inappropriate for NMFS to use the word ''recovery'' in describing activities that may injure or ''harm'' listed fish. Commenters noted that NMFS lacks the authority to link ''take'' to recovery goals.

Response: Comment noted. The word ''recovery'' was inadvertently included in the first example of activities that might fall within the scope of the definition of harm. This has been deleted in the final rule.

Comment 9: Some commenters suggested that the proposed rule, if adopted, would constitute an uncompensated ''taking'' in violation of the Fifth Amendment of the U.S. Constitution.

Response: This final rule will make no change in existing law. NMFS is not seeking to impose a regulation that denies landowners economically viable use of their property.

As stated elsewhere in this final rule under ''Incidental Take Exceptions'', the ESA authorizes NMFS to exempt parties from its take prohibitions under certain circumstances. Under the terms of ESA section 7(b)(4) and section 7(o)(2), taking of listed species that is incidental to, and not intended as part of, an otherwise lawful activity is not considered prohibited taking provided that such taking is in compliance with the terms and conditions of an incidental take statement issued by NMFS. In addition, the 1982 ESA amendments to section 10(a) authorize NMFS to issue incidental take permits allowing the incidental take of listed species in the course of otherwise lawful activities, provided the activities are conducted according to an approved Conservation Plan which to the maximum extent practicable, minimizes and mitigates the impacts of such taking and avoids jeopardy to the continued existence of the affected species. These mechanisms provide landowners with a means of continuing to use their property while addressing possible incidental take of listed species.

As the Solicitor General explained in the Federal government's reply brief in *Sweet Home* (Gov't Reply Br. at 17), ''[t]he prohibition on the taking of species, in conjunction with the program for authorizing incidental takes, * * * rationally and flexibly addresses the inherent difficulties involved in defining prohibited conduct in light of the wide diversity of species and the range of circumstances in which they live.''

Comment 10: Some commenters argued that the proposed rule is inconsistent with the U.S. Supreme Court's decision in *Babbitt* v. *Sweet Home*. In particular, some commenters felt the rule did not require an actual causal relationship between the habitat modification and the injury or death of an individual listed species.

Response: As stated previously, in order to constitute ''harm'', the regulation requires that a given act result in, or be reasonably certain to result in, the death or injury of listed fish or wildlife. The rule is consistent with the U.S. Supreme Court's decision in *Sweet Home* upholding the FWS regulation which also defines the term ''harm'' to include habitat modification or degradation.

Comment 11: One commenter suggested that NMFS must specifically state that it adopts the interpretation of ''harm'' articulated by the Solicitor General in his brief of the *Sweet Home* case.

Response: NMFS believes that this final rule is consistent with the interpretation of ''harm'' articulated by the Solicitor General. However, NMFS declines to specifically adopt each aspect of the Solicitor General's brief which was written 5 years ago.

Comment 12: One commenter argued that NMFS has no authority to promulgate the proposed rule because the Endangered Species Act expired in 1992 and has not been reauthorized by Congress.

Response: The ESA has been neither repealed nor does it contain an automatic sunset clause and it is, therefore, enforceable law. In addition, both the Departments of Commerce and Interior receive annual appropriations to carry out the provisions of the Endangered Species Act, including listings, rulemakings, enforcement and the issuance of permits.

Comment 13: Several commenters disagreed with NMFS' certification that the proposed rule will not impact a significant number of small businesses and urged NMFS to prepare a Regulatory Flexibility analysis.

Response: NMFS continues to believe that this rulemaking will not affect a significant number of small businesses. However, a Regulatory Flexibility Analysis is included with this final rulemaking.

Comment 14: One commenter suggested that the first example of ''take'' in the proposed rule was ambiguous because it states that activities modifying habitat include those ''constructing or maintaining barriers that eliminate or impede a listed species access to habitat essential for its survival or recovery''. The commenter stated that existing facilities that prevent or impede access to potential habitat that could be used for the recovery of the species do not cause a ''take''. Several other commenters stated that the current owner of a dam lawfully installed before a species is listed should not be liable for take based on subsequent listing. In the view of these commenters liability for take must be based upon some action occurring after the effective date of listing.

