DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[FRA Docket No. 2001–11213, Notice 2]

RIN 2130–AA81

Alcohol and Drug Testing: Determination of Minimum Random Testing Rates for 2002; Corrections

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Notice of determination; corrections.

SUMMARY: FRA published a document in the **Federal Register** of January 2, 2002, setting the minimum random drug and alcohol testing rates for calendar year 2002. The testing rates are based on the rail industry's overall positive rate, which is determined using annual railroad drug and alcohol program data taken from FRA's Management Information System. Although the original notice correctly set the minimum random testing rates, the overall positive rates for drug testing and alcohol testing were inadvertently transposed. This document corrects the error.

DATES: This correction is effective January 2, 2002.

FOR FURTHER INFORMATION CONTACT: Lamar Allen, Alcohol and Drug Program Manager, Office of Safety Enforcement, Mail Stop 25, FRA, 1120 Vermont Avenue, NW, Washington, DC 20005 (Telephone: (202) 493–6313).

Corrections

In the **Federal Register** issue of January 2, 2002, in FR Doc. 01–32047, two sentences need correcting. On page 21, in the third column, correct the first sentence of the **SUMMARY** caption to read:

Using data from Management Information System annual reports, FRA has determined that the calendar year 2000 rail industry random testing positive rate was .79 percent for drugs and .20 percent for alcohol.

On page 22, correct the last sentence in the first column that runs over into the second column, in the **SUPPLEMENTARY INFORMATION** caption to read:

In this notice, FRA announces that the minimum random drug testing rate will remain at 25 percent of covered railroad employees for the period January 1, 2002 through December 31, 2002, since the industry random drug testing positive rate for 2001 was .79 percent.

Dated: January 3, 2002.

George A. Gavalla,

Associate Administrator for Safety.

[FR Doc. 02–559 Filed 1–8–02; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 010521133-1307-02; I.D. No. 050101B]

RIN 0648-AP17

Endangered and Threatened Species; Final Rule Governing Take of Four Threatened Evolutionarily Significant Units (ESUs) of West Coast Salmonids

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

ACTION: Final rule.

SUMMARY: Under the Endangered Species Act (ESA), the Secretary of Commerce (Secretary) shall issue such regulations as he deems necessary and advisable for the conservation of species listed as threatened. NMFS now issues a final ESA 4(d) rule adopting regulations necessary and advisable to conserve four salmonid ESUs listed as threatened species. This final rule applies the take prohibitions enumerated in section 9(a)(1) of the ESA in most circumstances to three salmonid ESUs in California: California Central Valley Chinook, California Coastal Chinook, and Northern California steelhead. For these three ESUs, NMFS does not find it necessary and advisable to apply the take prohibitions described in the ESA to certain specified categories of activities that contribute to conserving these ESUs or are governed by a program that adequately limits impacts on these ESUs. Therefore, this final rule also includes 10 such limits on the application of the section 9(a)(1) take prohibitions for these three ESUs. This final rule also modifies an existing ESA 4(d) rule, which applies the take prohibitions to the threatened Central California Coast coho ESU, by incorporating the same 10 limits on the application of the take prohibitions as described for the chinook and steelhead ESUs.

DATES: Effective on March 11, 2002, except for §223.203 (b)(16)(v) and (b)(17)(vii) which are effective on July 8, 2002. Applications for a permit for scientific purposes or a permit to enhance the conservation or survival of Central Valley spring-run chinook, California Coastal chinook and Northern California steelhead must be received by the Assistant Administrator for Fisheries no later than April 9, 2002.

ADDRESSES: Assistant Regional Administrator, Protected Resources Division, NMFS, Southwest Region, 501 W. Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213.

FOR FURTHER INFORMATION CONTACT: Craig Wingert at 562–980–4021, Miles Croom at 707–575–6068, Diane Windham at 916–930–3601, or Chris Mobley at 301–713–1401.

SUPPLEMENTARY INFORMATION:

Background

On September 16, 1999, NMFS published a final rule listing the California Central Valley (CCV) Spring-run Chinook and California Coastal (CC) Chinook ESUs (*Oncorhynchus tshawytscha* or O. *tshawytscha*) as threatened species (64 FR 50394). In a final rule published on June 7, 2000, NMFS also listed the Northern California (NC) steelhead ESU (*O. mykiss*) as a threatened species (65 FR 36074). These final rules describe the background of the listing actions and provide a summary of NMFS' conclusions regarding the status of these three ESUs.

On October 31, 1996, NMFS listed the Central California Coast (CCC) coho salmon (*O. kisutch*) ESU as a threatened species (61 FR 56138). The final rule describes the background for this coho salmon listing action and also provides a summary of NMFS' conclusions regarding the status of the ESU. In conjunction with the final listing notice for the CCC coho salmon ESU, NMFS published a final ESA 4(d) rule which put in place all of the prohibitions of section 9(a)(1) of the ESA for this ESU.

Section 4(d) of the ESA provides that whenever a species is listed as threatened, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of the species. Such protective regulations may include any or all of the prohibitions that apply automatically to protect endangered species under ESA section 9(a). Those section 9(a) prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect; or to attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as

endangered, unless with written authorization for incidental take. It is also illegal under section 9 of the ESA to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Section 11 of the ESA provides for civil and criminal penalties for violation of section 9 or of regulations issued under the ESA.

Whether take prohibitions or other protective regulations are necessary or advisable is in large part dependent upon the biological status of the species and potential impacts of various activities on the species. The salmon and steelhead ESUs that are covered by this final rule have survived for thousands of years through cycles in ocean conditions and weather; therefore, NMFS has concluded that they are at risk of extinction primarily because their populations have been reduced by human ''take''. These ESUs have declined in abundance due to take of fish from harvest, past and ongoing destruction or damage to freshwater and estuarine habitats, hydropower development, hatchery practices, and other causes. Two reports prepared by NMFS (NMFS 1996 and 1998) reviewed the factors which have contributed to the decline of west coast steelhead and chinook populations, including the ESUs covered by this rule, and both conclude that all of the factors identified in section 4(a)(1) of the ESA have played some role in their decline. The reports identify destruction and modification of habitat, over-utilization in fisheries, and hatchery effects as significant factors for the decline of these ESUs. While the most influential factors for decline differ from species to species and among ESUs depending on their geographic location, the loss and degradation of habitat conditions and impacts from harvest among other impacts, are factors that have affected all of the species and ESUs. Accordingly, NMFS has determined that it is necessary and advisable to apply the section 9(a)(1) take prohibitions to the threatened ESUs covered in this final rule in order to reduce take and provide for their conservation.

NMFS believes that with appropriate safeguards, many state, local and other non-Federal activities can be specifically tailored to minimize impacts on listed salmonid ESUs such that additional Federal protections are unnecessary for their conservation. Although the primary purpose of state, local and other non-Federal programs is generally to further some activity such as maintaining roads, controlling development, ensuring clean water or harvesting trees, rather than conserving salmon or steelhead, some entities have modified one or more of these programs to protect and conserve listed salmonids and protect their habitat.

For this reason, NMFS has incorporated a mechanism (termed take limitations) in this final ESA 4(d) rule where state, local and other non-Federal entities can be assured that certain activities (see Substantive Content of Final Regulation for the 10 categories of activities specified in this rule) they conduct or permit are consistent with ESA requirements when they avoid or minimize the risk of take of listed ESUs. When NMFS determines that such programs provides sufficient conservation for the threatened salmonid ESUs covered by this final rule, NMFS will find that it is not necessary and advisable to apply take prohibitions to activities governed by those programs. In these circumstances, as described in more detail herein, additional Federal ESA regulation through the section 9(a) take prohibitions is not necessary and advisable because it would not meaningfully contribute to the conservation of the ESUs. NMFS believes that not applying take prohibitions to programs that meet such conservation standards may result in even greater conservation benefits for these threatened ESUs than would the blanket application of take prohibitions, through implementation of the program itself and by demonstrating to similarly situated jurisdictions or entities that practical and realistic salmonid protection measures exist. An additional benefit of using this take limitation approach is that NMFS can focus its enforcement efforts on activities and programs that have not yet adequately addressed the conservation needs of the ESUs covered by this rule.

Substantive Content of Final Regulation

On August 17, 2001, NMFS proposed to apply the ESA section 9(a)(1) take prohibitions to the CCV spring-run chinook salmon, CC chinook salmon, and NC steelhead ESUs. NMFS has concluded that the section 9 take prohibitions that automatically apply to endangered species are necessary and advisable for the conservation of these three threatened ESUs. Accordingly, this final rule applies the prohibitions of ESA section 9(a)(1) to each of these three ESUs. NMFS applied the section 9(a)(1) take prohibitions to the CCC coho salmon ESU in a previous rulemaking (see 61 FR 56138), and the August 17, 2001, proposed rule (66 FR 43150) did not propose to change those protections.

In its August 17, 2001, proposal (66 FR 43150), NMFS proposed that the take of listed fish in these four ESUs (i.e., CCV spring-run chinook, CC chinook, NC steelhead, and CCC coho salmon) would not be prohibited when it resulted from 10 specific categories of activities that meet specified levels of protection and conservation. As described in the proposed rule, these activities must be conducted in a way that contributes to the conservation of these ESUs, or they must be governed by a program that limits impacts on the ESUs to an extent that makes added protection through Federal regulation not necessary and advisable for their conservation. In this final rule NMFS has concluded that it will not apply the ESA section 9(a) prohibitions to these four ESUs for the 10 categories of activities described in this final rule when they meet the necessary level of protection and conservation.

As an alternative to utilizing the 10 limitations on the take prohibitions described in this final rule, affected entities may choose to seek an ESA section 10 permit from NMFS, or may be required to satisfy ESA section 7 consultation if Federal funding, management, or approval is involved. This final rule does not impose restrictions beyond those applied in other sections of the ESA, but rather provides another option beyond the provisions of sections 7 and 10 for the authorization of incidental take and in some instances directed take.

As discussed above, NMFS has identified 10 categories of activities or programs for which it is not necessary and advisable to impose take prohibitions when they contribute to the conservation of these four ESUs or are governed by a program that adequately limits impacts on these ESUs. Under the criteria specified in the final rule, these activities include the following: (1) Activities conducted in accordance with an existing ESA incidental take authorization; (2) ongoing scientific research activities, for a period of 6 months; (3) emergency actions related to injured, stranded, or dead salmonids; (4) fishery management activities; (5) hatchery and genetic management programs; (6) scientific research activities permitted or conducted by the State of California; (7) state, local, and private habitat restoration activities that are part of approved watershed conservation plans; (8) properly screened water diversion devices (i.e., screening devices per NMFS' guidelines or equivalent configurations); (9) routine road maintenance activities; and (10) municipal, residential, commercial, and industrial (MRCI) development activities. These limitations on the take prohibitions are described in more

detail in the proposed rule and the specific criteria and standards that must be met to qualify for the limitations are described in detail in the regulations contained in this final rule. In general, these take limitations and associated approval criteria are for future programs where NMFS will limit the application of the ESA section 9(a)(1) take prohibitions rather than for existing programs. NMFS anticipates that new take limits for additional activities may be added to these regulations in the future.

NMFS emphasizes that these 10 limitations on the section 9 take prohibitions are not prescriptive regulations. The fact that an activity is not conducted within the specified criteria for one of the 10 take limits does not necessarily mean that the activity violates the ESA or this regulation. Many activities do not affect the threatened ESUs covered by this final rule, and, therefore, do not need to be conducted within any of the 10 categories of take limits to avoid ESA section 9 take violations. Nevertheless, an entity can be certain it is not at risk of violating the section 9 take prohibitions or at risk of enforcement actions if it conducts its activities in accordance with the take limits. Jurisdictions, entities, and individuals are encouraged to evaluate their practices and activities to determine the likelihood of whether take is occurring. Entities can comply with the ESA through this and other 4(d) rules, section 10 research, enhancement, and incidental take permits, or through section 7 consultation with Federal agencies. If take is likely to occur, then the jurisdiction, entity or individual should modify its practices to avoid the take of these threatened salmonid ESUs or seek protection from potential ESA liability through section 7, section 10, or section 4(d) rule procedures.

