

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 222**

[Docket No. 140725620-4620-01]

RIN 0648-BE43

**Endangered and Threatened Species: Proposed Regulations for the Designation of Experimental Populations Under the Endangered Species Act**

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

**ACTION:** Proposed rule and request for comments.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), propose regulations to amend the Code of Federal Regulations (CFR) to implement the Endangered Species Act (ESA) regarding experimental populations. The CFR would be amended to establish definitions and procedures for: establishing and/or designating certain populations of species otherwise listed as endangered or threatened as experimental populations; determining whether experimental populations are “essential” or “nonessential;” and promulgating appropriate protective measures for experimental populations. We seek public comment on this proposal.

**DATES:** To allow us adequate time to consider your comments on this proposed rule, they must be received no later than October 2, 2015.

**ADDRESSES:** You may submit comments on this proposed rule, identified by NOAA-NMFS-2014-0104, by any of the following methods:

- Electronic submission: Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2014-0104>.

2. Click the “Comment Now!” icon, complete the required fields.

3. Enter or attach your comments.

—or—

- Mail: Submit written comments to Dwayne Meadows, Endangered Species Division F/PR3, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

- Fax: (301) 713-4060.

*Instructions:* Comments sent by any other method, to any other address or

individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Dwayne Meadows, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, (301) 427-8403.

**SUPPLEMENTARY INFORMATION:****Background**

Congress amended the ESA in 1982 (Pub. L. 97-304). Among the changes made to the law at that time was the addition of a new section, 10(j), which established procedures for designating a specific population of a listed species as an “experimental population.” Prior to the 1982 amendments we, and the U.S. Fish and Wildlife Service (USFWS), which implements the ESA for terrestrial, freshwater, and some other species of wildlife and plants, were authorized to translocate a listed species into unoccupied portions of its range in order to aid in the recovery of the species. Significant opposition to translocation efforts often occurred, however, usually due to concerns over the rigid protections and prohibitions applicable to these translocated populations. ESA section 10(j) was designed to resolve these conflicts by providing new administrative flexibility for selectively applying the prohibitions of the ESA to experimental populations of listed species (see, *e.g.*, H.R. Rep. No. 567, 97th Cong. 2d Sess. 34 (1982)).

Section 10(j)(1) of the ESA (16 U.S.C. 1539(j)(1)) defines an experimental population as a population that has been authorized for release by the Secretary of Commerce (Secretary) or Secretary of Interior, but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species. The Secretary may authorize the release (and related transportation) of any experimental population (including eggs, propagules, or individuals) of a listed species outside of the species’ current range if the Secretary determines that the release

would “further the conservation of” the listed species (16 U.S.C. 1539(j)(2)(A)). Section 10(j)(2)(B) also requires that, before authorizing the release of an experimental population, the Secretary “identify” the experimental population by regulation and determine, based on the best available information, whether the experimental population is “essential to the continued existence” of the listed species (16 U.S.C. 1539(j)(2)(B)).

Section 10(j) of the ESA further establishes that an experimental population shall be treated as a threatened species under the ESA, with two exceptions that apply if an experimental population is determined to be not essential to the listed species’ continued existence (*i.e.*, is nonessential): (1) A nonessential experimental population (NEP) shall be treated as a species proposed for listing for purposes of section 7 of the ESA, except when the NEP occurs in an area within the National Wildlife Refuge System or the National Park System; and (2) critical habitat shall not be designated for a NEP. Treatment of an experimental population as “threatened” under the ESA enables the Secretary to issue regulations under the authority of section 4(d) of the ESA that he or she deems necessary and advisable to provide for the conservation of the species, which may be less restrictive than taking prohibitions applicable to endangered species under ESA section 9. For essential experimental populations, treatment as a threatened species also means ESA section 7(a)(2) applies, requiring each Federal agency to consult with us to insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of the experimental population or result in the destruction or adverse modification of the experimental population’s critical habitat. When a NEP occurs within the National Wildlife Refuge System or National Park System, it also must be treated as a threatened species for the purposes of ESA section 7, and section 7(a)(2) consultations are required. Under the first exception described above, however, the only provisions of section 7 that apply to a NEP outside of a National Wildlife Refuge or National Park are sections 7(a)(1) and 7(a)(4). Section 7(a)(1) requires that Federal agencies use their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of threatened and endangered species. Section 7(a)(4) requires Federal agencies to confer,

rather than consult, with us on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory in nature.

