

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17**

[FWS–R1–ES–2009–0050; 92220–1113–0000–FY09–C3]

RIN 1018–AW60

Endangered and Threatened Wildlife and Plants; Establishment of a Nonessential Experimental Population of Bull Trout in the Clackamas River Subbasin, Oregon

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), in cooperation with the U.S. Forest Service (USFS) and the State of Oregon, propose to establish a nonessential experimental population (NEP) of bull trout (*Salvelinus confluentus*) in the Clackamas River and its tributaries in Clackamas County, Oregon, under section 10(j) of the Endangered Species Act of 1973, as amended (Act). The geographic boundaries of the NEP would include the entire Clackamas River subbasin as well as the mainstem Willamette River, from Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel. The best available data indicate that reintroduction of bull trout to the Clackamas subbasin is biologically feasible and will promote the conservation of the species. We are seeking comments on this proposal and on our draft environmental assessment (EA), prepared pursuant to the National Environmental Policy Act of 1969, as amended (NEPA), which analyzes the potential environmental impacts associated with the proposed reintroduction.

DATES: To ensure that we are able to consider your comments on this proposed rule, they must be received on or before February 8, 2010. We must receive requests for public hearings in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 25, 2010.

Comments on the EA must be received on or before: February 8, 2010.

ADDRESSES: You may submit comments on the proposed rule by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS–R1–ES–2009–0050.

- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R1–ES–2009–0050; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on the proposed rule on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments Procedures section below for more information).

You may submit comments on the draft EA by one of the following methods:

- *E-mail to:* clackamasbulltroutEA@fws.gov.
- *U.S. mail or hand-delivery:* Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE 98th Ave., Suite 100, Portland, OR 97266

Please see the draft EA for additional information regarding commenting on that document.

FOR FURTHER INFORMATION CONTACT:

Chris Allen, Oregon Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2600 SE 98th Ave., Suite 100, Portland, OR 97266 (telephone 503–231–6179, facsimile 503–231–6195). If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:**Public Comment Procedures**

To ensure that any final action resulting from this proposed rule will be as accurate and as effective as possible, we request that you send relevant information for our consideration. Comments on the proposed rule that will be most useful are those that are supported by data or peer-reviewed studies and those that include citations to, and analyses of, applicable laws and regulations. Please make your comments as specific as possible and explain the basis for them. In addition, please include sufficient information with your comments to allow us to authenticate any scientific or commercial data you reference or provide. In particular, we seek comments concerning the following:

- (1) The geographic boundary for the NEP;
- (2) The suitability of using Metolius River subbasin bull trout as donor stock; and,
- (3) Effects of the reintroduction on other native species and the ecosystem.

Prior to issuing a final rule on this proposed action, we will take into consideration comments and additional information we receive. Such information may lead to a final rule that

differs from this proposal. All comments and recommendations, including names and addresses, will become part of the administrative record.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the Web site. Please note that comments submitted to this Web site are not immediately viewable. When you submit a comment, the system receives it immediately. However, the comment will not be publically viewable until we post it, which might not occur until several days after submission.

If you mail or hand-deliver a hardcopy comment that includes personal information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. To ensure that the electronic docket for this rulemaking is complete and all comments we receive are publically available, we will post all hardcopy comments on <http://www.regulations.gov>.

In addition, comments and materials we receive, as well as supporting documentation used in preparing this proposed rule will be available for public inspection in two ways:

(1) You can view them on <http://www.regulations.gov>. In the Search Documents box, enter FWS–R1–ES–2009–0050, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, select the type of documents you want to view under the Document Type heading.

(2) You can make an appointment, during normal business hours, to view the comments and materials in person at the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Public Hearings

The Act provides for public hearings on this proposed rule, if requested. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by the date shown in the **DATES** section.

Background

Statutory and Regulatory Framework

The 1982 amendments to the Act (16 U.S.C. 1531 *et seq.*) included the addition of section 10(j) which allows for the designation of reintroduced populations of listed species as “experimental populations.” Under section 10(j) of the Act and our regulations at 50 CFR 17.81, the Service may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable natural habitat outside the species’ current natural range (but within its probable historic range, absent a finding by the Director of the Service in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed).