This final rule does not require jurisdictions, entities, and individuals to seek coverage from NMFS under any of the 10 take limits. In order to reduce its liability, a jurisdiction, entity, or individual may informally comply with a limit by choosing to modify its programs to be consistent with the evaluation considerations described in the individual limits. Alternatively, a jurisdiction, entity, or individual may seek, at its discretion, to qualify its plans, activities, or ordinances for inclusion under one of the 10 take limits by obtaining an authorization from the NMFS' Southwest Region Administrator as detailed in the regulations contained in this final rule (see **ADDRESSES**).

NMFS will continue to work collaboratively with all affected governmental entities to recognize existing management programs that conserve and meet the biological requirements of these and other threatened salmonid ESUs, and to strengthen other programs so that they contribute to the conservation of listed salmonids. This final rule may be amended to add new limits on the take prohibitions, or to amend or delete adopted take limits as circumstances warrant.

The following section entitled ''Notice of Availability'' lists four documents referred to in the proposed rule and this final regulation. The purpose of making these documents available to the public is to inform governmental entities and other interested parties of the technical components expected to be addressed in programs submitted for NMFS' review. These technical documents provide guidance to entities as they consider whether to submit a program to NMFS for coverage under one of the take limits in the final rule. The documents represent guidance, and are not binding regulations requiring particular actions by any entity or interested party.

For example, NMFS' technical report entitled: ''Viable Salmonid Populations (VSP) and the Recovery of ESUs'', which is referenced in the fishery and hatchery management take limits, provides a framework for identifying populations and their status as a component of developing adequate harvest or hatchery management plans. The final rule indicates that Fishery Management and Evaluation Plans (FMEPs) and Hatchery and Genetic Management Plans (HGMPs) should utilize the concepts of 'viable' and 'critical' salmonid population thresholds, consistent with the concepts contained in NMFS's VSP report. Similarly, NMFS' fish screening criteria explicitly recognize that they are general in nature and that site constraints or particular circumstances may require adjustments in design, which must be developed with a NMFS staff member or designee, to address site specific considerations and conditions. Finally, research involving electrofishing comes within the scientific research limit if conducted in accordance with NMFS' guidelines for electrofishing. The guidelines recognize that other techniques may be appropriate in particular circumstances, and NMFS can recognize those as appropriate during the approval process.

The Oregon Department of Transportation's (ODOT) road maintenance program for governing routine maintenance activities is an existing program currently being implemented that NMFS has found adequate for threatened ESU conservation and, therefore, has been established as a take limitation in a previous ESA 4(d) rule (65 FR 42422). Other jurisdictions may seek coverage under the road maintenance limit in this final rule if they use the ODOT program or submit a program that utilizes other practices found by NMFS to meet or exceed the ODOT standards for the protection of threatened salmonids.

Where this rule cites a guidance document, a program's consistency with the guidance is sufficient to demonstrate that the program meets the particular purpose for which the guidance is cited. However, the entity or individual requesting that NMFS concur that a program meets the criteria of a particular limit has the latitude to show that its variant or approach is, in the circumstances where it will apply and affect listed fish, equivalent or better.

NMFS will continue to review the applicability and technical content of its own documents as they are used in the future and make revisions, corrections, or additions as needed. NMFS will use the mechanisms of this final rule to take comment on revisions of any of the referenced state programs. If any of these documents are revised in the future and NMFS relies on the revised version to provide guidance in continued implementation of the rule, NMFS will publish in the **Federal Register** a notice of its availability stating that the revised document is now the one referred to in 50 CFR 223.203(b).

Notice of Availability

The following is a list of documents cited in the regulatory text of this final rule. Copies of these documents may be obtained upon request (see Appendix A to 50 CFR 223.203).

1. Oregon Department of Transportation (ODOT) Maintenance Management System Water Quality and Habitat Guide (July, 1999).
2. Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act (NMFS, 2000a).
3. Fish Screening Criteria for Anadromous Salmonids, National Marine Fisheries Service, Southwest Region, 1997.
4. Viable Salmonid Populations and the Recovery of Evolutionarily Significant Units. (June 2000).

The limits on the take prohibitions in this final rule do not relieve Federal agencies of their duty under section 7 of the ESA to consult with NMFS if actions they fund, authorize, or carry out may affect the ESUs covered by this rule or any other listed species. To the extent that actions subject to section 7

consultation are consistent with a circumstance for which NMFS has limited the take prohibitions, a letter of concurrence from NMFS will greatly simplify the consultation process, provided the program is still consistent with the terms of the limit.

Applicability of Final Rule to Specific ESUs

In the regulatory language in this final rule, the limits on the applicability of the take prohibitions to specific ESUs are accomplished through citation to the Code of Federal Regulations' (CFRs') enumeration of threatened marine and anadromous species in 50 CFR 223.102. For the convenience of readers of this document, 50 CFR 223.102 refers to the threatened salmonid ESUs covered in this final rule through the following designations:

(a)(3) Central California Coast coho salmon

(a)(20) Central Valley spring-run chinook salmon

(a)(21) California Coastal chinook salmon

(a)(22) Northern California steelhead

Summary of Comments in Response to the Proposed Rule

The public comment period for the proposed rule was open from August 17, 2001, through October 1, 2001. During the comment period, NMFS held three public hearings (Chico, CA on 9/13/01; Eureka, CA on 9/18/01; and Ukiah, CA on 9/19/01) to solicit public comments. A limited number of individuals provided oral testimony at the three public hearings. During the comment period, NMFS received 8 written comments on the proposed rule from various agencies, non-governmental organizations, and individuals. A summary of the comments and NMFS' responses to those comments are presented here by specific issue.

Comments and Responses

Tribal Coordination

Comment 1: The Bureau of Indian Affairs (BIA) reminded NMFS of its obligation to consult with potentially affected Indian tribes that might be affected by this ESA 4(d) rule pursuant to Executive Order 13175 (Consultation and coordination with Indian tribal governments). In addition, BIA provided NMFS with a list of recognized Indian tribes that occur within the range of the threatened ESUs covered by this final rule.

Response: In response to the BIA's guidance, NMFS notified all of the potentially affected Indian tribes of the proposed ESA 4(d) rule and the U.S. District Court Order to finalize the rule by December 31, 2001. NMFS offered to meet with any tribe to explain the rule, discuss its potential impact on the tribe, and to explain its relationship to the Tribal ESA 4(d) rule which NMFS published on July 10, 2000 (65 FR 42481). NMFS has consulted in the past with many of these tribes on previous ESA 4(d) rules, as well as the Tribal ESA 4(d) rule, and will consult with any and all tribes as they request us to do so.

Comment 2: BIA requested clarification as to whether or not the Tribal ESA 4(d) rule (65 FR 42481, July 10, 2000) applied to the four ESUs covered in this ESA 4(d) rule.

Response: The Tribal ESA 4(d) rule (65 FR 42481) NMFS published on July 10, 2000, is actually a broadly defined limitation on the ESA section 9(a)(1) take prohibitions for recognized Indian tribes that applies to all threatened salmon and steelhead ESUs including the four covered by this final ESA 4(d) rule and any threatened salmonid ESUs that may be listed in the future. Under this Tribal ESA 4(d) rule, a section 9(a)(1) take limitation was created for resource management plans (e.g., harvest, habitat restoration, research and monitoring, etc.) developed by Tribes where NMFS has determined that implementation of the plan will not appreciably reduce the likelihood of survival and recovery for the listed ESU(s) that are affected by the plan. This Tribal ESA 4(d) rule was intended to harmonize NMFS' statutory conservation efforts under the ESA with tribal rights and the Federal Trust responsibility to tribes.

Comment 3: BIA advised NMFS that Tribal governments may incur direct compliance costs if they choose to pursue coverage under the Tribal ESA 4(d) rule or this final rule.

Response: NMFS does not anticipate that Indian Tribes will pursue coverage under the take limits in this final ESA 4(d) rule. Although Tribes are certainly eligible to pursue coverage under the limitations in this final rule, the purpose of the Tribal ESA 4(d) rule was to provide recognized tribes with a broad take limitation that could cover any type of resource management plan including those that might be developed pursuant to this final ESA 4(d) rule (e.g., routine road maintenance, fish harvest, habitat restoration, etc.). For this reason, NMFS would strongly recommend to Tribes that they utilize the Tribal ESA 4(d) rule instead of this final rule to obtain coverage for their activities if they choose to do so. Not only is the Tribal ESA 4(d) rule sufficiently flexible that it can accommodate the full range of tribal resource management plans, but it provides for a broad and open government-to-government consultation process in developing and evaluating such plans. NMFS recognizes that Tribes may incur direct compliance costs in the development of tribal resource management plans. NMFS is prepared to work closely with interested tribes to develop resource management plans for consideration under the Tribal ESA 4(d) rule that will minimize costs and will also provide technical expertise and other support wherever it can pursuant to the 1997 Secretarial Order (June 5, 1997).

Take Guidance

Comment 4: One commenter stated the proposed ESA 4(d) rule does not adequately state why a take prohibition is necessary for these threatened ESUs, nor does it establish a basis for the conclusion that specified activities are likely to result in a take.

Response: NMFS believes that the listing determinations for each of the ESUs covered by this final rule, as well as all other west coast salmonid listing determinations, have documented the historic and current factors responsible for their decline to the point where ESA protection was necessary. Factors responsible for the decline of these ESUs include loss and degradation of freshwater habitat from a wide range of habitat modifying activities, harvest of fish in recreational and in some cases commercial fisheries, predation, and natural fluctuations in the environment (e.g., ocean conditions, rainfall, drought, etc.). NMFS believes that historic and ongoing take of fish in these ESUs as a result of these factors has contributed significantly to their decline. For this reason, NMFS has concluded that it is necessary and advisable to prohibit and closely regulate the allowable take of these species. Failure to prohibit and regulate take by this final rule would result in continued decline of listed salmonids.

It is NMFS' policy to increase public awareness of, and to identify which activities we believe are likely or not likely to, injure or kill a listed species. The take guidance in the proposed rule and in this final rule are intended to do that. It is only possible based on direct experience with managing populations in their natural environment and from scientific literature to describe the types of activities that may have adverse impacts (i.e., result in take) on fish and their habitat and describe their consequences (e.g., blocking fish from reaching spawning grounds, dewatering incubating redds, etc.). NMFS understands that there is considerable

interest by many entities in knowing as much as possible about what constitutes take of a listed species and the take guidance in this final rule attempts to provide that information. However, determining whether an individual local program or activity will or is likely to injure or kill a listed fish requires an accurate and credible assessment that takes into account local factors and conditions.

Comment 5: One commenter stated that NMFS' take guidance in the proposed rule identifies activities that ''are very likely'' or ''may'' injure or kill listed species, instead of stating only activities resulting in ''actual death or injury.''

Response: NMFS provided broad take ''guidance'' for the purpose of helping individuals understand what actions could possibly lead to take. By offering guidance on what type of activities may cause take, individuals can better avoid any illegal behavior that could result in an actual death or injury.

Comment 6: One commenter stated that the proposed ESA 4(d) rule is more restrictive than the ESA section 9 take prohibitions.