The provisions of section 10(j) of the ESA, as summarized above, introduce some terminology and concepts that are not otherwise used or defined in the ESA or in our current implementing regulations. These terms and concepts include: “further the conservation of,” “experimental population,” identifying an experimental population, and determining whether an experimental population is essential to the continued existence of the species. The USFWS promulgated regulations in 1984 (49 FR 33885, August 27, 1984) to guide their implementation of ESA section 10(j) (50 CFR 17.80 through 17.83), including provisions related to the terms and concepts noted above. The USFWS has designated dozens of experimental populations using those regulations (see 50 CFR 17.84 through 17.85). Although the USFWS regulations do not govern regulatory actions by NMFS, we have explicitly considered those regulations recently in the only three experimental population designations we have made: Middle Columbia River steelhead trout in the Deschutes River Basin (78 FR 2893, January 15, 2013); Central Valley spring-run Chinook Salmon in the San Joaquin River (78 FR 79622, December 31, 2013); and upper Columbia River spring-run Chinook Salmon in the Okanogan River Subbasin (79 FR 40004, July 11, 2014).

We believe that there is a need for us to have regulations laying out NMFS’s interpretation of and procedures for implementing ESA section 10(j), beyond what Congress has specifically directed, just as USFWS did in their section 10(j) implementing regulations. Now that we have gained some experience in designating experimental populations, we are in a position to develop our own implementing regulations for ESA section 10(j) that will help provide clarity and reduce uncertainty for the public about our future practices. In developing this proposal, we reviewed the ESA, legislative history of the 1982 ESA amendments, existing USFWS ESA section 10(j) regulations, public comments from the USFWS rulemaking to develop their ESA section 10(j) regulations, and relevant public comments from our own recent experimental population designations, and we consulted with USFWS staff. We then convened a group of NMFS staff with experience in ESA section 10(j) designations to help develop this proposal. In the following sections, we discuss our proposed regulations

section by section. We compare our proposal to the existing USFWS regulations to make clear the areas where our regulations will differ from the USFWS regulations. We strove to maintain consistency between our proposed regulations and the existing USFWS regulations as much as possible to provide for consistent implementation of ESA section 10(j) between the agencies, but we are proposing changes we believe are necessary to implement the statutory requirements in a manner appropriate for species under NMFS’ jurisdiction. NMFS’ intent when designating an experimental population under ESA section 10(j) is that the population will retain that designation until the donor species is delisted, or until, for some unforeseen reason, the experimental population fails, for example, due to lack of donor stock or problems with implementation.

### Definitions

Section 10(j) of the ESA states that an “experimental population” means “any population (including any offspring arising solely therefrom) authorized by the Secretary for release under [section 10(j)(2)], but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.” Where members of an experimental population overlap with natural populations of the same species, they are not deemed to be an experimental population. In its ESA section 10(j) regulations at 50 CFR 17.80, USFWS added that a population shall be treated as experimental only when the times of geographic separation are “reasonably predictable”, for example, with “fixed migration patterns, natural or man-made barriers.” They further stated that “[a] population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.” USFWS full definition of “experimental population” is:

“The term experimental population means an introduced and/or designated population (including any off-spring arising solely therefrom) that has been so designated in accordance with the procedures of this subpart but only when, and at such times as the population is wholly separate geographically from nonexperimental populations of the same species. Where part of an experimental population overlaps with natural populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will only be recognized outside the areas of overlap. Thus, such a

population shall be treated as experimental only when the times of geographic separation are reasonably predictable; e.g., fixed migration patterns, natural or man-made barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.”

We believe USFWS’s interpretation is applicable for situations in which complete temporal or physical barriers exist that ensure the geographic isolation of an experimental population for at least part of the year or life cycle of the individuals in the experimental population. Thus, we propose to adopt the same definition as USFWS for “experimental population,” with two small changes. First, we propose to substitute “any” for the word “an” in the first sentence of USFWS’s definition, to match the statutory language. Second, in the second sentence of their definition, USFWS uses the word “natural” to distinguish populations not designated as experimental from experimental populations. In our experience with our species, the term natural can be confusing when dealing with situations where some nonexperimental animals or populations derive from hatchery, aquaculture, or other captive breeding programs (e.g., such programs for salmonids). Therefore, we propose to substitute the word “nonexperimental” for “natural” in the definition to improve clarity for species under NMFS’s jurisdiction.