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 Service must find by regulation that such release will further the conservation of the species. In making such a finding the Service uses 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 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.

Furthermore, as set forth in 50 CFR 17.81(c), all regulations designating experimental populations under section 10(j) must 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, 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, which may include but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from natural populations; 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.

Under 50 CFR 17.81(d), the Service must consult with appropriate State fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. To the maximum extent practicable, 10(j) rules represent an agreement between the Fish and Wildlife Service, the affected State and Federal agencies, and persons holding any interest in land which may be affected by the establishment of an experimental population.

Under 50 CFR 17.81(f), the Secretary may designate critical habitat as defined in section 3(5)(A) of the Act for an essential experimental population. No designation of critical habitat will be made for nonessential populations. 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.

Any population determined by the Secretary to be an experimental population will be treated as if it were listed as a threatened species for purposes of establishing protective regulations with respect to that population. The protective regulations adopted for an experimental population will contain applicable prohibitions, as appropriate and exceptions for that population.

Any experimental population designated for a listed species (1) determined not to be essential to the survival of that species and (2) not occurring within the National Park System or the National Wildlife Refuge System, will be treated for purposes of section 7 (other than subsection (a)(1)

thereof) as a species proposed to be listed under the Act as a threatened species.

Any experimental population designated for a listed species that either (1) has been determined to be essential to the survival of that species, or (2) occurs within the National Park System or the National Wildlife Refuge System as now or hereafter constituted, will be treated for purposes of section 7 of the Act as a threatened species. Notwithstanding the foregoing, any biological opinion prepared pursuant to section 7(b) of the Act and any agency determination made pursuant to section 7(a) of the Act will consider any experimental and nonexperimental populations to constitute a single listed species for the purposes of conducting the analyses under such sections.

Biological Information

The bull trout is a large native char found in the coastal and intermountain west of North America and is one of five species in the genus *Salvelinus* found in the United States (Bond 1992, p. 1). Bull trout have a slightly forked tail; yellow or cream-colored spots on their back; yellow, orange, or pink spots on their side; and no black spots on their dorsal fin. Migratory adults commonly reach 24 inches (61 centimeters) or more (Goetz 1989, pp. 29–30; Pratt 1992, p. 8). The largest known specimen weighed 32 pounds (14.5 kilograms) (Simpson and Wallace 1982, p. 95).

The historical range of bull trout in the coterminous United States extended from the Canadian border south to the Jarbidge River in northern Nevada and from the Pacific Ocean inland to the Clark Fork River in western Montana and the Little Lost River in central Idaho. Genetic analysis has shown that bull trout in the coterminous United States are divided into three major genetically differentiated (*e.g.*, evolutionary) groups or lineages (Spruell *et al.* 2003, p. 21). These lineages are characterized as: (1) “Coastal,” including the Deschutes River and all of the Columbia River drainage downstream (including the Willamette and Clackamas rivers), as well as most coastal streams in Washington, Oregon, and British Columbia; (2) “Snake River,” which includes the John Day, Umatilla, and Walla Walla rivers in Oregon and Washington, as well as major river basins in central Idaho; and (3) “Upper Columbia River,” which includes major river basins in Montana, Washington, and northern Idaho. The existence of a “coastal” evolutionary lineage is further supported by the work of Taylor *et al.* (1999, p. 1162) and a recent range-wide

bull trout genetic analysis by the Service (USFWS 2008, unpublished data).

Bull trout exhibit both resident and migratory life history strategies, although bull trout in the "coastal" lineage are largely migratory. Migratory bull trout spawn in tributary streams where juvenile fish rear for 1 to 4 years before migrating to either a lake (adfluvial form), river (fluvial form) (Fraley and Shepard 1989, pp. 138–9; Goetz 1989, p. 24), or saltwater (anadromous form) to rear as subadults and to live as adults (Cavender 1978, p. 139; McPhail and Baxter 1996, p. 14; Washington Department of Fish and Wildlife (WDFW) *et al.* 1998, p. 2). Bull trout normally reach sexual maturity between age 4 and 7 and may live longer than 12 years. They are iteroparous (spawning more than once in a lifetime). Both consecutive-year and alternate-year spawning have been reported (Fraley and Shepard 1989, p. 135). Preferred habitat consists of cold water, complex cover, stable channels, loose and clean gravel, and migratory corridors (Fraley and Shepard 1989, pp. 137–9; Goetz, 1989, pp. 16–25).