Response: NMFS disagrees. The proposed and final ESA 4(d) rule do impose the section 9(a)(1) take prohibitions in the ESA, but simultaneously it puts into place limitations on those take prohibitions for certain categories of activities under specified conditions. In effect, whenever NMFS finds that an activity falls within a take limit in the final rule, the section 9 take prohibitions do not apply to that activity. In this way, this rule is more flexible and potentially less restrictive than an alternative ESA 4(d) rule that would simply put into place the section 9 take prohibitions without limitation. In this latter case where only the take prohibitions are in effect, the only way to comply with the ESA is to either avoid taking entirely or to have take authorized through ESA sections 7 or 10.

Comment 7: One commenter requested clarification that the rule does not prohibit take associated with an activity when it is conducted pursuant to an approved Federal permit.

Response: If a Federal permit was subject to a previous section 7 consultation for which an incidental take permit was issued, then take associated with the project will have been previously authorized. However, if a Federal permit was issued without section 7 consultation or without an incidental take statement for the ESUs in this final rule, then the permitted activity would not have take authorization for these ESUs and might violate the ESA section 9 take prohibitions. Under this circumstance, ESA section 7 consultation should be initiated or reinitiated with NMFS so that incidental take can be properly authorized.

Comment 8: Several commenters suggested or requested that NMFS create take limitations for other programs such as the Natural Resources Conservation Service's Field Office Technical Guidance and some or all elements of the CALFED program in California's Central Valley.

Response: NMFS believes that the ESA 4(d) rule process provides another opportunity in addition to ESA sections 7 and 10, for state and other jurisdictions to assume leadership for threatened salmonid conservation at the state and local level in addition to the conventional tools that are available through sections 7 and 10 of the ESA. NMFS is prepared to collaborate with Federal, state, tribal, and local entities to develop and evaluate programs that will take advantage of the ESA 4(d) option for achieving salmonid conservation and compliance with section 9 take prohibitions of the ESA. NMFS is especially interested in state-level conservation programs because such programs can more efficiently and comprehensively provide for conservation of threatened salmonids. However, incorporation of any additional take limitations into this or future ESA 4(d) rules will need to go through the rulemaking process.

Federal programs, including many programs and activities being carried out as part of the CALFED implementation program, are subject to ESA section 7 consultation if they may affect listed species. This ESA 4(d) rule does not and cannot relieve Federal agencies of their ESA section 7 consultation obligations under the ESA and, therefore, authorization of incidental take for Federally permitted, conducted, or funded programs must occur through the section 7 process.

Legal Issues/Section 7/National Environmental Policy Act (NEPA)/ Regulatory Flexibility Analysis/ Regulatory Impact Review

Comment 9: The Department of the Interior commented that the ESA 4(d) rule may affect terrestrial and other species under the jurisdiction of the U.S. Fish and Wildlife Service (FWS) and that NMFS should, therefore, consult with FWS pursuant to section 7 of the ESA.

Response: NMFS recognizes that promulgation of this ESA 4(d) rule is a Federal action requiring consultation under section 7 of the ESA. NMFS must ensure through the ESA section 7 process that the 4(d) rule does not jeopardize the continued existence of listed species or result in the destruction or adverse modification of their critical habitat. NMFS has completed the required ESA section 7 consultation with itself concerning the effects of this 4(d) rule on listed species under NMFS' jurisdiction and concluded that the rule is not likely to adversely affect these listed species or adversely modify their critical habitat.

NMFS also consulted with FWS concerning the effects of promulgating this ESA 4(d) rule on listed species under FWS' jurisdiction (FWS' listed species) and their critical habitat. FWS concurred with NMFS that the imposition of ESA section 9(a)(1) take prohibitions for the ESUs addressed by this rule was not likely to adversely affect FWS' listed species or their critical habitat. However, both agencies recognized that plans, programs, or activities developed for future approval by NMFS pursuant to the take limits in this final rule have the potential to affect FWS' listed species or their critical habitat depending on their geographic location and the details of the plan, program or activity. Through the consultation process NMFS has committed to work closely with FWS during development of such plans, programs or activities to determine if and how they may affect FWS' listed species or their critical habitat. As part of this early coordination process, NMFS has committed to work with FWS and any applicant seeking a take limit approval under this final rule to ensure that any plan, program, or activity that is developed either avoids impacts to, or does not adversely affect any of FWS' listed species or their critical habitat. Finally, if a plan, program or activity cannot be developed that will not adversely affect or not avoid impacts to FWS' listed species or their critical habitat NMFS will continue to work with FWS to ensure appropriate compliance with the ESA for FWS' listed species or critical habitat. On the basis of these determinations and commitments, FWS concluded that promulgation of this rule is not likely to adversely affect species under FWS' jurisdiction.

Comment 10: Some commenters asked NMFS to clarify the extent which NEPA applies to the ESA 4(d) rule.

Response: NEPA applies to this and other ESA 4(d) rules, and as this final rule states, NMFS completed Environmental Assessments (EAs) for this regulatory action. Those documents were made available during the comment period and continue to be

available via NMFS' Southwest Region website (http://swr.nmfs.noaa.gov).

Comment 11: One commenter suggested that the EAs prepared by NMFS were inadequate and failed to examine a full range of alternatives, particularly with regard to some of the take limitations contained in the proposed rule.

Response: NMFS believes that the range of alternatives examined in the EAs is appropriate and that no additional alternatives need to be considered.

NMFS believes that the EAs that were prepared for this final rule are adequate to support the regulatory action of imposing the section 9(a)(1) take prohibitions on the CCV spring-run chinook, CCC chinook, and NC steelhead ESUs. However, NMFS has determined that additional NEPA analysis is necessary to support any future agency approvals under the 10 take limitations contained in the rule. NMFS intends to conduct additional, programmatic NEPA analysis that specifically addresses the environmental impacts of approving activities under each of the take limitations (e.g., water diversion screening, etc.) contained in this final rule. This is consistent with the approach NMFS is now taking for the ESA 4(d) rule it published in July 2000 which covered 14 threatened salmon and steelhead ESUs. Until programmatic NEPA analyses are completed for each of the take limitations in this final rule as described above, NMFS will prepare separate NEPA analysis for any plan or activity for which the agency is requested to make an approval under any of the rule's take limitations. For example, until a programmatic NEPA document is completed which specifically addresses recreational angling under the Fishery Management and Evaluation Plan (FMEP) take limitation in this final rule, NMFS will not approve any FMEPs until approval of that plan has been addressed in a plan specific NEPA document.

Comment 12: Two commenters argued that according to the holding in *Alsea Valley Alliance* v. *Evans*, 99-6265-HO (D. Oreg., September 12, 2001), the four threatened salmonid ESUs covered by this ESA 4(d) rule have been improperly listed under the ESA, and hence, NMFS has no statutory authority to issue an ESA 4(d) rule pertaining to them.

Response: NMFS disagrees. Unless a listing decision is invalidated by a court, or superceded by another formal rule making, an ESU remains listed and, thus, properly subject to ESA 4(d) rule protection. None of the four ESUs covered by this final rule were de-listed as a result of the *Alsea* case and, thus, NMFS has an obligation to promulgate ESA 4(d) rules that it believes are necessary and advisable for their conservation.

Comment 13: The National Association of Home Builders (NAHB) commented that it opposes the proposed ESA 4(d) rule on many of the same grounds that are currently being litigated by NAHB against NMFS in *Kittitas County* v. *Evans* with regard to the July 10, 2000 ESA 4(d) rule, particularly the MRCI limit.

Response: NMFS will not address arguments and objections that are raised generally by reference to a pending case, such as Kittitas County. Rather, NMFS will respond to specific comments made in this rulemaking.

Comment 14: NAHB commented that with this ESA 4(d) rule NMFS is interpreting the ESA in a way that alters the federal-state framework by permitting Federal encroachment upon a traditional state power such as the states' traditional and primary power over land and water use. NAHB also asserted that NMFS had failed to demonstrate what it is necessary and advisable to place the additional burden on local governments of creating and submitting to NMFS for approval, ordinances that actively conserve these threatened salmonid ESUs

Response: NMFS disagrees that the ESA 4(d) rule alters the federal-state framework by encroaching on land and water use regulation by state/local governments. NMFS also disagrees that the rule places any additional burdens on state and local governments. To the extent that state or local regulation or permitting of land use or water use may result in the take of these threatened salmonids, the Municipal Residential Commercial and Industrial (MRCI) and other take limitations contained in this rule provide a mechanism for the state/local entity to relieve itself of the take prohibitions. Also, development and submittal of a plan to NMFS for consideration under any of the take limitations in the ESA 4(d) rule is completely voluntary. Should individuals, local governments or the state instead wish to obtain a take exception for threatened species subject to the section 9 prohibitions, they may submit a Habitat Conservation Plan to NMFS under section 10 of the ESA.

Comment 15: NAHB commented that NMFS did not demonstrate why it is necessary and advisable to require that each ordinance be approved by NMFS and placed in the **Federal Register** and be subjected to 30 days of public notice and comment in order to obtain coverage for the MRCI take limitation.

Response: In order for NMFS to determine whether a particular ordinance or plan may be sufficiently protective of threatened species, it must be submitted to NMFS for review and consideration. Prior to making any such determination, NMFS believes that it is important to obtain public and/or agency comments on both the ordinance or plan and our pending determination. For this reason, this final rule calls for publishing a notification in the **Federal Register** announcing the availability of the ordinance or plan for review and comment.

Comment 16: NAHB commented that NMFS cannot hold local governments liable for take under the ESA.

Response: The take limitations in the rule are permissive and not mandatory. Any vicarious liability determination would arise from application of the take prohibitions to the local government, depend upon the specifics of the regulations and the regulated activity, and so would depend upon the circumstances of each case.

Comment 17: NAHB asserted that the proposed ESA 4(d) rule raises 10th Amendment concerns by creating a state duty to administer the Federal law of ''take'' against third parties.

Response: The take limitations in this final rule are permissive, not mandatory (i.e., they impose no requirements on state and local governments). The only prohibition in this final rule is against take of the threatened species covered by this final rule. This final rule does not impose any affirmative duty upon the state to administer the ESA.

Viable Salmon Population (VSP) Framework

Comment 18: One commenter said that references to ''historic abundance levels'' and ''habitat capacity of the population'' in the discussion in the proposed rule about how NMFS would assess population status as part of its VSP framework are ambiguous and unclear.

Response: Historic conditions are meant to serve as one possible reference point in evaluating population status because under historic conditions populations were assumed to have been viable. The time frame, therefore, refers to a period in time where the population or ESU was considered self sustaining and may represent different time frames for different species or populations. Although historical data, if it is available, may be a useful tool in this assessment, it does not mean that NMFS will require or assume that every population must be at a historic

abundance level in order to be viable. Where historic data are not available or are of uncertain accuracy, the assessment of viable population levels could be based upon an evaluation of the habitat capacity or carrying capacity of the habitat available to a population.

Take Limitations - General Comments

Comment 19: Several commenters stated that each of the take limitations should have provisions for monitoring and oversight where NMFS is approving plans or ordinances (e.g., FMEPs, routine road maintenance, water diversion screening, etc.).

Response: NMFS agrees that programs that are approved under the take limits in this rule are incomplete if there is no mechanism to track their effectiveness and implementation. NMFS believes that this final rule provides for a sufficient level of monitoring and oversight of activities that may qualify for coverage under the 10 take limitations. Several of the take limits (e.g., recreational fishing, hatchery and genetic management, routine road maintenance, MRCI) in this final rule specifically require that monitoring be incorporated into programs or plans in order to qualify for coverage under the limitation. In addition, the final rule indicates that NMFS will evaluate on a regular basis the effectiveness of all programs that are approved under the take limits to insure that they are achieving the level of protection that is consistent with the conservation of the threatened ESUs covered in the rule. If a program or plan does not meet the required objectives, NMFS will work with the relevant entity to make adjustments to the program accordingly. If the relevant entity chooses not to adjust the program to meet the necessary objectives for coverage under the take limit, then NMFS will publish notification in the **Federal Register** that the program is no longer exempt from the ESA section 9(a)(1) take prohibitions because it does not sufficiently conserve the threatened ESUs.