Therefore, we propose that an “experimental population” means “any introduced and/or designated population (including any off-spring arising solely therefrom) that has been so designated in accordance with the procedures of this subpart [of the regulations] but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species. Where part of an experimental population overlaps with nonexperimental populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will only be recognized outside the areas of overlap. Thus, such a population shall be treated as experimental only when the times of geographic separation are reasonably predictable; e.g., fixed migration patterns, natural or man-made barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.”

In order to implement ESA section 10(j) for any new experimental population, the ESA requires a determination as to whether or not the experimental population is essential to the continued existence of the species. ESA section 10(j), however, does not provide a definition of an “essential experimental population.” The USFWS defined an “essential experimental population” as an experimental population “whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild,” and stated that “[a]ll other experimental populations are to be classified as nonessential.” This definition closely follows language in the report of the Congressional Conference Committee when the 1982 ESA amendments were passed (see Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 97–835 (1982), at 15). Here again we believe the definition used by USFWS is helpful, is consistent with congressional intent and has worked well to date; and we recognize that adopting an identical definition for this fundamental term will provide consistency between NMFS and USFWS in the implementation of ESA section 10(j). We therefore propose to adopt the same definition as USFWS.

### Listing

The beginning of the “Listing” section of the USFWS section 10(j) regulations (50 CFR 17.81(a)) describes the experimental population designation process and specifies that it is the Secretary of the Interior who has the authority to designate and release an experimental population of a listed species under USFWS jurisdiction into suitable habitat outside of the species’ current natural range. In our proposed regulations, we similarly specify that it is the Secretary of Commerce who has the authority to designate and release an experimental population for species under our jurisdiction.

Consistent with the general intent of Congress with regard to the adoption of regulations and the specific requirement in ESA section 10(j)(2)(B) that an experimental population be identified by regulation, USFWS included a requirement that regulations designating experimental populations be adopted in accordance with 5 U.S.C. 553 (see 50 CFR 17.81(a)), which contains the informal rulemaking provisions of the Administrative Procedure Act. Therefore, we propose to adopt this provision as well.

### Current Range

The USFWS regulations at 50 CFR 17.81(a) provide for the designation of

an experimental population that has been or will be released into suitable habitat “outside the current natural range” of the species. However, ESA section 10(j)(2)(A) only uses the phrase “outside the current range” rather than “outside the current natural range” to identify the geographic area in which an experimental population is authorized for release. Further, there is no definition of “range”, “current range,” or “current natural range” in the ESA or 50 CFR parts 222 (NMFS ESA implementing regulations) or 424 (Joint NMFS/USFWS ESA implementing regulations). The USFWS ESA section 10(j) regulations at 50 CFR 17.80 through 17.83 also do not define “natural”. Based on our experience with our species, we do not believe addition of the word “natural” in the phrase “outside the current range” is necessary for our species. Therefore, we do not propose to include the word “natural” as a qualifier for the current range of a species.

The USFWS regulations at 50 CFR 17.81(a) also establish a limitation that release of an experimental population outside of the probable historic range of a species is allowed only if the Director of the USFWS makes a finding that “the primary habitat of the species has been unsuitably and irreversibly altered or destroyed.” This provision is not required under the ESA, and we believe it unnecessarily limits our ability to implement section 10(j) of the ESA in a manner that conserves our listed species. Therefore, we do not include this language in our proposed rule.

### Furthering the Conservation of the Species

As noted above, ESA section 10(j) requires that before authorizing the release of an experimental population outside the current range of the species, the Secretary must determine that such release will further the conservation of the species. The ESA provides little guidance on how to make such a determination. The ESA does define “conservation” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.” In their ESA section 10(j) regulations, USFWS identified four factors that, using the best scientific and commercial data available, they consider in making a finding that the experimental population release will further the conservation of the species: (1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or

propagules for introduction elsewhere; (2) The likelihood that any such experimental population will become established and survive in the foreseeable future; (3) The relative effects that establishment of an experimental population will have on the recovery of the species; and (4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area (50 CFR 17.81(b)).