The current distribution of bull trout in the lower Columbia River portion of the "coastal" lineage includes populations in the Deschutes, Hood, Lewis, Klickitat, and upper Willamette rivers. Throughout much of its historical range, the decline of bull trout has been attributed to habitat degradation and fragmentation, the blockage of migratory corridors, poor water quality, angler harvest, entrainment (the incidental withdrawal of fish and other aquatic organisms in water diverted out-of-stream for various purposes) into diversion channels and dams, and introduced nonnative species. Specific land and water management activities that may negatively impact bull trout populations and habitat, if not implemented in accordance with best management practices, include the operation of dams and other diversion structures, forest management practices, livestock grazing, agriculture, agricultural diversions, road construction and maintenance, mining, and urban and rural development (Beschta *et al.* 1987, pp. 221–224; Chamberlain *et al.* 1991, pp. 199–200; Furniss *et al.* 1991, pp. 297–302; Meehan and Bjornn 1991, pp. 483–517; Nehlsen *et al.* 1991, p. 16; Craig and Wissmar 1993, p. 18; Frissell 1993, p. 351; McIntosh *et al.* 1994, pp. 47–48; Wissmar *et al.* 1994, p. 28; Montana Bull Trout Scientific Group (MBTSG) 1995a [p. 14], 1995b [p. 10], 1995c [p. 13], 1995d [p. 21], 1995e [p. 13], 1996a [p. 12], 1996b [p. 9], 1996c [p. 12], 1996d [p. 11], 1996e [p. 12], 1996f [p. 10];

Light *et al.* 1996, pp. 9–11; U.S. Department of Agriculture (USDA) and U.S. Department of the Interior (USDI) 1995 [pp. 70–1], 1996 [pp. 106–107, 111], 1997 [pp. 132–154]).

The historical distribution of bull trout in the Clackamas River subbasin likely extended from the lower Clackamas River, upstream to headwater spawning and rearing areas (Shively *et al.* 2007, Ch. 1, pp. 10–12). It is possible that bull trout from the Clackamas River migrated to the upper Willamette River above Willamette Falls or to lower Columbia River tributaries (Zimmerman 1999, p. 17); however, it is unlikely that bull trout historically occupied habitat upstream of waterfall barriers known to impede upstream movement of anadromous salmon and steelhead species in the Clackamas River.

The last documented bull trout observation in the Clackamas River subbasin was in 1963 (Stout 1963, p. 97). Due to geographic distance to extant bull trout populations in other subbasins, natural recolonization of the Clackamas River subbasin is extremely unlikely without human assistance (USFWS 2002, Ch. 5, p. 9). Extirpation was likely caused by many of the same factors that led to the decline in the species across its range, including migration barriers from hydroelectric and diversion dams, direct and incidental harvest in sport and commercial fisheries, targeted eradication through bounty fisheries (currently known as sport reward programs), and habitat and water quality degradation from forest management and agricultural activities not in accordance with best management practices (Shively *et al.* 2007, Ch. 1, pp. 18–22).

Relationship of the Proposed Experimental Population To Recovery Efforts

On November 1, 1999, we published a final rule to list bull trout within the coterminous United States as threatened under the Act (64 FR 58910). This final rule served to consolidate the five separate distinct population segment (DPS) listings into one coterminous U.S. DPS listing. We published a draft recovery plan for the Columbia River, Klamath River, and St. Mary-Belly River segments on November 29, 2002 (67 FR 71439) and the Coastal Puget Sound and Jarbidge River segments on July 1, 2004 (69 FR 39950 and 69 FR 39951, respectively). The draft recovery objectives are:

(1) Maintain current distribution of bull trout within core areas as described in recovery unit chapters and restore

distribution where recommended in recovery unit chapters;

(2) Maintain stable or increasing trend in abundance of bull trout;

(3) Restore and maintain suitable habitat conditions for all bull trout life history stages and strategies; and

(4) Conserve genetic diversity and provide opportunity for genetic exchange.