Comment 20: One commenter was concerned that activities falling under any one of the 10 take limitation categories in the proposed rule were automatically exempt from the take prohibitions and would not be monitored by NMFS.

Response: Virtually all of the take limitations in this final rule require that entities seeking a limitation submit a plan to NMFS which addresses a wide range of detailed criteria specified in the rule. These include habitat modifying activities such as routine road maintenance, MRCI development, and water diversion screening. Only after NMFS has reviewed these plans against the specified criteria in the rule and responded to public comments on the plans, will NMFS make a determination as to whether or not the plan qualifies for coverage under a limit. As discussed in the preceding response to comment, NMFS believes this final rule requires sufficient monitoring of activities covered under the take limits, and ample opportunity for NMFS to provide oversight of activities covered under the take limits.

MRCI Take Limitation

Comment 21: One commenter expressed concerns that the MRCI take limitation does not explicitly require entities seeking coverage to address cumulative impacts or mitigation and recommended the final rule include such a requirement.

Response: NMFS recognizes the importance of assessing cumulative impacts for MRCI development and other types of activities covered by the take limitations in this final rule. For some take limitations such as recreational angling (i.e. the FMEP take limit), NMFS has explicitly incorporated consideration of cumulative impacts into the rule where it is feasible. For habitat modifying activities, however, this is difficult. NMFS believes, however, that cumulative impacts are addressed at least in part for habitat modifying activities, such as MRCI development and routine road maintenance, since coverage of such an activity under the rule requires NMFS to find that it is contributing to the attainment of, or is contributing to the maintenance of, properly functioning habitat conditions for the threatened ESUs covered in the rule.

Comment 22: One commenter stated that the description of the evaluation criteria relating to riparian management areas in MRCI plans should indicate that such areas are often larger than one site-potential tree height and that it should also specify the types of riparian functions that should be protected in such plans.

Response: NMFS recognizes that riparian areas are important to threatened salmonids and, therefore, provided guidance in this final rule that MRCI plans should provide sufficient riparian management requirements or measures within a distance of one site-potential tree height from the stream channel. This general guidance was based on the best available scientific information which indicates that this stream side area is the one in which development activities most affect riparian zone habitat functions. Although this is a good rule of thumb, NMFS recognizes, as stated in the guidance for riparian zone management, that this distance can vary substantially from location to location and should be determined on a site-specific basis taking into account the conditions of the site or area and the type of habitat that may be affected by the MRCI development.

Comment 23: One commenter indicated that it was unclear whether a plan must be submitted to NMFS when an entity requests coverage under the MRCI take limit, and that it was also unclear who is responsible for approving such a plan if warranted.

Response: NMFS does expect interested jurisdictions to submit a plan to NMFS which describes the MRCI activities to be covered and which addresses the twelve evaluation criteria contained in the take limit. As indicated in this final rule, the Southwest Regional Administrator is responsible for determining whether a MRCI plan qualifies for coverage under this take limit.

Comment 24: The MRCI limit is subjective, violates the ESA, and is arbitrary and void for vagueness.

Response: The MRCI limitation was intended to be more broadly flexible than most of the other take limitations in order to address and provide coverage to the wide variety of circumstances that may arise under this category of activities. As noted elsewhere in this final rule, tailoring activities to comply with the take limitations and submittal of any plan to NMFS for consideration under any of the take limits, including the MRCI limit, is strictly voluntary. The MRCI limit has 12 specific land use considerations relevant to preserving fish habitat that NMFS will use to evaluate submitted land use regulations. NMFS' use of these considerations to make its consistent with conservation and attaining and maintaining properly functioning condition determinations gives adequate clarity and certainty to this part of this regulation.

Comment 25: One commenter felt that NMFS should provide performance standards that ordinances should meet and that the twelve evaluation criteria contained in the MRCI take limit were too vague.

Response: As discussed in this final rule, the fundamental performance standard against which ordinances or plans will be evaluated under this take limit is whether they contribute to maintaining and/or restoring properly functioning habitat conditions that will conserve the threatened ESUs. Under this limit, NMFS will evaluate

ordinances or plans to determine if and how they affect conditions on the landscape and the extent to which they are contributing to the maintenance of or restoration of essential habitat functions. If such plans would maintain or contribute to restoring these functions, then they may qualify under the take limitation.

The 12 considerations contained in this final rule identify the specific issues and/or factors NMFS will use as a framework for evaluating ordinances or plans. These considerations are based on current scientific understanding of salmonid biological requirements. By assessing these twelve considerations, NMFS believes it can evaluate the extent to which an ordinance or plan contributes to maintaining or restoring properly functioning habitat conditions that will conserve the threatened ESUs. Depending on the scope of the ordinance or plan, all twelve of these considerations may not be relevant. NMFS recognizes this fact and will base its evaluation on only those considerations that are relevant.

Recreational Fisheries Take Limitation

Comment 26: One commenter suggested that the final rule should provide a mechanism allowing FMEPs to be ''tiered'' off of Pacific Fishery Management Council (PFMC) approved Fishery Management Plans in order to avoid redundancy and duplication.

Response: The FMEP take limitation in this final rule is intended to provide a more efficient mechanism for insuring that freshwater recreational fisheries managed by the State of California adequately protect and contribute to the conservation of the threatened ESUs covered by the rule while still providing for angling opportunities. Coverage of State managed fisheries in this manner will provide assurance to the State and anglers that they are in compliance with the ESA. Such fisheries are under the jurisdiction of the State and are not managed by PFMC. Since the PFMC manages marine fisheries covered by Federal Fishery Management Plans it is unclear how the FMEP process in this final rule can be tiered off of the FMP process that is implemented by the PFMC. Because the two processes manage two separate fisheries, NMFS does not believe that there will be unnecessary duplication or redundancy in the development of FMEPs. To the extent feasible, however, NMFS will encourage the State to utilize information gathered as part of the FMP process in the development of FMEPs that are submitted for coverage under this rule.

Water Diversion Screening Take Limitation

Comment 27: One commenter argued that the water diversion screening take limitation is inappropriate and does not meet the requirements of the ESA.

Response: NMFS believes strongly that the water diversion screening take limit is appropriate, that it provides for the conservation of the threatened ESUs covered by the rule, and that it is consistent with the ESA. As the commenter pointed out, NMFS is well aware that the entrainment of juvenile salmonids in unscreened or poorly screened water diversions is a problem, both in the central valley and in coastal watersheds. The water diversion screening limit in this rule is intended to provide an incentive for screening unscreened or poorly screened diversions. This final rule and this take limit do not allow unregulated take of listed salmonids at water diversions in the central valley or in coastal watersheds. In fact, this final rule imposes the ESA section 9(a)(1) take prohibitions on these three threatened ESUs making it illegal to entrain these fish into water diversions, and only relieves diverters of the take prohibitions if they qualify by meeting the criteria in the water diversion screening take limit or by obtaining take authorization through the processes of ESA section 7 or 10. NMFS will only provide coverage to water diverters under the water screening diversion take limit if they meet the criteria specified in the rule. These criteria call for: (1) NMFS to certify that a diversion is screened, maintained, and operated in compliance with NMFS' fish screening criteria; and (2) the owner/operator of the facility to allow NMFS to inspect the facility to insure compliance with the criteria. NMFS believes these screening criteria are fully protective of juvenile salmonids and presently uses them as the basis for evaluating water screening diversion projects under ESA sections 7 and 10 of the ESA.

Comment 28: One commenter was concerned that this final rule and this take limitation in particular would exempt all take of these threatened ESUs at the Federal and state water pumping facilities that operate in the central valley, provided they are operated in compliance with whatever screening criteria are in place.

Response: As discussed elsewhere, this final rule will impose the ESA section 9(a)(1) take prohibitions on three threatened ESUs, including the CCV spring-run chinook ESU. The water diversion screening take limit is primarily built into the rule to provide an incentive to smaller, non-Federal water diverters to screen their diversions with appropriate screens. In contrast, the Federal and state pumps and the associated fish protection facilities are part of the Federal and state water projects which are operated in a coordinated fashion by the Bureau of Reclamation and the Department of Water Resources. The combined operation of the Federal and state water projects, including the Federal and state pumps and the associated fish protection facilities, constitute a Federal project activity which is subject to section 7 of the ESA. This final rule does not relieve Federal agencies such as the Bureau of Reclamation of their obligation to consult under the ESA, nor does it exempt the take of these threatened species by Federal agencies. For this reason, the incidental take of CCV spring-run chinook at the Federal and state pumps and the associated fish protection facilities are authorized through section 7 of the ESA, not this final ESA 4(d) rule. Future modifications of the fish protection facilities in the Delta will comport to the extent appropriate with NMFS' fish screening criteria and the mechanism for any required ESA compliance will be section 7 of ESA through the Bureau of Reclamation.

Comment 29: One commenter asserted that NMFS' screening criteria are not well supported or justified scientifically.

Response: NMFS disagrees. NMFS' fish screening criteria are extensively detailed and have undergone a high degree of scientific scrutiny. They are based on decades of operational experience that have yielded some of the best screen designs for salmonid protection in existence. Several States, including California, have adopted NMFS' screening criteria and use them extensively. Lastly, extensive biological evaluations have demonstrated little or no injury to fish when testing screen facilities constructed to NMFS' criteria.

Comment 30: One commenter suggested that this take limit should also ''grandfather'' in older fish screen and passage facilities provided they met the standards that were in existence at the time they were installed.

Response: The intent of this take limitation is to allow a water diversion to be made as safe as possible for the threatened ESUs covered by the rule. Therefore, we believe that the best available information regarding fish screen criteria that are protective of salmonids should be used as the basis for providing coverage to water diversions under this limit. In our view, the 1997 criteria constitute the best

available information. As new biological information becomes available, however, it may be necessary to update these criteria and all new facilities from that point forward would need to comply with any updated criteria. NMFS recognizes that it may not be necessary to retrofit all existing screen facilities with new features every time that new information becomes available and that some older facilities may still function in a manner that is protective of threatened salmonids. In such cases, NMFS may consider certification of screen designs that meet the criteria in place at the time of construction providing there is no evidence to show that the device is causing the take of listed salmonids.

Habitat Restoration Take Limitation

Comment 31: One commenter argued that NMFS should not insert itself in the process of approving watershed conservation plan guidelines. This commenter also contended that NMFS does not have the authority to require states or local governments to consult with the agency in the development of such plans.

Response: The goal of this take limitation is to provide a mechanism for exempting habitat restoration projects from the ESA section 9 take prohibitions when those projects have been identified as being necessary to restore watershed function as a result of watershed scale assessments. In order for NMFS to provide this type of blanket coverage for habitat restoration projects and to avoid having to review all watershed conservation plans and habitat restoration projects separately, we believe it is appropriate for NMFS to link this exemption to an approval of watershed conservation plan guidelines. Absent the process described by this take limitation, the only means available for NMFS to authorize take that may occur as a result of habitat restoration projects is to review and approve them individually through ESA section 7 or section 10 processes. The process described in this take limit, if implemented by the state, can serve to expedite implementation of habitat restoration projects while at the same time promote watershed assessments and the development of watershed conservation plans on the basis of standard guidance. As clearly stated in the proposed and final rule, state and local entities are not required to use any of the take limitations, including the limitation for habitat restoration. In other words, NMFS is not requiring the state and local entities to develop guidelines or watershed conservation plans. We have made this option available as part of a process for facilitating the implementation of habitat restoration projects through exemption from the section 9 take prohibitions. As an alternative to using this take limitation, state or local entities may choose to utilize the section 7 or section 10 processes to obtain take authorization for habitat restoration projects they plan to implement.