The first factor USFWS considers is related to effects on the source populations of the organisms used to establish or enhance an experimental population. The remaining three factors they consider relate to the likelihood or extent the experimental population will survive, thrive, and contribute to the recovery and conservation of the species. These three factors focus on key steps in the implementation of an experimental population: (1) initial establishment, (2) the contribution of an established experimental population to the recovery of the listed species, and (3) the effect any nearby human activities might have on the experimental population and its potential contribution to the species recovery.

We have found that using the list of factors developed by USFWS gives the public adequate general information about how we plan to interpret the provision for “furthering the conservation of the species,” without introducing needless complexity. In rulemakings we have already completed to designate experimental populations (see above), we have provided detailed discussions of relevant species-specific information that we considered in order to make the “further the conservation of” finding based on these four factors, and we intend to continue this practice in future rulemakings. We also note the desirability of maintaining consistency between our regulations and those of USFWS. Therefore, we propose to adopt the same language and four factors as the USFWS regulations for making the determination that release of an experimental population will further the conservation of the species, with two small editorial revisions. First, we added a comma in the second sentence of paragraph (b) because it is appropriate grammatically. Second, the third factor in USFWS’s regulations says USFWS will consider the “relative effects” the experimental population will have on recovery of the species. In our experience with our species, we have found the term “relative” in this factor is superfluous, and we therefore

do not include it in our proposal. Neither of these changes is intended to make our proposed regulation functionally different than USFWS's corresponding regulation.

#### *Identification of the Experimental Population*

In their ESA section 10(j) implementing regulations, USFWS requires that any regulation designating an experimental population shall provide, among other things, “[a]ppropriate means to identify the experimental population, including, but not limited to, its actual or proposed location, actual or anticipated migration, number of specimens released or to be released, and other criteria appropriate to identify the experimental population(s)” (50 CFR 17.81(c)(1)). We believe these examples of means of identifying an experimental population are relevant and helpful, and we propose to include them in our regulations. However, we add the qualifier “if appropriate” to our proposal to make it clear that not all of the listed means will be relevant to each experimental population designation for our species. With the addition of the “if appropriate” qualifier, we also change the commas separating the examples to semicolons to more clearly separate them.

#### *Finding Whether the Experimental Population Is or Is Not Essential*

The USFWS ESA section 10(j) regulations at 50 CFR 17.81(c)(2) incorporate the requirement of the ESA that the designation of an experimental population include a determination as to whether the experimental population is essential to the continued existence of the listed species. The language is as follows: “(c) Any regulation promulgated under paragraph (a) of this section shall provide: . . . (2) A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild[.]” Based on our experience, this language is adequate to describe the statutory requirement, and we propose to adopt identical language. We have already discussed above that we will adopt the same definition as the USFWS regulations for “essential experimental population.”

#### *Protective Measures*

In 50 CFR 17.81(c)(3) of their ESA section 10(j) regulations, USFWS establishes that their rulemakings for designating experimental populations will also provide: “Management

restrictions, protective measures, or other special management concerns of that population, which may include, but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from natural populations[.]” This provision addresses the linkage between designating experimental populations under section 10(j) of the ESA and implementing companion protective regulations under ESA section 4(d). The language also specifies actions needed to successfully implement an experimental population release. We agree that it is helpful to clarify the relationship between sections 4(d) and 10(j) of the ESA and the intent of Congress and the agency in implementing ESA section 10(j). Based on our experience with our species, however, we believe additional clarifying language in this section is appropriate for our species.

We believe this section should make it clear that management restrictions, protective measures, and other special management concerns would be applied to an experimental population *as appropriate* to the specific situation as not all of these measures would be applicable for all of our species. We therefore add this clarification to our proposed regulatory language. Second, we again propose using the word “nonexperimental,” instead of the word “natural,” to describe nonexperimental populations, as discussed above. Third, we add language to further clarify the distinction between regulations adopted under the provisions of ESA section 4(d) and those adopted under ESA section 10(j). Finally, we add a comma after “include,” because it is appropriate grammatically to separate the “but are not limited to” clause. These clarifications are not intended to make our proposed regulations functionally differ from those of USFWS. Therefore, our proposed regulatory language is: “Management restrictions, protective measures, or other special management concerns of that population, as appropriate, which may include, but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from nonexperimental populations and protective regulations established pursuant to section 4(d) of the Act.”