Recovery criteria specific to the Willamette River Recovery Unit (USFWS 2002, Ch. 5 pp. 7–8) follow:

(1) Distribution criteria will be met when bull trout are distributed among five or more local populations in the recovery unit: four in the Upper Willamette River core area and one in the Clackamas River core habitat.

(2) Abundance criteria will be met when an estimated abundance of adult bull trout is from 900 to 1,500 or more individuals in the Willamette River Recovery Unit, distributed in each core area as follows: 600 to 1,000 in the Upper Willamette core area and 300 to 500 in the Clackamas River core habitat.

(3) Trend criteria will be met when adult bull trout exhibit stable or increasing trends in abundance in the Willamette River Recovery Unit, based on a minimum of 10 years of monitoring data.

(4) Connectivity criteria will be met when migratory forms are present in all local populations and when intact migratory corridors among all local populations in core areas provide opportunity for genetic exchange and diversity.

Establishment of an experimental population of bull trout in the Clackamas River will help to achieve distribution in the Clackamas River core habitat (recovery criterion 1 and recovery objective 1) and will increase abundance of adult bull trout in the Willamette River Recovery Unit (recovery criterion 2 and recovery objective 2).

Is the Proposed Experimental Population Essential or Nonessential?

When we establish experimental populations under section 10(j) of the Act we must determine whether such a population is essential to the continued existence of the species in the wild. Although the experimental population will contribute to the recovery of the bull trout in the Willamette basin, it is not essential to the continued existence of the species in the wild. Bull trout populations are broadly distributed, occurring in 121 core areas in 5 western States, and the species' continued existence is dependent upon conserving a number of interacting populations that are well distributed throughout its

range. Conservation of a single, local population not possessing markedly divergent genetic components or adaptive traits and not occurring in a unique or unusual ecological setting or geographical context may contribute to the recovery of the species, but such individual, local populations by themselves are not essential to the species' continued existence. Because the donor stock for the reintroduction will come from a wild population of bull trout, the reintroduced population will not possess markedly divergent genetic components or adaptive traits. Furthermore, the Clackamas River is not a unique or unusual ecological setting or geographical context for bull trout. Bull trout occur in other portions of the Willamette River basin and in other nearby tributaries to the Columbia River. Therefore, as required by 50 CFR 17.81(c)(2), we find that the proposed experimental population is not essential to the continued existence of the species in the wild, and we propose to designate the experimental population in the Clackamas River as a nonessential experimental population (NEP).

Location of Proposed NEP

The NEP area would include the entire Clackamas River subbasin as well as the mainstem Willamette River, from Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel. The Willamette River's confluence with the Columbia River occurs at river mile (RM) 101, near the City of Portland. A secondary channel of the Willamette River, named the Multnomah Channel, branches off the Willamette River approximately 3 river miles (5 river kilometers (km)) upstream from its confluence with the Columbia River. This secondary channel runs approximately 20 river miles (32 river km) along the west side of Sauvie Island before joining the Columbia River at RM 86 near the town of St. Helens. The NEP boundary extends down the Multnomah Channel to its confluence with the Columbia River, as well as the mainstem Willamette River, from Willamette Falls to its confluence with the Columbia River.

Under this proposed rule, the Service would release bull trout into areas of suitable spawning and rearing habitat in the Clackamas River subbasin. The portion of the subbasin currently containing these areas is limited to the mainstem river and its tributaries in the upper headwaters of the subbasin, upstream of the Collawash River confluence. This portion of the subbasin, referred to as the upper Clackamas River subbasin, contains a

total of 70.1 river miles (112.8 river km) of suitable spawning and rearing habitat. The amount and characteristics of habitat in the Clackamas River subbasin compare favorably to other river systems in the lower Columbia River with extant bull trout populations (*e.g.*, Lewis, McKenzie, and Deschutes rivers) (Shively *et al.* 2007, Ch. 2, p. 40).