Take Guidance

The threatened salmonid ESUs addressed in this final rule are in danger of becoming extinct throughout all or a significant portion of their range in the foreseeable future. Abundance of these ESUs has been reduced by over-fishing, past and ongoing freshwater and estuarine habitat destruction, hydropower development, hatchery practices, and other causes. NMFS has concluded, therefore, that it is necessary and advisable to apply the ESA section 9(a)(1) prohibitions to these ESUS to aid in their conservation. ESA section 9(a)(1) prohibitions make it illegal for any person subject to the United States' jurisdiction to ''take'' these species without written authorization. ''Take'' is defined to occur when a person engages in activities that harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect a species or attempt to do any of these. Impacts on a protected species' habitat may harm members of that species and, therefore, constitute a ''take'' under the ESA. Such acts may include significant habitat modification or degradation that actually kills or injures listed fish by significantly impairing essential behavioral patterns including breeding, spawning, rearing, migrating, feeding or sheltering (64 FR 60727, November 8, 1999).

On July 1, 1994 (59 FR 34272), NMFS and the FWS published a policy committing both agencies to identify, to the extent possible, those activities that would or would not violate section 9 of the ESA. The intent of this policy is to increase public awareness about ESA compliance and focus public attention on those actions needed to protect listed species.

Based on the best available information, NMFS believes the categories of activities that follow are those activities which as a general rule may be most likely to result in injury or harm to listed salmonids. It is important to emphasize, however, that whether injury or harm results from a particular activity is entirely dependent upon the facts and circumstances of each individual case. The mere fact that an activity may fall within one of these categories does not mean that the specific activity is causing harm or injury. These categories of activity, however, are ones that may be most likely to cause harm and, thus, violate the ESA section 9(a)(1) take prohibitions in this final rule. The activities listed below in A thru J are as cited in NMFS' harm rule (64 FR 60727, November 8, 1999).

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

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

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

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

E. Removing water or otherwise altering stream flow when it significantly impairs spawning, migration, feeding or other essential behavioral patterns.

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

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

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

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

J. 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.

K. Illegal fishing. Harvest in violation of fishing regulations.

L. Various streambed disturbances may trample eggs or trap adult fish preparing to spawn. The disturbance could be mechanical disruption caused by constructing push-up dams, removing gravel, mining, or other work in a stream channel. It may also take the form of egg trampling or smothering by livestock in the streambed or by

vehicles or equipment being driven across or down the streambed (as well as any similar physical disruptions).

M. Interstate and foreign commerce dealing in listed salmonids and importing or exporting listed salmonids may harm the fish unless it can be shown through an ESA permit that they were harvested in a manner that complies with ESA requirements.

N. Altering lands or waters in a manner that promotes unusual concentrations of predators.

O. Shoreline and riparian disturbances (whether in the riverine, estuarine, marine, or floodplain environment) that may retard or prevent the development of certain habitat characteristics upon which the fish depend (e.g., removing riparian trees reduces vital shade and cover, floodplain gravel mining, development, and armoring shorelines reduces the input of critical spawning substrates, and bulkhead construction can eliminate shallow water rearing areas).

P. Filling or isolating side channels, ponds, and intermittent waters (e.g., installing tide gates and impassable culverts) can destroy habitats the fish depend upon for refuge areas during high flows.

The list provides examples of the types of activities that could have a high risk of causing take, but it is by no means exhaustive. It is intended to help people avoid activities that may violate the ESA and to encourage efforts to protect and conserve the threatened ESUs covered in this final rule. A determination as to whether take has actually occurred depends on the circumstances of a particular case.

Many activities that may kill or injure salmonids, such as fill and removal authorities, National Pollutant Discharge Elimination System or other water quality permitting, and pesticide use are regulated by state and/or Federal processes. For those types of activities, NMFS would not concentrate enforcement efforts on those who operate in conformity with current permits. Rather, if the regulatory program does not provide adequate salmonid protection, NMFS intends to work with the responsible agency to make necessary changes in the program.

For instance, concentrations of pesticides may affect salmonid behavior and reproductive success. Current EPA label requirements were developed in the absence of information about the impacts of such pesticides on aquatic species such as salmonids. Where new information indicates that pesticide label requirements are not adequately protective of salmonids, NMFS will work with EPA through the ESA section 7 consultation process to develop more protective use restrictions and, thereby, provide the best possible guidance to all users. Similarly, where water quality standards or state authorizations lead to pollution loads that may cause take, NMFS intends to work with the state water quality agencies and EPA to bring those standards or permitting programs to a point that does protect salmonids.

Persons or entities concluding that their activity is likely to injure or kill protected fish are encouraged to immediately adjust that activity to avoid take (or adequately limit any impacts on the species) and seek NMFS' authorization for incidental take under: (a) an ESA section 10 incidental take permit; (b) an ESA section 7 consultation; or (c) one of the limits (if available) on the take prohibitions provided in this final rule. The public is encouraged to contact NMFS (see **FOR FURTHER INFORMATION CONTACT**) for assistance in determining whether circumstances at a particular location (involving these activities or any others) would constitute a violation of this final rule.

Impacts on listed salmonids resulting from actions in compliance with a permit issued by NMFS pursuant to section 10 of the ESA would not constitute a violation of this final rule. Section 10 permits may be issued for research activities, enhancement of a species' survival, or to authorize incidental take occurring in the course of an otherwise lawful activity. NMFS consults on a broad range of activities conducted, funded, or authorized by Federal agencies. These include fisheries harvest, hatchery operations, silviculture activities, grazing, mining, road construction, dam construction and operation, discharge of fill material, and stream channelization and diversion. Federally funded or approved activities that affect listed salmonids and for which ESA section 7 consultations have been completed will not constitute violations of this final rule provided the activities are conducted in accord with all reasonable and prudent measures and terms and conditions contained in any biological opinion and incidental take statement issued by NMFS.

References

A list of references cited in this final rule is available upon request (see **ADDRESSES**).

Classification

Regulatory Flexibility Act

In accordance with the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), therefore, NMFS prepared an IRFA which was made available through the proposed ESA 4(d) rule for public comment. Although no comments were received on the IRFA during the public comment period, NMFS has made some revisions to the Final Regulatory Flexibility Analysis (FRFA) by defining further geographic subareas to insure its consistency with the Final Regulatory Impact Review (RIR). The FRFA is available upon request (see **ADDRESSES**) and a summary follows.

This ESA 4(d) rule has no specific requirements for regulatory compliance. Instead, the rule sets an enforceable performance standard in the form of the section 9(a)(1) take prohibitions (i.e., do not ''take'' the threatened ESUs) that applies to all entities and individuals unless an activity is within a carefully circumscribed set of activities for which NMFS will not impose the take prohibitions. Hence, the universe of entities reasonably expected to be directly or indirectly impacted by the prohibition is potentially broad.

The entities potentially affected by imposition of the ESA section 9 take prohibitions occur over a large geographic area which includes the Sacramento River basin in California's central valley, as well as coastal watersheds ranging from the Russian River to Redwood Creek. Activities potentially affecting salmon and steelhead ESUs covered by the proposed rule are those associated with agriculture, fishing, hatcheries, mining, heavy construction, highway and street construction, logging, wood and paper mills, electric services, water transportation, and other industries. As many of these activities involve local, state, and Federal oversight, including permitting, governmental activities from the smallest towns or planning units to the largest cities may potentially be impacted. The activities of some nonprofit organizations may also be affected by these regulations.

NMFS examined the potential impact of the ESA 4(d) rule on a sector-by-sector basis. Unavailable or inadequate data leaves a high degree of uncertainty surrounding both the numbers of entities likely to be affected, and the characteristics of any impacts on particular entities. The problem is complicated by differences among entities even in the same sector as to the nature and size of their current operations, contiguity to waterways, individual strategies for dealing with the take prohibitions, etc. Finally, most of the activities that would be subject to the take prohibitions in the rule are already subject to the take prohibitions

imposed by existing ESA 4(d) rules that protect other salmonid ESUs utilizing the same habitat. Thus, determining the incremental cost of this rule requires information concerning regulated entities' response to pre-existing ESA 4(d) rules, some of which have been in effect for only a little over a year.

In the absence of 4(d) rules, entities could comply with the ESA through section 10 research, enhancement, and incidental take permits with private entities, or through ESA section 7 consultation with Federal agencies. Since implementation of the July 2000 4(d) rule NMFS has received plans from various entities in Oregon, Washington, Idaho and California for approval under the limits to the take prohibitions. States can now send a list of research activities they expect to authorize for the following year instead of sending individual ESA section 10 applications. During promulgation of the July 2000 rule NMFS did not have a complete understanding of the economic impacts entities would incur as a result of imposition of the take prohibitions. To gain some insight as to how entities may have changed their activities in response to implementation of the take prohibitions, we have summarized the numbers of plans submitted and their status under the July 4(d) rule in the following table. While portions of these plans were developed independently of the July 4(d) rule, they may have been modified in order to qualify for the take limits of the rule, as opposed to undergoing ESA section 7 or 10 procedures. Authorization under the rescue/salvage limit, City of Portland, Oregon Parks and Recreation Department's Pest Management Program and Washington's Forest Practices became effective September 8, 2000, and January 8, 2001, for the steelhead and salmon ESUs respectively, and are not listed in the table. Oregon Department of Transportation's (ODOT's) Routine Road Maintenance program also became effective with the effective dates, but other entities can qualify for ESA coverage under this limit if they use ODOT's program or an equivalent program.

Limit	Number of Plans Received to Date	Number of Plans Pending Approval	Number of Plans Approved	Number of Plans Expected in Next Year
Research	3	0	3	4 yearly (Oregon Washington Idaho, California)
Fishery Management Plans	13	12	1	33
Hatchery Genetic Management Plans	9	9	0	61
Joint State/Tribal Plans	2	0	2	12
Habitat Restoration Activities	0	0	0	4
Diversion Screening	20	2	0	100
Oregon Department of Transportation's (ODOT's) Routine Road Maintenance or Equivalent Plan	0	0	0	7-10
Municipal, Residential, Commercial, and Industrial Plans	0	0	0	10

Entities that are now subject to the July 4(d) rule fall into 4 categories: (1) Those entities who have sought or are actively seeking ESA compliance via the July 4(d) rule limits; (2) those who are not sure if their activities will harm salmonids, but are seeking guidance from NMFS; (3) those who are actively seeking ESA compliance via the section 10 or section 7 process; and (4) those entities that are taking salmon but are not seeking ESA compliance.

Examination of the geographical aspects of overlapping ESUs, and consideration of differences in the distribution of the different ESUs within river systems revealed five subareas composing the geographic extent of the four ESUs combined. Subarea 1 consists of that area where this rule's take prohibition for Central Valley spring chinook would be superimposed on existing take prohibitions for threatened Central Valley steelhead and endangered winter-run chinook salmon. In this region only a small variety of activities involving deliberate take of spring-run chinook is expected to be affected.

Subarea 2 consists of that area where Central California coast coho will be subject to limitations on the take prohibition not presently allowed by the existing ESA 4(d) rule for that threatened ESU and no new take prohibition is being added. The impact of this rule in this subarea is the increased flexibility allowed by the 10 take prohibition limits.

Subarea 3 consists of that area where this rule superimposes the take prohibitions for Northern California steelhead and California coastal chinook on the existing take prohibition for Central California coast coho. Deliberate take of the steelhead and chinook will be newly affected in this subarea and the take limits will be introduced for coho, making them congruent with the take limits for steelhead and chinook in that area.

Subarea 4 consists of the area where this rule superimposes the take prohibition for steelhead and chinook on the existing take prohibition for the Southern Oregon/Northern California coho ESU. Deliberate take of steelhead and chinook will be newly regulated in this area, but no change will be made for the take limits applicable to coho.