#### *Periodic Review*

50 CFR 17.81(c)(4) of the USFWS section 10(j) regulations requires that any regulation designating an experimental population shall provide a process for periodic review and evaluation of the success or failure of the release and the effect of the release

on the conservation and recovery of the species. We agree with this provision to help ensure the success of experimental population designations and to formally and publicly review these designations. We note that the ESA requires that we conduct a status review every 5 years for each listed species under our jurisdiction. We intend to use the 5 year review process for tracking the status of experimental populations and ensuring that experimental population designations further the conservation of the species as expected.

#### *Permits To Allow Establishment and Maintenance of an Experimental Population*

In their ESA section 10(j) regulations, USFWS notes that they may issue a permit under section 10(a)(1)(A) of the ESA, if appropriate under the standards set out in subsections 10(d) and (j) of the ESA, to allow acts necessary for the establishment and maintenance of an experimental population. This provision highlights the intent of Congress that experimental populations be implemented through provisions of the ESA and provides the relevant mechanism by which this would normally occur. Our implementing practices are similar to those of USFWS, and we therefore propose to include this provision in our regulations, with some edits solely to improve clarity and streamline the provision. In the USFWS regulations at 50 CFR 17.81, this provision is an un-numbered sentence as part of paragraph (4) under subparagraph (b), which otherwise deals with the factors to consider in making a determination that an experimental population will further the conservation of the species. In order to emphasize the provision as a stand-alone provision and to make it easier to directly cite, in our proposed rule we place this provision in its own numbered subparagraph (d). We also propose to not include the following phrase from the USFWS regulations: “under the standards set out in subsections 10(d) and (j) of the ESA,” because the phrase is unnecessary. Under the provisions of the statute, any permit for an experimental population issued under ESA section 10(a)(1)(A) would have to meet the standards set out in those subsections, so it is not necessary to explicitly list the subsections in the regulations. Our proposed regulations will thus read, “The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate, to allow acts necessary for the establishment and maintenance of an experimental population.”

### *Stakeholder Consultations*

In their regulations implementing ESA section 10(j), USFWS establishes that, in the process of developing and implementing experimental population rules, they will consult with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners, including through public meetings, when appropriate (50 CFR 17.81(d)). USFWS further establishes in this paragraph that, to the maximum extent practicable, any regulation promulgated pursuant to this section shall represent an agreement between USFWS, the affected State and Federal agencies, and persons holding any interest in land which may be affected by the establishment of an experimental population. We strongly believe that consultations with affected parties are critical to the success of experimental population designations and propose to adopt this language in our regulations. We believe that our trust responsibilities with regard to tribal governments warrant explicitly including consultation with tribes in our ESA section 10(j) regulations. We have therefore listed tribal governments in our proposal. This addition is not intended to suggest that USFWS's regulations do not allow for consultation with tribal governments, and, in fact, USFWS has consulted with tribal governments on ESA section 10(j) designations. Therefore, listing tribal governments in our regulations would not make our provision functionally differ from the corresponding provision in USFWS's regulations. We would just like to explicitly list tribal governments in our regulations based on our experience with our species. In fact, tribal governments have been integral in the development of experimental populations we have already designated (see above).

We propose one other addition in this section of our regulations. The USFWS regulations at 50 CR 17.81(d) identify persons holding an interest in land which may be affected by an experimental population designation as a stakeholder group to be consulted. Based on our experience and work in aquatic habitat and the fact that all of our species are aquatic species, we believe the addition of persons holding interests in water (*i.e.*, aquatic habitat), which may be affected by an experimental population designation, as an additional stakeholder group is warranted and have included that addition in this proposed rule.

### *Location of Experimental Population Regulations in the Code of Federal Regulations*

In their ESA section 10(j) regulations, USFWS provides that special rules relating to a designation of an experimental population will be published in specific sections of the CFR as appropriate, and that experimental populations will be separately listed in the lists of threatened and endangered plants and animals in the CFR as appropriate. In our proposed regulations, we similarly state that our regulations relating to specific experimental populations will continue to be published in Title 50, part 223 of the CFR, with our regulations related to threatened species, and that our designated experimental populations also will be separately listed in the lists of threatened and endangered plants and animals in the CFR as appropriate. We note that the regulations relating to listing and designation of an experimental population that are being proposed in this rulemaking would be published in Title 50, part 222 of the CFR, with our other ESA implementing regulations.