Section 10(j) of the Act requires that an experimental population be geographically separate from wild populations of the same species. The nearest wild bull trout populations to the Clackamas River are located in the following tributaries of the lower Columbia River: The Lewis (RM 84), Hood (RM 165), and Deschutes (RM 200) rivers. Because fluvial populations of bull trout tend to migrate, individual fish from these populations may seasonally occupy the mainstem of the lower Columbia River. Although we have no records of bull trout in the mainstem Willamette River, given our understanding of bull trout ecology in other river systems, it is likely that, historically, bull trout seasonally occupied the mainstem Willamette River. If a reintroduction of bull trout to the Clackamas River is successful, it is possible that a small percentage of adult bull trout will migrate to, and overwinter in, the mainstem Willamette River, between Willamette Falls and its points of confluence with the Columbia River, including Multnomah Channel. Should any bull trout be found in the Willamette River within the NEP boundary, the Service will assume the fish to be part of the reintroduced population, unless the fish is tagged or otherwise known to be from another population. It is unlikely that reintroduced bull trout will migrate outside of the NEP boundary into the Columbia River or upstream of Willamette Falls in the Willamette River due to the significant distance to spawning and rearing habitats in the upper Clackamas River. Bull trout found outside of the NEP boundary but known to be part of the NEP will assume the status of bull trout within the geographic area in which they are found. Although Willamette Falls and the confluence points of the Willamette and Columbia Rivers are not absolute boundaries, the NEP is geographically separate from other wild bull trout populations due to geographic distance.

Likelihood of Population Establishment and Survival

The Service, USFS, Oregon Department of Fish and Wildlife (ODFW), and other major stakeholders established the Clackamas River Bull Trout Working Group (CRBTWG) to

assess the feasibility of bull trout reintroductions. In 2007, the CRBTWG completed the Clackamas River Bull Trout Reintroduction Feasibility Assessment (Feasibility Assessment), a scientifically rigorous examination of habitat suitability and projected viability of a reintroduced population. The Feasibility Assessment indicates that there is a reasonable likelihood that reintroduced bull trout will survive and reestablish in the upper portion of the Clackamas River, from North Fork Reservoir to the headwaters. Specifically, the CRBTWG concludes:

- (1) There is a high level of confidence that bull trout have been locally extirpated from the Clackamas subbasin;
- (2) The causes for their decline have been sufficiently mitigated;
- (3) High-quality habitat is available in sufficient amounts;
- (4) Nearby donor stocks are unlikely to naturally recolonize;
- (5) Suitable donor stocks are available that can withstand extraction of individuals;
- (6) Nonnative brook trout presence is restricted to a small portion of the suitable habitat and not a likely threat; and

- (7) A diverse and abundant fish assemblage would serve as a sufficient prey base with no obvious threats posed by bull trout to these species (Shively *et al.* 2007, Ch. 5, pp. 3–4).

Based on this assessment, reintroduced bull trout are likely to become established and persist in the Clackamas River subbasin. Copies of the Feasibility Assessment can be found: (1) Online at <http://www.fws.gov/oregonfwo/Species/Data/BullTrout/ReintroductionProject.asp> or <http://www.regulations.gov>, or (2) In person, by appointment, during normal business hours, at the Oregon Fish and Wildlife Office (**see FOR FURTHER INFORMATION CONTACT**).

Addressing Causes of Extirpation

Investigating the causes for decline and extirpation of bull trout in the Clackamas River is necessary to understand whether the threats have been sufficiently curtailed such that reintroduction efforts are likely to be successful. The CRBTWG identifies the primary threats to be hydroelectric dams (passage and screening), forest management (*i.e.*, lack of aquatic habitat protection), and fisheries management (particularly sport fishing upstream of North Fork Dam) (Shively *et al.* 2007, Ch.1, pp. 22–23). The changes in threats since extirpation of bull trout in the Clackamas Basin are explained below in more detail.