Subarea 5 consists of those portions of the Northern California steelhead and California coastal chinook ESUs not utilized by either coho ESU. Because steelhead (and chinook to a lesser extent) are much more widely distributed within the ESU boundaries than coho, there are substantial areas where steelhead and/or chinook will be protected which are not utilized by coho. Modifications to habitat which have no risk of taking coho may risk taking steelhead and chinook in such areas.

Although there may be some limited impact in all of these subareas the only substantial economic impacts on individual small entities from this rule, therefore, are expected to occur in the non-federal portions of subarea 5, which lie almost entirely in low population density areas of Humboldt, Mendocino, and Sonoma counties. These three counties had a combined 1998 population of about 640,000 with personal income of about $18 billion. However, most of the people and income are contributed by urban centers in Sonoma and Humboldt counties which are not contained in subarea 5. No population estimate is available for subarea 5, but it is believed to be less than 15,000. Small entities in this

subarea likely to be directly affected by this rule include private timber harvesters, cattle ranches, a small number of farms and vineyards, and possibly small businesses engaged in road and culvert construction. The number of such entities is not known, but is a small subset of the same classes of entities found in the three counties containing subarea 5.

This final rule applies the take prohibitions enumerated in ESA section 9(a)(1), and also limits application of the take prohibitions to certain specified categories of activities that contribute to conserving these ESUs or are governed by a program that adequately limits impacts on these ESUs. There are no record keeping or reporting requirements associated with imposition of the take prohibition; therefore, it is not possible to simplify or tailor record keeping or reporting to be less burdensome for small entities. However, some programs for which NMFS may in the future find it is unnecessary to prohibit take because they fall under one of the take limitations in this final rule would involve recordkeeping and/or reporting to support that continuing determination. NMFS has attempted to minimize any burden associated with these programs.

The public reporting burden per response for this collection of information is estimated to average 5 hours for a submission on screening of a water diversion or for a report on salmonids assisted, disposed of, or salvaged; 20 hours to prepare a road maintenance agreement; 30 hours for an MRCI ordinance development package; and 10 hours for an MRCI development annual report.

This rule also contains a collection-of-information requirement associated with habitat restoration activities conducted under watershed conservation plans that has received PRA approval from OMB under control number 0648-0230. The public reporting burden for the approval of watershed conservation plans is estimated to average 10 hours.

These estimates include any time required for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information.

In formulating this final rule, NMFS considered several alternative approaches which are described in the IRFA. These included: (1) Enacting a ''global'' ESA 4(d) protective regulation for threatened species through which NMFS would automatically apply the section 9 take prohibitions to all threatened species at the time of listing; (2) enacting ESA 4(d) protective regulations that include the take prohibitions, but contain no take limits, or only a few limits, on the application of the take prohibitions for relatively uncontroversial activities such as fish rescue/salvage; (3) enacting ESA 4(d) regulations which include the take prohibitions in combination with detailed prescriptive requirements applicable to one or more sectors of activity; (4) enacting ESA 4(d) protective regulations similar to the existing interim 4(d) protective regulations for Southern Oregon/Northern California coast coho salmon which includes four additional limitations on the extension of the take prohibitions, for harvest plans, hatchery plans, scientific research, and habitat restoration projects, when in conformance with specified criteria; (5) enacting ESA 4(d) regulations similar to the interim rule for Southern Oregon/Northern California coast coho, but with recognition of more programs and circumstances in which application of take prohibitions is neither necessary or advisable, and (6) enacting no ESA 4(d) protective regulations for the threatened salmonid ESUs. This last approach would leave the threatened ESUs without any protection other than provided by ESA section 7 consultations for actions with some Federal nexus.

The approach taken in this final rule is alternative 5 which would impose the ESA section 9 take prohibition and also create 10 limits to the take prohibitions for specific circumstances or categories of activity (see discussion of take limitations in the proposed rule). This approach is fundamentally the same as that taken in NMFS's July 2000 ESA 4(d) rule for 14 threatened salmonids (65 FR 42422). For several of these activity categories (i.e., recreational harvest, artificial propagation, habitat restoration, road maintenance, and municipal, residential, commercial and industrial development) the regulation is structured so that it allows plans or programs developed after promulgation of this final rule to be submitted to NMFS for review and approval under criteria described in the rule.

All of the other alternatives which provide take prohibitions for the threatened ESUs may result in unnecessary impacts on economic activity of small entities, given NMFS' judgment that more limited protections would suffice to conserve the species. NMFS believes this final rule provides the greatest latitude for individual entities and regulatory agencies to tailor activities and programs to fit individual circumstances while avoiding or minimizing take of threatened salmonids. At present, NMFS concludes that there are no legally viable alternative rules that would have less impact on small entities and still fulfill the agency's obligations to protect these threatened salmonid ESUs.

Executive Order (E.O.) 12866

Pursuant to E.O. 12866 (58 FR 51735, October 4, 1993), NMFS has prepared a Regulatory Impact Review (RIR) which considers costs and benefits of the regulatory alternatives that were considered in developing this ESA 4(d) rule, including the alternative of not promulgating a protective rule. Copies of the RIR are available upon request (see **ADDRESSES**).

Costs and benefits of this final rule and other alternative rule making approaches include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits where estimates cannot be meaningfully made for impacts that are essential to consider. The benefit provided by this rule, as well as each of the other alternatives NMFS considered that afford sufficient protection for the threatened ESUs, is its contribution to the recovery of the threatened ESUs. No monetized measure of the benefit of recovery is available.

The RIR finds that in Area 1, Area 3, and Area 4 the only activities likely to be affected by this final rule are those involving deliberate direct take of listed species, especially angling, hatchery operation, and research. The costs of these activities, either to the state or private parties, are estimated to increase over the baseline due to increased permitting, NEPA documentation, and monitoring requirements. Activities in Area 2, where coho already have a take prohibition in place, will become less costly due to reduced permitting and NEPA requirements. In Area 5, timber harvest, grazing, stream diversions, summer dams, road construction and maintenance, and construction of new or improved culverts will come under increased regulation. Incremental costs associated with summer dams, roads, and culverts are significant but could not be quantified at this time. Aggregate quantified incremental first-year costs for the proposed rule are estimated to be between $11.8 million and $17.7 million, while annual costs thereafter are estimated to be from $4.6 million to $9.1 million. The same costs estimated for a blanket take prohibition with no limits are estimated at $18.9 million to $21.6 million and $6.2 million to $10.7 million, respectively.

The RIR concludes that the proposed rule would substantially improve conditions favorable to recovery of the threatened ESUs compared to taking no action, that the only alternative which could achieve quicker results (detailed prescriptive requirements) is too costly and intrusive, and that the proposed rule is the least costly rule among the alternatives which are sufficiently protective of threatened salmon and steelhead ESUs.

Because this final rule will eliminate application of the section 9 take prohibition to those State or local programs or activities that fall within defined take limitation criteria protective of salmonids, those programs will encourage participation and contribute to the conservation of the threatened ESUs covered by the rule; NMFS' involvement will be more collaborative and less often require enforcement actions. This approach has the greatest probability that compliance burdens will be equally shared, that economic incentives will be employed in appropriate cases, and that practical standards adapted to the particular characteristics of the state or region will aid citizens in reducing the risks of take in an efficient way. For these reasons, it is likely that this final rule will minimize the cost to the public of avoiding or minimizing take over the long term in comparison with the other alternatives that were considered.

Executive Order 13175-Consultation and Coordination with Indian Tribal Governments

E.O. 13175 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments or the Federal government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. This final rule does not impose substantial direct compliance costs on the communities of Indian tribal governments. Accordingly, the requirements of section 3(b) of E.O. 13175 do not apply to this final rule.

Nonetheless, NMFS took steps to inform potentially affected tribal governments, to provide information to tribes on the content and scope of the rule and its relationship to the Tribal ESA 4(d) rule (65 FR 42481, July 10, 2000), and to solicit tribal input on the rule. NMFS did not receive any formal comments from Indian tribes, but remains prepared to meet with interested tribes to discuss the rule and its relationship to their activities. As a result of the July 2000 Tribal ESA 4(d) rule, NMFS has already established efforts to coordinate with many of the tribes that are located within the range of ESUs affected by this rule.

Executive Order 13132 - Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of those circumstances is applicable to this final rule. In fact, this final rule provides a mechanism by which NMFS may defer to state and local government programs, where they provide necessary protections for threatened salmonids.

NMFS' July 2000 ESA 4(d) rule for 14 threatened salmonids (65 FR 42422), including three steelhead ESUs in California, was the first instance in California where the agency defined some reasonably broad categories of activities, both public and private, for which take prohibitions were not considered necessary and advisable when specified criteria were met. Since that rule was promulgated, NMFS has engaged in discussions with various State and local agencies and other organizations in California wishing to pursue development of programs that would qualify under the various take limits contained in that final rule. In addition, NMFS has sought working relationships with other governmental and non-governmental organizations, and endeavored to promote use of the ESA 4(d) rule. Because the threatened ESUs addressed in this rule overlap substantially with the ESUs addressed in the July 2000 ESA 4(d) rule (65 FR 42422), working relationships have already been established with many agencies and organizations that may be affected by this rule.

In addition to these efforts, NMFS staff have given presentations to interagency forums, community groups, and others, and served on a number of interagency advisory groups or task forces considering conservation measures. Many cities, counties and other local governments have sought guidance and consideration of their planning efforts from NMFS, and staff have met with them whenever possible. Lastly, NMFS staff have continued coordination with the state aimed at developing recreational fisheries and artificial propagation management plans and other programs that will be protective of threatened salmonids and ultimately may be recognized within the July 2000 ESA 4(d) rule or this final rule.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. This final rule contains collection-of-information requirements subject to the PRA and which have been approved by OMB under control number 0648-0399.

The public reporting burden per response for this collection of information is estimated to average 5 hours for a submission on screening of a water diversion or for a report on salmonids assisted, disposed of, or salvaged; 20 hours to prepare a road maintenance agreement; 30 hours for an MRCI ordinance development package; and 10 hours for an MRCI development annual report.

This final rule also contains a collection-of-information requirement associated with habitat restoration activities conducted under watershed conservation plans that has received PRA approval from OMB under control number 0648-0230. The public reporting burden for the approval of watershed conservation plans is estimated to average 10 hours.

These estimates include any time required for reviewing instruction, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information.

Send comments on these or any other aspects of the collection of information to NMFS (see **ADDRESSES**) and to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC. 20503 (Attention: NOAA Desk Officer).

National Environmental Policy Act

NMFS prepared EAs, as defined under the authority of NEPA of 1969, addressing each threatened ESU covered by this final rule. Based on a review and evaluation of the information contained in these NEPA documents, NMFS has determined that promulgation of protective regulations for these four threatened salmonid ESUs, including the creation of limitations on the applicability of the prohibitions on taking any of those salmonids, is not a major Federal action that would significantly affect the quality of the

human environment within the meaning of section 102(2)(c) of NEPA of 1969. NMFS believes these EAs examined appropriate alternatives, and that preparation of an Environmental Impact Statement is not required. Copies of the EAs/Findings of No Significant Impact are available on request (see **ADDRESSES**).

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Marine mammals, Transportation.

Dated: December 31, 2001.

Rebecca Lent,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531-1543; subpart B, § 223.12 also issued under 16 U.S.C. 1361 *et seq.*

2. In § 223.203, paragraphs (a), (b)(1), and (c) are revised and introductory text to this section, paragraphs (b)(14) through (b)(22), and Appendix A to this section are added to read as follows:

§ 223.203 Anadromous fish.

Available guidance documents cited in the regulatory text are listed in Appendix A to this section.

(a) *Prohibitions*. The prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species apply to the threatened species of salmonids listed in § 223.102(a)(1) through (a)(10), and (a)(12) through (a)(22), except as provided in paragraph (b) of this section and § 223.209(a).