### *Critical Habitat for Experimental Populations Determined To Be Essential*

The Secretary may designate critical habitat, as defined in section (3)(5)(A) of the ESA, for an experimental population determined to be essential (but not for populations determined to be nonessential). In their ESA section 10(j) regulations, USFWS emphasizes that the designation of critical habitat for an essential experimental population will be made in accordance with section 4 of the ESA (50 CFR 17.81(f)). We agree that emphasizing the provisions of ESA section 4 in the ESA section 10(j) regulations is useful, and we therefore propose to include the same language in our regulations. In our proposed regulations, we made two changes from the language in 50 CFR 17.81(f), however. First, the USFWS regulations say: "No designation of critical habitat will be made for nonessential populations." We add the word "experimental" after "nonessential," to emphasize that the nonessential populations are, in fact, ESA section 10(j) experimental populations.

Second, in their regulations, USFWS adds additional language regarding critical habitat for experimental populations (50 CFR 17.81(f)). The language USFWS uses is: "In those situations where a portion or all of an essential experimental population overlaps with a natural population of

the species during certain periods of the year, no critical habitat will be designated for the area of overlap, unless implemented as a revision to critical habitat of the natural population for reasons unrelated to the overlap itself." This language is not included in the ESA, and in our experience with our species this language has been unnecessary to understand and implement the relevant provisions of the ESA. We therefore do not include this language in our proposed rule.

### **Prohibitions**

The USFWS ESA section 10(j) regulations at 50 CFR 17.82 reiterate the ESA section 10(j) provision that each member of an experimental population shall be treated as if it were listed as a threatened species and add that this applies for purposes of establishing protective regulations under section 4(d) of the ESA. Based on our experience with our species, even with the language in 50 CFR 17.82, stakeholders still have questions regarding the relationship between ESA sections 10(j) and 4(d). Therefore, we propose modified language for our regulations to clarify and explain in more detail the relationship between these two sections. This modified language is not intended to function differently or lead to different outcomes than the USFWS language, but is only intended to provide greater explanation about the relationship between ESA sections 10(j) and 4(d). The first sentence would read the same as 50 CFR 17.82: "Any population determined by the Secretary to be an experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act with respect to such population." However, we propose to replace the second sentence of the USFWS regulations at 50 CFR 17.82 ("The Special rules (protective regulations) adopted for an experimental population under § 17.81 will contain applicable prohibitions, as appropriate, and exceptions for that population.") with the following text in our regulations: "Accordingly, when designating, or revising, an experimental population under section 10(j) of the Act, the Secretary may also exercise his or her authority under section 4(d) of the Act to include protective regulations necessary and advisable to provide for the conservation of such species as part of the special rule for the experimental population. Any protective regulations applicable to the species from which the experimental population was sourced do not apply to the experimental

population unless specifically included in the special rule for the experimental population.”

### Interagency Cooperation

In their regulations implementing ESA section 10(j), USFWS includes a section on provisions related to interagency cooperation under section 7 of the ESA (50 CFR 17.83) that describes what types of analyses are conducted under ESA section 7 with respect to experimental populations. Much of this section reiterates language in section 10(j) of the ESA itself (see ESA section 10(j)(2)(C)). However, USFWS does include an additional provision that any biological opinion prepared pursuant to section 7(b) of the ESA and any agency determination made pursuant to section 7(a) of the ESA “shall consider any experimental and nonexperimental populations to constitute a single listed species for the purposes of conducting the analyses under such sections.”

We propose to adopt the language used by USFWS in 50 CFR 17.83(a) and (b) in our own regulations, with the addition of citations to the relevant parts of ESA section 7 that are referenced in each subparagraph (*i.e.*, section 7(a)(4) in subparagraph (a) and section 7(a)(1) in subparagraph (b)) for ease of reference, to direct the reader to the applicable part of the ESA, and with the addition of the phrase “of the Act” in paragraph (a) to explicitly specify that the regulation refers to section 7 of the statute. However, we do not propose to include the additional USFWS provision quoted above related to ESA section 7, as section 10(j) of the ESA and our proposed regulations already describe how ESA section 7 is to be implemented with respect to experimental populations, and based on our experience, this additional language is unnecessary for our species. None of these differences are intended to cause our regulation to functionally differ from USFWS’s corresponding regulation.

### Relationship to Existing Experimental Populations

We have already designated three experimental populations of salmonids (see above). We do not intend the proposed implementing regulations herein to require us to review or revise those designations. We do not believe the implementing regulations we are proposing in this proposed rule would meaningfully alter the findings we came to in our prior designations and rulemakings.