Diversion dams present in the late 1800s and early 1900s no longer exist in the lower Clackamas River subbasin on river segments that would impede bull trout migration. Within bull trout historical habitat in the Clackamas River subbasin there are three existing dams owned and operated by Portland General Electric (PGE). Beginning in the late 1990s, PGE began Federal relicensing proceedings for its hydroelectric dams in the Clackamas River subbasin. In their final license application to the Federal Energy Regulatory Commission (FERC) and in an accompanying Settlement Agreement among more than 30 local, State, Federal, and Tribal governments, non-governmental organizations, and other interested stakeholders, PGE proposed to make several upstream and downstream fish passage improvements for the three dams along the mainstem Clackamas River. One improvement, which is already completed, is the reconstruction of the River Mill Dam fish ladder. Other improvements include upgrades to the downstream fish collection facility and bypass at North Fork Dam, construction of a new fish trap and handling facility at the North Fork fishway, and new downstream fish passage facilities at River Mill Dam (Shively *et al.* 2007, Ch.1, p. 23).

The majority of lands in the upper portion of the Clackamas River subbasin are USFS and Bureau of Land Management (BLM) administered public forestlands. These lands are managed in accordance with the Mt. Hood National Forest Land and Resource Management Plan (USFS 1990) or the Salem District BLM Resource Management Plan (USDI 1995), respectively, as amended by the 1994 Northwest Forest Plan (USDA and USDI 1994). The 1994 Northwest Forest Plan established an Aquatic Conservation Strategy (ACS) with protective measures, standards and guidelines, and land allocations to maintain and restore at-risk fish species, including bull trout. The ACS Riparian Reserve land allocation extends a minimum of 300 feet (91.4 meters) on both sides of all fish-bearing streams and prohibits scheduled timber harvest. These plans, along with the Omnibus Public Land Management Act of 2009 (Pub. L. 111–11) that establishes several new wilderness areas in the upper Clackamas River watershed, provide substantial protections for watersheds and aquatic habitats on USFS- and BLM-administered public lands in the upper subbasin. No additional changes or protections regarding forest management activities on public or non-

public forest lands are necessary to support a successful reintroduction of bull trout in the Clackamas River subbasin (Shively *et al.* 2007, Ch.1, pp. 124–125).

When the National Marine Fisheries Service (NMFS) listed salmon and steelhead in the Clackamas River under the Act (64 FR 14308, March 24, 1999; 71 FR 834, June 28, 2005; 70 FR 37160, January 5, 2006), fisheries management practices for the portion of the Clackamas River subbasin upstream of North Fork Reservoir changed substantially. For example, stocking of catchable rainbow trout within the Clackamas River has been discontinued altogether along the mainstem and tributaries upstream of North Fork Reservoir, and current sport fishing regulations now require catch and release of all native trout caught in the Clackamas River subbasin. Additionally, angling is restricted to the use of artificial flies and lures upstream of North Fork Reservoir. All waters in the Willamette Zone for the State of Oregon's sport fishing regulations are closed to angling for bull trout. Beginning in 2003, the ODFW eliminated the stocking of nonnative brook trout in lakes with outlets to streams in the upper Clackamas River subbasin that provide suitable bull trout spawning and rearing habitat. With these significant changes in angling regulations, the CRBTWG concludes that this threat for decline has been addressed. No additional changes to angling regulations in the upper portion of the subbasin are necessary to support a successful reintroduction of bull trout (Shively *et al.* 2007, Ch.1, pp. 24).

Donor Stock Assessment and Effects on Donor Populations

A donor stock should be comprised of fish that most closely resemble the bull trout that historically inhabited the Clackamas River (*e.g.*, genotype, phenotype, behavior, and life history expression). However, because little is known about the biology and evolutionary history of bull trout that historically occupied the Clackamas River, and no genetic material is available for analysis, the CRBTWG was limited to an assessment of biological information from other local populations, existing studies of the evolution and biogeography of bull trout, information derived from historical harvest data from the Clackamas River, and recent regional bull trout genetic analyses.