Response: See response to comment 8 where the word recovery was stricken from the example in this final rule. NMFS agrees that simply holding title to a barrier that affects access to the habitat of listed species is not necessarily a take under the ESA. However, maintaining or improving an existing facility may actually injure or kill members of a listed species if it significantly impairs essential behavioral patterns such as spawning, rearing or migrating. Maintaining an existing barrier that prevents or impedes access to habitat may cause take of listed species, if adequate comparable habitat is not otherwise available to the listed population. In addition, any person who engages in diverting water may be engaged in a take if the diversion of water injures or kills listed species by significantly impairing essential behavioral patterns.

Comment 15: Several commenters noted the use of ''likely to impair'' as inappropriate in the examples provided in the preamble to the proposed rule.

Response: NMFS agrees and has made the necessary changes in this final rule. NMFS notes that an act must be reasonably certain to impair essential behavioral patterns of listed species in order to constitute ''harm'' within this definition.

Comment 16: Several commenters urged or stated that NMFS was required to specifically adopt the legal principles of ''proximate cause'' and ''foreseeability'' as limitations of liability for ''harm'' to listed species. One commenter noted that NMFS should clarify that the regulation does not create liability for hypothetical, speculative or conjectural injury.

Response: NMFS agrees that the regulation does not create liability for hypothetical, speculative or conjectural injury as can be deduced from the term ''actual.'' NMFS notes that that same term ''actual'' provides for cause-in-fact liability. NMFS' definition of ''harm'' is consistent with the views articulated in the opinion of the U.S. Supreme Court in *Sweet Home* v. *Babbitt*. In that opinion, the Court did not limit its discussion to a single term of art for the causal links necessary to show ''harm'' to a species resulting from habitat

modification. The specific elements of causation to be proved, including foreseeability, will be determined on a case-by-case basis. Further, this document and the examples discussed in it, are intended to provide the public with information about activities which may result in injury or death of listed species. In NMFS' view, it is reasonably foreseeable that these activities and similar activities may injure or kill fish and wildlife, including listed species. While an action ''harms'' a listed species only if it actually results in the death or injury of a listed species, NMFS continues to encourage members of the public to consult with its staff whenever an activity is undertaken in the habitat of listed species and/or when listed species are present.

Comment 17: One commenter noted that ''merely continuing previously established [water] withdrawals or diversions should not be considered per se an unlawful take of subsequently listed species.'' The commenter further noted that new water withdrawals or diversions should not be considered unlawful takes because Congress has a long-standing history of deference to state law on water rights. The commenter lastly notes that example 5 (see ''Activities That May Constitute A Take'') should be deleted in favor of an ''ad hoc, case-by-case approach'' and that such water diversions should be carefully reviewed and responded to as appropriate.

Response: NMFS agrees that each water diversion affecting listed species should be carefully reviewed on a case-by-case basis to determine whether its operation injures or kills listed species. The ESA and state water law operate in cognizance of the principles of comity, federalism and importance of reading apparently conflicting laws in such a manner as to avoid conflict and promote the purposes of both legislative acts wherever possible. It is appropriate to note that the Endangered Species Act encourages this approach by declaring it ''to be the policy of Congress that the Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.'' 16 U.S.C. § 1531(c)(2).

Activities That May Constitute a Take

A principal purpose of this final rule is to provide clear notification to parties that habitat modification or degradation may harm listed species and, therefore, constitute a ''take'' under the ESA. The following list identifies several examples of habitat-modifying activities that may fall within the scope of this final rule when these or similar activities cause death or injury to fish or wildlife, including those activities that significantly impair essential behavioral patterns of listed species. In all instances a causal link must be established between the habitat modification and the injury or death of listed species.