### Request for Information

We intend that any rule finally adopted be as effective as possible in implementing the ESA. Any final regulation based on this proposal will consider information and recommendations timely submitted from all interested parties. Therefore, we solicit comments, information, and recommendations on this proposed regulation from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. Comments should be as specific as possible and refer to sections and paragraphs involved. Specifically we request information and comments on:

- (1) The terms we define above and in the proposed regulations, and
- (2) The proposed listing and experimental population designation process and considerations.

This rulemaking does not materially modify our current methods and procedures for designating experimental populations.

You may submit your information concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

### Information Quality Act and Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review pursuant to the Information Quality Act (Section 515 of Pub. L. 106–554), which was published in the **Federal Register** on January 14, 2005 (70 FR 2664). The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. There are no documents supporting this proposed rule that meet this criteria.

### Classification

#### *Executive Order 12866*

This proposed rule has been determined to be not significant under E.O. 12866.

#### *Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 801 *et seq.*), whenever a Federal agency is required to publish a notification of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

The Chief Counsel for Regulation, Department of Commerce, will certify to the Chief Counsel for Advocacy at the Small Business Administration that this proposed rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

The proposed regulations clarify how we implement the provisions of section 10(j) of the ESA. The proposed regulations do not materially alter our current practices. The proposed regulations do not expand our reach. We are the only entity that is directly affected by this proposed rule because we are the only entity that can designate experimental populations of threatened or endangered species under NMFS jurisdiction. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this proposed rule. Therefore, the only potential effect on any external entities large or small would likely be positive, through reducing any uncertainty on the part of the public about our process for designating experimental populations by formalizing our practices and procedures.

*Executive Order 12630*

In accordance with E.O. 12630, this proposed rule does not have significant takings implications. A takings implication assessment is not required because this rulemaking: (1) Would not effectively compel a property owner to have the government physically invade property, and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This rulemaking would substantially advance a legitimate government interest (conservation and recovery of listed species) and would not present a barrier to all reasonable and expected beneficial use of private property.

*Executive Order 13132*

In accordance with E.O. 13132, we have determined that this rule does not have federalism implications as that term is defined in E.O. 13132.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

The Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), require that Federal agencies obtain approval from OMB before collecting information from the public. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. This proposed rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

*National Environmental Policy Act*

We have analyzed this proposed rule in accordance with the criteria of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and NOAA's Administrative Order regarding NEPA compliance (NAO 216–6 (May 20, 1999)).

We have determined that this proposed rule is categorically excluded from NEPA documentation requirements, consistent with 40 CFR 1508.4. We have determined that this action satisfies the standards for reliance upon a categorical exclusion under NOAA Administrative Order (NAO) 216–6. Specifically, this action fits within the categorical exclusion for “policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.” NAO 216–6, section 6.03c.3(i). This action would not trigger an

exception precluding reliance on the categorical exclusion because it does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats (*Id.* sec. 5.05c). As such, it is categorically excluded from the need to prepare an Environmental Assessment. In addition, we find that because this proposed rule will not result in any effects to the physical environment, much less any adverse effects, there would be no need to prepare an Environmental Assessment even aside from consideration of the categorical exclusion. See, e.g., *Oceana, Inc. v. Bryson*, 940 F. Supp. 2d 1029 (N.D. Cal. April 12, 2013). Issuance of this proposed rule does not alter the legal and regulatory status quo in such a way as to create any environmental effects. See, e.g., *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d. 8 (D.D.C. 2007).

*Government-to-Government Relationship With Tribes (E.O. 13175)*

E.O. 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. If we issue a regulation with tribal implications (defined as having a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes), we must consult with those governments or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments.

We invite all interested tribes to discuss the proposed rule with us at their convenience should they choose to have a government-to-government consultation.

*Energy Supply, Distribution, or Use (E.O. 13211)*

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates

or is expected to lead to the promulgation of a final rule or regulation that (1) is a significant regulatory action under E.O. 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy.

This proposed rule has been determined not to be a significant regulatory action under E.O. 12866 and is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

**References Cited**

A complete list of all references cited in this rule is available upon request (see **FOR FURTHER INFORMATION CONTACT**).

**List of Subjects in 50 CFR Part 222**

Endangered and threatened species.

Dated: July 24, 2015.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs,*

National Marine Fisheries Service.