By exploring issues associated with life history strategy, metapopulation dynamics, biogeography, and genetic considerations, the CRBTWG identified

bull trout populations in the “coastal” lineage as the best source for a donor population (*see Biological Information* above). Any of the “coastal” lineage bull trout populations are likely to carry the genetic material to preserve and protect the “coastal” lineage regardless of localized and specific adaptations. Although these local adaptations are important, each of the populations is likely to contain the evolutionary potential that is characteristic of the “coastal” evolutionary lineage. However, in a further refinement, the CRBTWG determined that donor populations from lower Columbia River tributaries would be most appropriate due to their geographic proximity to the historical bull trout population in the Clackamas River and because genetic studies indicate these populations are more closely related to one another than to other “coastal” lineage populations (USFWS 2008, unpublished data). The potential lower Columbia River donor populations of bull trout include fish in five river basins: The Willamette River, Hood River, Lewis River, Deschutes River, and Klickitat River basins (Shively *et al.* 2007, Ch. 3, pp. 8–14).

Specific benchmarks have been developed concerning the minimum bull trout population size necessary to maintain genetic variation important for short-term fitness and long-term evolutionary potential. Rieman and Allendorf (2001, pp. 762) concluded that an average of 100 spawning adults each year is required to minimize risks of inbreeding in a bull trout population and that 1,000 spawning adults each year will likely prevent loss of genetic diversity due to genetic drift. This later value of 1,000 spawning adults may also be reached with a collection of local populations among which gene flow occurs. The CRBTWG utilized these general benchmarks in the Feasibility Assessment to assess potential risk to each of the five potential donor stocks in the lower Columbia River from the loss of individuals, recognizing that risk increases as donor populations near 100 spawning adults and diminishes as populations approach 1,000 spawning adults (Shively *et al.* 2007, Ch. 3, pp. 8–14).

When the Feasibility Assessment was developed in December 2007, bull trout from two of the five river basins, the Lewis River and Deschutes River, contained groups of interacting local populations that exceeded 1,000 spawning adults. For the Lewis River basin, this included the combined Pine Creek and Rush Creek populations that occur above Swift Dam. For the Deschutes River basin, this included the three interacting populations present in

the Metolius River subbasin. Since publication of the Feasibility Assessment there have been declines in adult spawner abundance in both the Lewis and Deschutes river bull trout groups, with the Lewis River population dropping significantly in 2007 and 2008, to its current estimated adult spawner abundance of 379 individuals (Doyle 2009, pp. 2–7). Although the Deschutes River (Metolius River subbasin) bull trout population has also decreased over the last 2 years, the CRBTWG considered this population to be the least at risk of the potential donor stocks. Furthermore, per Rieman and Allendorf (2001, pp. 762), the total number of annual spawning adults is sufficiently large enough (approximately 1,000 spawning adults) to protect against the loss of genetic diversity from genetic drift.

The proposed action includes the direct transfer of wild bull trout adults, subadults, juveniles, and fry from the Metolius River subbasin to the Clackamas River. The numbers and life stages of fish transferred each year will be linked strongly to the annual population size of the donor stock, as well as to information derived from monitoring the success of the various life stages in the NEP over the initial few years of the project. An implementation plan, including information about potential release sites, methods, disease screening, and the number of individuals to be released, is appended to our EA and includes additional information on release sites, release timing, monitoring, and suggested management and research.

Management Considerations and Protective Measures

We conclude that the effects of Federal, State, or private actions and activities will not pose a substantial threat to bull trout establishment and persistence in the Clackamas subbasin, because most activities currently occurring in the NEP area are compatible with bull trout recovery and there is no information to suggest that future activities would be incompatible with bull trout recovery. Most of the area containing suitable release sites with high potential for bull trout establishment is managed by the USFS and is protected from major development activities and timber harvest through the following mechanisms: (1) 47 miles (76 km) of the Clackamas River, from its headwaters to the Big Cliff area just upstream of North Fork Reservoir, was designated in 1988 as part of the Federal Wild and Scenic Rivers System (USFS 1993, p. 14); (2)