(b) *Limits on the prohibitions*. (1) The exceptions of section 10 of the ESA (16 U.S.C. 1539) and other exceptions under the Act relating to endangered species, including regulations in part 222 of this chapter implementing such exceptions, also apply to the threatened species of salmonids listed in § 223.102(a)(1) through (a)(10), and (a)(12) through (a)(22).

* * * * *

(14) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(20) through (a)(22) do not apply to activities specified in an application for a permit for scientific purposes or to enhance the conservation or survival of the species, provided that the application has been received by the Assistant Administrator for Fisheries, NOAA (AA), no later than April 9, 2002. The prohibitions of paragraph (a) of this section apply to these activities upon the AA's rejection of the application as insufficient, upon issuance or denial of a permit, or September 9, 2002, whichever occurs earliest.

(15) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3), and (a)(20) through (a)(22) do not apply to any employee or designee of NMFS, the United States Fish and Wildlife Service, any Federal land management agency, the California Department of Fish and Game (CDFG), or of any other governmental entity that has co-management authority for the listed salmonids, when the employee or designee, acting in the course of his or her official duties, takes a threatened salmonid without a permit if such action is necessary to:

(i) Aid a sick, injured, or stranded salmonid,

(ii) Dispose of a dead salmonid, or

(iii) Salvage a dead salmonid which may be useful for scientific study.

(iv) Each agency acting under this limit on the take prohibitions of paragraph (a) of this section is to report to NMFS the numbers of fish handled and their status, on an annual basis. A designee of the listed entities is any individual the Federal or state fishery agency or other co-manager has authorized in writing to perform the listed functions.

(16) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3), and (a)(20) through (a)(22) do not apply to fishery harvest activities provided that:

(i) Fisheries are managed in accordance with a NMFS-approved Fishery Management and Evaluation Plan (FMEP) and implemented in accordance with a letter of concurrence from NMFS. NMFS will approve an FMEP only if it clearly defines its intended scope and area of impact and sets forth the management objectives and performance indicators for the plan. The plan must adequately address the following criteria:

(A) Define populations within affected listed ESUs, taking into account spatial and temporal distribution, genetic and phenotypic diversity, and other appropriate identifiably unique biological and life history traits. Populations may be aggregated for management purposes when dictated by information scarcity, if consistent with survival and recovery of the listed ESU. In identifying management units, the plan shall describe the reasons for using such units in lieu of population units, describe how the management units are defined, given biological and life history traits, so as to maximize consideration of the important biological diversity contained within the listed ESU, respond to the scale and complexity of the ESU, and help ensure consistent treatment of listed salmonids across a diverse geographic and jurisdictional range.

(B) Utilize the concepts of ''viable'' and ''critical'' salmonid population thresholds, consistent with the concepts contained in NMFS's technical report entitled ''Viable Salmonid Populations and the Recovery of ESUs'' (NMFS, 2000b). This report provides a framework for identifying the biological requirements of listed salmonids, assessing the effects of management and conservation actions, and ensuring that such actions provide for the survival and recovery of listed species. Proposed management actions must recognize the significant differences in risk associated with viable and critical population threshold states and respond accordingly to minimize the long-term risks to population persistence. Harvest actions impacting populations that are functioning at or above the viable threshold must be designed to maintain the population or management unit at or above that level. For populations shown with a high degree of confidence to be above critical levels but not yet at viable levels, harvest management must not appreciably slow the population's achievement of viable function. Harvest actions impacting populations that are functioning at or below critical threshold must not be allowed to appreciably increase genetic and demographic risks facing the population and must be designed to permit the population's achievement of viable function, unless the plan demonstrates that the likelihood of survival and recovery of the entire ESU in the wild would not be appreciably reduced by greater risks to that individual population.

(C) Set escapement objectives or maximum exploitation rates for each management unit or population based on its status and on a harvest program that assures that those rates or objectives are not exceeded. Maximum exploitation rates must not appreciably reduce the likelihood of survival and recovery of the ESU. Management of fisheries where artificially propagated fish predominate must not compromise the management objectives for commingled naturally spawned populations.

(D) Display a biologically based rationale demonstrating that the harvest management strategy will not appreciably reduce the likelihood of survival and recovery of the ESU in the wild, over the entire period of time the proposed harvest management strategy affects the population, including effects reasonably certain to occur after the proposed actions cease.

(E) Include effective monitoring and evaluation programs to assess compliance, effectiveness, and parameter validation. At a minimum, harvest monitoring programs must collect catch and effort data, information on escapements, and information on biological characteristics, such as age, fecundity, size and sex data, and migration timing.

(F) Provide for evaluating monitoring data and making any revisions of assumptions, management strategies, or objectives that data show are needed.

(G) Provide for effective enforcement and education. Coordination among involved jurisdictions is an important element in ensuring regulatory effectiveness and coverage.

(H) Include restrictions on resident and anadromous species fisheries that minimize any take of listed species, including time, size, gear, and area restrictions.

(I) Be consistent with plans and conditions established within any Federal court proceeding with continuing jurisdiction over tribal harvest allocations.

(ii) The state monitors the amount of take of listed salmonids occurring in its fisheries and provides to NMFS on a regular basis, as defined in NMFS' letter of concurrence for the FMEP, a report summarizing this information, as well as the implementation and effectiveness of the FMEP. The state shall provide NMFS with access to all data and reports prepared concerning the implementation and effectiveness of the FMEP.

(iii) The state confers with NMFS on its fishing regulation changes affecting listed ESUs to ensure consistency with the approved FMEP. Prior to approving a new or amended FMEP, NMFS will publish notification in the **Federal Register** announcing its availability for public review and comment. Such an announcement will provide for a comment period on the draft FMEP of not less than 30 days.

(iv) NMFS provides written concurrence of the FMEP which specifies the implementation and reporting requirements. NMFS' approval of a plan shall be a written approval by the NMFS' Southwest Regional Administrator. On a regular basis, NMFS will evaluate the effectiveness of the program in protecting and achieving a level of salmonid productivity commensurate with conservation of the listed salmonids. If the program is deficient, NMFS will identify ways in which the program needs to be altered or strengthened. If the responsible agency does not make changes to respond adequately to the new information, NMFS will publish notification in the **Federal Register** announcing its intention to withdraw the limit for activities associated with that FMEP. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to withdraw the limit so that the prohibitions would then apply to those fishery harvest activities. A template for developing FMEPs is available from NMFS' Southwest Region web site (http://swr.nmfs.noaa.gov).

(v) The prohibitions of paragraph (a) of this section relating to threatened species listed in § 223.102 (a)(20) do not apply to fishery harvest activities managed solely by the State of California until July 8, 2002.

(17) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3) and (a)(20) through (a)(22) do not apply to activity associated with artificial propagation programs provided that:

(i) A state or Federal Hatchery and Genetics Management Plan (HGMP) has been approved by NMFS as meeting the following criteria:

(A) The HGMP has clearly stated goals, performance objectives, and performance indicators that indicate the purpose of the program, its intended results, and measurements of its performance in meeting those results. Goals shall address whether the program is intended to meet conservation objectives, contribute to the ultimate sustainability of natural spawning populations, and/or is intended to augment tribal, recreational, or commercial fisheries. Objectives should enumerate the results desired from the program that will be used to measure the program's success or failure.

(B) The HGMP utilizes the concepts of viable and critical salmonid population threshold, consistent with the concepts contained in NMFS' technical report entitled: ''Viable Salmonid Populations and Recovery of ESUs'' (NMFS, 2000b). Listed salmonids may be purposefully taken for broodstock purposes only if the donor population is currently at or above the viable threshold and the collection will not impair its function; if the donor population is not currently viable but the sole objective of the current collection program is to enhance the propagation or survival of the listed ESU; or if the donor population is shown with a high degree of confidence to be above critical threshold although not yet functioning at viable levels, and the collection will not appreciably slow the attainment of viable status for that population.

(C) Broodstock collection programs reflect appropriate priorities taking into account health, abundances, and trends in the donor population. The primary purpose of broodstock collection programs of listed species is to re-establish indigenous salmonid populations for conservation purposes. Such programs include restoration of similar, at-risk populations within the same ESU, and reintroduction of at-risk populations to underseeded habitat. After the species' conservation needs are met and when consistent with survival and recovery of the ESU, broodstock collection programs may be authorized by NMFS for secondary purposes such as to sustain tribal, recreational, and commercial fisheries.

(D) The HGMP includes protocols to address fish health, broodstock collection, broodstock spawning, rearing and release of juveniles, deposition of hatchery adults, and catastrophic risk management.

(E) The HGMP evaluates, minimizes, and accounts for the propagation program's genetic and ecological effects on natural populations, including disease transfer, competition, predation, and genetic introgression caused by the straying of hatchery fish.

(F) The HGMP describes interrelationships and interdependencies with fisheries management. The combination of artificial propagation programs and harvest management must be designed to provide as many benefits and as few biological risks as possible for the listed species. For those programs of which the purpose is to sustain fisheries, HGMPs must not compromise the ability of FMEPs or other management plans to conserve listed salmonids.

(G) The HGMP provides for adequate artificial propagation facilities to properly rear progeny of naturally spawned broodstock, to maintain population health and diversity, and to avoid hatchery-influenced selection or domestication.

(H) The HGMP provides for adequate monitoring and evaluation to detect and evaluate the success of the hatchery program and any risks potentially impairing the recovery of the listed ESU.

(I) The HGMP provides for evaluating monitoring data and making any revisions of assumptions, management strategies, or objectives that data show are needed;

(J) NMFS provides written concurrence of the HGMP which specifies the implementation and reporting requirements. For federally operated or funded hatcheries, the ESA section 7 consultation will achieve this purpose.

(ii) The state monitors the amount of take of listed salmonids occurring in its hatchery program and provides to NMFS on a regular basis a report summarizing this information, and the implementation and effectiveness of the HGMP as defined in NMFS' letter of concurrence. The state shall provide NMFS with access to all data and reports prepared concerning the implementation and effectiveness of the HGMP.

(iii) The state confers with NMFS on a regular basis regarding intended collections of listed broodstock to ensure consistency with the approved HGMP.

(iv) Prior to final approval of an HGMP, NMFS will publish notification in the **Federal Register** announcing its availability for public review and comment for a period of at least 30 days.

(v) NMFS' approval of an HGMP shall be a written approval by NMFS' Southwest Regional Administrator.

(vi) On a regular basis, NMFS will evaluate the effectiveness of the HGMP in protecting and achieving a level of salmonid productivity commensurate with the conservation of the listed salmonids. If the HGMP is not effective, NMFS will identify to the responsible agency ways in which the program needs to be altered or strengthened. If the responsible agency does not make changes to respond adequately to the new information, NMFS will publish notification in the **Federal Register** announcing its intention to withdraw the limit on activities associated with that program. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to withdraw the limit so that take prohibitions would then apply to that program. A template for developing HGMPs is available from NMFS Northwest Region's web site (www.nwr.noaa.gov).

(vii) The prohibitions of paragraph (a) of this section relating to threatened species listed in § 223.102 (a)(20) do not apply to artificial propagation programs managed solely by the State of California until July 8, 2002.

(18) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102(a)(3) and (a)(20) through (a)(22) do not apply to scientific research activities provided that:

(i) Scientific research activities involving purposeful take are conducted by employees or contractors of CDFG or as a part of a monitoring and research program overseen by or coordinated with CDFG.

(ii) CDFG provides for NMFS' review and approval a list of all scientific research activities involving direct take planned for the coming year, including an estimate of the total direct take that is anticipated, a description of the study design, including a justification for taking the species and a description of the techniques to be used, and a point of contact.

(iii) CDFG annually provides to NMFS the results of scientific research activities directed at threatened salmonids, including a report of the direct take resulting from the studies and a summary of the results of such studies.