For the reasons set out in the preamble, part 222, of chapter II, title 50 of the Code of Federal Regulations, is proposed to be amended as follows:

**PART 222—GENERAL ENDANGERED AND THREATENED MARINE SPECIES**

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

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

■ 2. Add subpart E to part 222 to read as follows:

**Subpart E—Experimental Populations**

Sec.

222.501 Definitions.

222.502 Listing.

222.503 Prohibitions.

222.504 Interagency cooperation.

**Subpart E—Experimental Populations****§ 222.501 Definitions.**

(a) The term *experimental population* means any introduced and/or designated population (including any off-spring arising solely therefrom) that has been so designated in accordance with the procedures of this subpart but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species. Where part of an experimental population overlaps with nonexperimental populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be

recognized as such while in the area of overlap. That is, experimental status will only be recognized outside the areas of overlap. Thus, such a population shall be treated as experimental only when the times of geographic separation are reasonably predictable; *e.g.*, fixed migration patterns, natural or man-made barriers. A population is not treated as experimental if total separation will occur solely as a result of random and unpredictable events.

(b) The term *essential experimental population* means an experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild. All other experimental populations are to be classified as *nonessential*.

#### § 222.502 Listing.

(a) The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable habitat outside the species' current range, subject to the further conditions specified in this section, *provided*, that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

(b) Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Secretary must find by regulation that such release will further the conservation of the species. In making such a finding, the Secretary shall utilize the best scientific and commercial data available to consider:

(1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;

(2) The likelihood that any such experimental population will become established and survive in the foreseeable future;

(3) The effects that establishment of an experimental population will have on the recovery of the species; and

(4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area.

(c) Any regulation promulgated under paragraph (a) of this section shall provide:

(1) Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location; actual or anticipated migration; number of specimens released or to be released, if appropriate; and other criteria appropriate to identify the experimental population(s);

(2) A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild;

(3) Management restrictions, protective measures, or other special management concerns of that population, as appropriate, which may include, but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from nonexperimental populations and protective regulations established pursuant to section 4(d) of the Act; and

(4) A process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

(d) The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate, to allow acts necessary for the establishment and maintenance of an experimental population.

(e) The National Marine Fisheries Service shall consult with appropriate State fish and wildlife agencies, affected tribal governments, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the National Marine Fisheries Service, the affected State and Federal agencies and tribal governments, and persons holding any interest in land or water which may be affected by the establishment of an experimental population.

(f) Any population of an endangered species or a threatened species determined by the Secretary to be an experimental population in accordance with this subpart shall be identified by special rule in part 223 as appropriate and separately listed in 50 CFR 17.11(h) (wildlife) or 50 CFR 17.12(h) (plants) as appropriate.

(g) The Secretary may designate critical habitat as defined in section (3)(5)(A) of the Act for an essential experimental population as determined pursuant to paragraph (c)(2) of this section. Any designation of critical habitat for an essential experimental population will be made in accordance with section 4 of the Act. No designation of critical habitat will be made for nonessential experimental populations.

#### § 222.503 Prohibitions.

(a) Any population determined by the Secretary to be an experimental population shall be treated as if it were listed as a threatened species for purposes of establishing protective regulations under section 4(d) of the Act with respect to such population.

(b) Accordingly, when designating, or revising, an experimental population under section 10(j) of the Act, the Secretary may also exercise his or her authority under section 4(d) of the Act to include protective regulations necessary and advisable to provide for the conservation of such species as part of the special rule for the experimental population. Any protective regulations applicable to the species from which the experimental population was sourced do not apply to the experimental population unless specifically included in the special rule for the experimental population.

#### § 222.504 Interagency cooperation.

(a) Any experimental population designated for a listed species determined pursuant to § 222.502(c)(2) not to be essential to the survival of that species and not occurring within the National Park System or the National Wildlife Refuge System, shall be treated for purposes of section 7 of the Act (other than this paragraph (a) thereof) as a species proposed to be listed under the Act as a threatened species, and the provisions of section 7(a)(4) of the Act shall apply.

(b) Any experimental population designated for a listed species that either has been determined pursuant to § 222.502(c)(2) to be essential to the survival of that species, or occurs within the National Park System or the National Wildlife Refuge System as now or hereafter constituted, shall be treated for purposes of section 7 of the Act as a threatened species, and the provisions of section 7(a)(2) of the Act shall apply.

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