1. Constructing or maintaining barriers that eliminate or impede a listed species' access to habitat or ability to migrate;

2. Discharging pollutants, such as oil, toxic chemicals, radioactivity, carcinogens, mutagens, teratogens or organic nutrient-laden water including sewage water into a listed species' habitat;

3. Removing, poisoning, or contaminating plants, fish, wildlife, or other biota required by the listed species for feeding, sheltering, or other essential behavioral patterns;

4. Removing or altering rocks, soil, gravel, vegetation or other physical structures that are essential to the integrity and function of a listed species' habitat;

5. Removing water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding or other essential behavioral patterns;

6. Releasing non-indigenous or artificially propagated species into a listed species' habitat or where they may access the habitat of listed species;

7. Constructing or operating dams or water diversion structures with inadequate fish screens or fish passage facilities in a listed species' habitat;

8. Constructing, maintaining or using inadequate bridges, roads, or trails on stream banks or unstable hill slopes adjacent to or above a listed species' habitat; and

9. Conducting timber harvest, grazing, mining, earth-moving or other operations which result in substantially increased sediment input into streams.

10. Conducting land-use activities in riparian areas and areas susceptible to mass wasting and surface erosion, which may disturb soil and increase sediment delivered to streams, such as logging, grazing, farming, and road construction.

This list is not exhaustive. It is intended to provide some examples of the types of activities that might be considered by NMFS as constituting a take under the ESA and its regulations. Questions regarding whether specific activities will constitute a violation of this rule and general inquiries regarding prohibitions and permits should be directed to NMFS (see **ADDRESSES**).

Incidental Take Exceptions

The ESA authorizes NMFS to exempt parties from its take prohibitions under certain circumstances. Under section 7 of the ESA, NMFS conducts consultations on proposed Federal actions and determines whether the proposed action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its critical habitat. If the proposed action does not do so, or would not if specified reasonable and prudent alternatives were followed, NMFS may then issue a biological opinion and incidental take statement. The incidental take statement estimates the expected incidental take of a listed species resulting from the action and specifies those terms and conditions required to implement the reasonable and prudent measures necessary or appropriate to minimize this incidental take. If the proposed action is conducted in accordance with these terms and conditions, the incidental take is exempted from the ESA's take prohibitions.

Under section 10(a)(1)(B), NMFS may permit non-Federal parties to take a listed species if such a taking is incidental to, and not the purpose of, an otherwise legal activity. Prior to receiving an incidental take permit pursuant to 10(a)(1)(B), a non-Federal party must prepare a permit application and conservation plan. A conservation plan must contain a description of (1) the impact that will likely result from the taking; (2) what steps the applicant will take to minimize and mitigate to the maximum extent practicable, the impacts and how these steps will be funded; (3) what alternative actions to the take were considered and why they are not being utilized; and (4) any measures the Secretary of Commerce (Secretary) may require as being necessary or appropriate for the purposes of the plan (16 U.S.C. 1539(a)(2)(A)). If the Secretary finds that the applicant will minimize and mitigate to the maximum extent practicable the impacts of any incidental take, and will meet other requirements of section 1539 (a)(2)(B), the Secretary may issue a permit, legally binding the applicant to the conservation measures set forth in the conservation plan.

Congress intended that the conservation planning process be used to reduce conflicts between listed species and private development and to provide a framework that would encourage ''creative partnerships'' between the private sector and local, state, and Federal agencies in the

interest of endangered and threatened species and habitat conservation. NMFS encourages the development of conservation plans and intends to continue pursuing such agreements in the future with willing parties.

Change in Enumeration of Threatened and Endangered Species

In the proposed rule, issued on May 1, 1998 (63 FR 24148), the definition of harm was added in alphabetical order to 50 CFR 217.12. Since May 1, 1998, NMFS has issued a final rule consolidating and reorganizing existing regulations regarding implementation of the ESA. In this reorganization, § 217.12 has been redesignated as § 222.102; therefore, the definition of harm has been added in this final rule to § 222.102.