(iv) Scientific research activities that may incidentally take threatened salmonids are either conducted by CDFG personnel, or are in accord with a permit issued by the CDFG.

(v) CDFG provides NMFS annually, for its review and approval, a report listing all scientific research activities it conducts or permits that may incidentally take threatened salmonids during the coming year. Such reports shall also contain the amount of incidental take of threatened salmonids occurring in the previous year's scientific research activities and a summary of the results of such research.

(vi) Electrofishing in any body of water known or suspected to contain threatened salmonids is conducted in accordance with NMFS' Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act (NMFS 2000a).

(vii) NMFS' approval of a research program shall be a written approval by NMFS' Southwest Regional Administrator.

(19) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102(a)(3) and (a)(20) through (a)(22) do not apply to habitat restoration activities, as defined in paragraph (b)(19)(iv), provided that the activity is part of a watershed conservation plan, and:

(i) The watershed conservation plan has been certified by the State of California to be consistent with the state's watershed conservation plan guidelines.

(ii) The State's watershed conservation plan guidelines have been found by NMFS to provide for plans that:

(A) Take into account the potential severity of direct, indirect, and cumulative impacts of proposed activities in light of the status of affected species that are listed as threatened.

(B) Will not reduce the likelihood of either survival or recovery of listed species in the wild.

(C) Ensure that any taking will be incidental.

(D) Minimize and mitigate any adverse impacts.

(E) Provide for effective monitoring and adaptive management.

(F) Use the best available science and technology, including watershed analysis.

(G) Provide for public and scientific review and input.

(H) Include any measures that NMFS determines are necessary or appropriate.

(I) Include provisions that clearly identify those activities that are part of plan implementation.

(J) Control risk to listed species by ensuring funding and implementation of the above plan components.

(iii) NMFS will periodically review state certifications of watershed conservation plans to ensure adherence to approved watershed conservation plan guidelines.

(iv) ''Habitat restoration activity'' is defined as an activity whose primary purpose is to restore natural aquatic or riparian habitat conditions or processes. ''Primary purpose'' means the activity would not be undertaken but for its restoration purpose.

(v) Prior to approving state watershed conservation plan guidelines under paragraph (b)(19)(ii) of this section, NMFS will publish notification in the **Federal Register** announcing the availability of the proposed guidelines for public review and comment. Such an announcement will provide for a comment period on the draft guidelines of not less than 30 days.

(20) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102(a)(3) and (a)(20) through (a)(22) do not apply to the physical diversion of water from a stream or lake, provided that:

(i) NMFS' engineering staff or any resource agency or tribe NMFS designates (authorized officer) has agreed in writing that the diversion facility is screened, maintained, and operated in compliance with NMFS' Southwest Region ''Fish Screening

Criteria for Anadromous Salmonids, January 1997'' or with any subsequent revision.

(ii) The owner or manager of the diversion allows any NMFS engineer or authorized officer access to the diversion facility for purposes of inspection and determination of continued compliance with the criteria.

(iii) On a case-by-case basis, NMFS or an Authorized Officer will review and may approve a juvenile fish screen design and construction plan and schedule that the water diverter proposes for screen installation. The plan and schedule will describe interim operation measures to avoid take of threatened salmonids. NMFS may require a commitment of compensatory mitigation if implementation of the plan and schedule is terminated prior to completion. If the plan and schedule are not met, or if a schedule modification is made that is not approved by NMFS or the Authorized Officer, or if the screen installation deviates from the approved design, the water diversion will be subject to take prohibitions and mitigation.

(iv) This limit on the prohibitions of paragraph (a) of this section does not include any impacts or take caused by reduced flows resulting from the diversion or impacts caused during installation of the diversion device. These impacts are subject to the prohibition on take of listed salmonids.

(21) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3) and (a)(20) through (a)(22) do not apply to routine road maintenance activities provided that:

(i) The activity results from routine road maintenance conducted by employees or agents of the State of California, or any county, city or port in California, that complies with a program substantially similar to that contained in the Oregon Department of Transportation's (ODOT) Transportation Maintenance Management System Water Quality and Habitat Guide (July, 1999) or that is determined to meet or exceed the protections provided by the ODOT Guide; or by employees or agents of the State of California or any county, city or port in California that complies with a routine road maintenance program that meets proper functioning habitat conditions as described further in paragraph (a)(21)(ii) of this section. NMFS' approval of state, city, county, or port programs that are equivalent to the ODOT program, or of any amendments, shall be a written approval by NMFS' Southwest Regional Administrator. Any jurisdiction desiring its routine road maintenance activities to be considered within this limit must first commit in writing to apply management practices that result in protections equivalent to or better than those provided by the ODOT Guide, detailing how it will assure adequate training, tracking, and reporting, and describing in detail any dust abatement practices it requests to be covered.

(ii) NMFS finds the routine road maintenance activities of the State of California, or any city, county, or port, to be consistent with the conservation of threatened salmonids' habitat when it contributes to the attainment and maintenance of properly functioning condition (PFC). NMFS defines PFC as the sustained presence of natural habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. Actions that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward PFC. Periodically, NMFS will evaluate an approved program for its effectiveness in maintaining and achieving habitat function that provides for conservation of the listed salmonids. Whenever warranted, NMFS will identify ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions, or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the threatened ESUs. If any jurisdiction within the limit does not make changes to respond adequately to the new information in the shortest amount of time feasible, but not longer than 1 year, NMFS will publish notification in the **Federal Register** announcing its intention to withdraw the limit so that take prohibitions would then apply to the program. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) prohibitions.

(iii) Prior to implementing any changes to a program within this limit the jurisdiction provides NMFS a copy of the proposed change for review and approval as to being within this limit.

(iv) Prior to approving any State of California, city, county, or port program as being within this limit, or approving any substantive change in a program as being within this limit, NMFS will publish notification in the **Federal Register** announcing the availability of the program or the draft changes for public review and comment. Such an announcement will provide for a comment period of not less than 30 days.

(v) Pesticide and herbicide spraying is not included within this limit, even if in accord with the ODOT guidance.

(22) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3) and (a)(20) through (a)(22) do not apply to municipal, residential, commercial, and industrial (MRCI) development (including redevelopment) activities provided that:

(i) Such development occurs pursuant to city, county, or regional government ordinances or plans that NMFS has determined are adequately protective of threatened species by maintaining or restoring properly functioning habitat conditions. NMFS approval or determinations about any MRCI development ordinances or plans shall be a written approval by the NMFS Southwest Regional Administrator. NMFS will apply the following 12 evaluation considerations when reviewing MRCI development ordinances or plans to assess whether they adequately conserve threatened salmonids by maintaining and restoring properly functioning habitat conditions:

(A) The MRCI development ordinance or plan ensures that development will avoid inappropriate areas such as unstable slopes, wetlands, areas of high habitat value, and similarly constrained sites.

(B) The MRCI development ordinance or plan adequately avoids stormwater discharge impacts to water quality and quantity or to the hydrograph of the watershed, including peak and base flows of perennial streams.

(C) The MRCI development ordinance or plan provides adequately protective riparian area management requirements to attain or maintain PFC around all rivers, estuaries, streams, lakes, deepwater habitats, and intermittent streams. Compensatory mitigation is provided, where necessary, to offset unavoidable damage to properly functioning habitat conditions caused by MRCI development impacts to riparian management areas.

(D) The MRCI development ordinance or plan avoids stream crossings by roads, utilities, and other linear development wherever possible, and, where crossings must be provided, minimizes impacts through choice of mode, sizing, and placement.

(E) The MRCI development ordinance or plan adequately protects historical stream meander patterns and channel

migration zones and avoids hardening of stream banks and shorelines.

(F) The MRCI development ordinance or plan adequately protects wetlands and wetland functions, including isolated wetlands.

(G) The MRCI development ordinance or plan adequately preserves the hydrologic capacity of permanent and intermittent streams to pass peak flows.

(H) The MRCI development ordinance or plan includes adequate provisions for landscaping with native vegetation to reduce need for watering and application of herbicides, pesticides, and fertilizer.

(I) The MRCI development ordinance or plan includes adequate provisions to prevent erosion and sediment run-off during construction.

(J) The MRCI development ordinance or plan ensures that water supply demands can be met without impacting flows needed for threatened salmonids either directly or through groundwater withdrawals and that any new water diversions are positioned and screened in a way that prevents injury or death of salmonids.

(K) The MRCI development ordinance or plan provides necessary enforcement, funding, reporting, and implementation mechanisms and formal plan evaluations at intervals that do not exceed 5 years.

(L) The MRCI development ordinance and plan complies with all other state and Federal environmental and natural resource laws and permits.

(ii) The city, county or regional government provides NMFS with annual reports regarding implementation and effectiveness of the ordinances, including: any water quality monitoring information the jurisdiction has available; aerial photography (or some other graphic display) of each MRCI development or MRCI expansion area at sufficient detail to demonstrate the width and vegetation condition of riparian set-backs; information to demonstrate the success of stormwater management and other conservation measures; and a summary of any flood damage, maintenance problems, or other issues.

(iii) NMFS finds the MRCI development activity to be consistent with the conservation of threatened salmonids' habitat when it contributes to the attainment and maintenance of properly functioning habitat conditions. For this purpose, NMFS defines properly functioning habitat conditions as the sustained presence of a watershed's habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. To contribute to the attainment and maintenance of properly functioning habitat conditions, activities that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward achieving properly functioning habitat conditions. Periodically, NMFS will evaluate an approved program for its effectiveness in maintaining and achieving habitat function that provides for conservation of the listed salmonids. Whenever warranted, NMFS will identify to the jurisdiction ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions, or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the threatened species. If any jurisdiction within the limit does not make changes to respond adequately to the new information in the shortest amount of time feasible, but not longer than 1 year, NMFS will publish notification in the **Federal Register** announcing its intention to withdraw the limit so that take prohibitions would then apply to the program. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) prohibitions.

(iv) Prior to approving any city, county, or regional government ordinances or plans as being within this limit, or approving any substantive change in an ordinance or plan as being within this limit, NMFS will publish notification in the **Federal Register** announcing the availability of the ordinance or plan or the draft changes for public review and comment. Such an announcement will provide for a comment period of not less than 30 days.

(c) *Affirmative Defense*. In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened species of salmonids listed in § 223.102 (a)(3), (a)(5) through (a)(10) and (a)(12) through (a)(22), any person claiming the benefit of any limit listed in paragraph (b) of this section or § 223.209(a) shall have a defense where the person can demonstrate that the limit is applicable and was in force, and that the person fully complied with the limit at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

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Appendix A to §223.203 - List of Guidance Documents

The following is a list of documents cited in the regulatory text. Copies of these documents may be obtained upon request from the Northwest or Southwest Regional Administrators (see Table 1 in § 600.502 of this title).

1. Oregon Department of Transportation (ODOT) Maintenance Management System Water Quality and Habitat Guide (July, 1999).
2. Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act.
3. Fish Screening Criteria for Anadromous Salmonids, National Marine Fisheries Service, Southwest Region, 1997.
3. Fish Screening Criteria for Anadromous Salmonids, National Marine Fisheries Service, Southwest Region, 1997.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 001128334-1312-02; I.D. 091401B]

RIN 0648-AN88

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to amend the regulations that implement the Atlantic Large Whale Take Reduction Plan (ALWTRP) to clarify its authority to temporarily restrict the use of lobster trap and gillnet fishing gear within defined areas to protect North Atlantic right whales, and to establish criteria and procedures for implementing a Dynamic Area Management (DAM) program in areas north of 40o N. latitude, in order to further reduce risk of entanglement of right whales by such gear.

DATES: This final rule is effective February 8, 2002.

ADDRESSES: Copies of the Environmental Assessment (EA), its Regulatory Impact Review (RIR), and the