Classification

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.* requires the preparation of an initial and final Regulatory Flexibility Analyses unless an agency determines that a rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. A final Regulatory Flexibility Analysis has been prepared for this action and is available from NMFS (see **ADDRESSES**).

A Final Environmental Assessment and Finding of No Significant Impact have been completed for this final rule.

This rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this rule will make no change in existing law.

List of Subjects in 50 CFR Part 222

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: November 2, 1999.

Andrew A. Rosenberg,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 222 is amended as follows:

PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES

1. The authority citation for part 222 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701.

2. In § 222.102, the definition for ''Harm'' is added in alphabetical order to read as follows:

§ 222.102 Definitions.

* * * * *

Harm in the definition of ''take'' in the Act means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering.

* * * * *

[FR Doc. 99–29216 Filed 11–5–99; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[I.D. 120996A]

Magnuson-Stevens Act Provisions; Essential Fish Habitat

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

ACTION: Interim final rule; reopening of comment period.

SUMMARY: NMFS announces the reopening of a public comment period to assist in the development of a final rule for Essential Fish Habitat (EFH). The interim final rule established guidelines to assist the Regional Fishery Management Councils (Councils) and the Secretary of Commerce (Secretary) in the description and identification of EFH in fishery management plans, including the identification of threats and conservation measures. The interim regulations also detailed the procedures that the Secretary, other Federal agencies, state agencies, and the Councils should use to coordinate, consult, or provide recommendations on Federal and state actions that may adversely affect EFH. NMFS now requests additional comments on four specific issues.

DATES: Comments must be received at the appropriate address or fax number (See **ADDRESSES**) no later that 5:00 p.m., eastern standard time, on December 23, 1999.

ADDRESSES: Comments should be addressed to EFH Coordinator, Office of Habitat Conservation, NMFS, 1315 East-West Highway, Silver Spring, MD 20910–3282. Comments also may be sent via facsimile (fax) to 301–713–1043. Comments will not be accepted if submitted via e-mail or Internet.

FOR FURTHER INFORMATION CONTACT: Jon Kurland, NMFS, 301–713–2325, fax 301–713–1043, e-mail *jon.kurland@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Background

This rulemaking is required by section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act, 16 U.S.C. 1855(b)). The interim final rule was promulgated on December 19, 1997 (62 FR 66531). Details concerning the justification for and development of the interim final rule were provided in the proposed rule (62 FR 19723, April 23, 1997).

The interim final rule contains two subparts. Subpart J of 50 CFR part 600 provides guidelines to the Councils for including information in fishery management plans on the description and identification of EFH, the identification of threats to EFH from fishing and non-fishing activities, and the identification of recommended measures to conserve and enhance EFH, as required by sections 303(a)(7) and 305(b)(1)(A) of the Magnuson-Stevens Act (16 U.S.C. 1853(a)(7), 1855(b)(1)(A)). Subpart K of 50 CFR part 600 details the procedures for implementing the coordination, consultation, and recommendation requirements of section 305(b) of the Magnuson-Stevens Act (16 U.S.C. 1855(b)).

In issuing the interim final rule, NMFS decided to postpone development of a final rule for two reasons. First, NMFS decided to provide an additional comment period to allow another opportunity for affected parties to provide input prior to the development of a final rule. Second, NMFS determined that it would be advantageous to implement the EFH provisions of the Magnuson-Stevens Act for a period of time via interim final regulations, which would afford an opportunity to gain experience adding EFH information to fishery management plans and carrying out consultations and coordination with Federal and state agencies whose actions may adversely affect EFH.

Since the promulgation of the interim final rule, EFH provisions for 39 fishery management plans have been developed by the Councils and approved or partially approved by the Secretary. Additionally, NMFS and Federal agencies have begun consulting on actions that may adversely affect EFH. Approximately 2000 EFH consultations have been completed to date.