the State of Oregon designated 82 miles (132 km) of the Clackamas River and its tributaries as part of the Oregon Scenic Waterway Program in 1989 (ORS 390.826); (3) the 1994 Northwest Forest Plan established protective measures, standards and guidelines, and land allocations to maintain and restore at-risk fish species, including bull trout; (4) NMFS' listings of salmon and steelhead under the Act caused fisheries management practices (*i.e.*, sport fishing regulations and stocking of catchable rainbow trout) in the Clackamas River subbasin to become significantly more restrictive; and (5) the Federal Omnibus Public Land Management Act of 2009 (Pub. L. 111–11) designated two new wilderness units in the upper Clackamas River watershed at Sisi Butte (3,245 acres) and at Big Bottom (1,264 acres), and the Big Bottom Protection Area (1,581 acre special management unit) that is adjacent to the Big Bottom Wilderness unit.

Aquatic resources in the Clackamas River subbasin are managed by the USFS, the State of Oregon, municipal and county governments, and private landowners. Multiple-use management of these waters will not change as a result of the NEP designation. Current agricultural and recreational activities and other activities by private landowners within and near the NEP area are compatible with bull trout recovery in the Clackamas River subbasin and are not expected to change as a result of the NEP designation. Therefore, we do not believe the reintroduction of bull trout will conflict with existing human activities or hinder public use of the area.

The Service, ODFW, and the USFS, in cooperation with the CRBTWG, will plan and manage the reintroduction of bull trout. In addition, these agencies will carefully collaborate on releases, monitoring, coordination with landowners and land managers, public awareness, and other tasks necessary to ensure successful reintroduction of the species. The CRBTWG is assisting in the development of an Implementation and Monitoring Plan to help guide the reintroduction effort. A few specific management considerations related to the experimental population are addressed below.

(a) *Incidental Take:* Experimental population special rules contain specific prohibitions and exceptions regarding the taking of individual animals. These special rules are compatible with routine human activities in the expected reestablishment area. Section 3(19) of the Act defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to

engage in any such conduct.” If we adopt the 10(j) rule as proposed, take of bull trout within the experimental population area would be allowed provided that the take is unintentional, not due to negligent conduct, or is consistent with State fishing regulations that have been coordinated with the Service. We expect levels of incidental take to be low because the reintroduction is compatible with existing activities and practices in the area. As recreational fishing for species other than bull trout is popular within the NEP area, we expect some incidental take of bull trout from this activity but, as long as it is in compliance with ODFW fishing regulations, and Tribal regulations on land managed by the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWSROO), such take will not be a violation of the Act.

(b) *Special Handling:* Service and ODFW employees and authorized agents acting on their behalf may handle bull trout for scientific purposes, to relocate bull trout to avoid conflict with human activities, for recovery purposes; to relocate bull trout to other release sites in the Clackamas River, to aid sick or injured bull trout; and to salvage dead bull trout. However, non-Service or other non-authorized personnel will need to acquire permits from the Service and ODFW for these activities. USFS personnel, the primary land managers in the reestablishment area, will be permitted to handle reintroduced bull trout through a modification of their existing 10(a)(1)(A) recovery permit.

(c) *Coordination with Land Owners and Land Managers:* The proposed reintroduction has been discussed with potentially affected State agencies, Tribal entities, local governments, businesses, and landowners within the expected reestablishment area. The land along the expected reestablishment area is owned mainly by USFS although a small portion located in North Fork Reservoir is owned by PGE.

(d) *Public Awareness and Cooperation:* During October and November 2008, in cooperation with ODFW and USFS, we conducted several NEPA scoping meetings on this proposed action. We notified a comprehensive list of stakeholders of the meetings including affected Federal and State agencies, Tribal entities, local governments, landowners, nonprofit organizations (environmental and recreational), and other interested parties. The comments we received are listed in the draft EA, were included in the formulation of alternatives considered in the NEPA process, and will be considered in any final

regulation designating a NEP for reintroduced bull trout.

(e) *Potential impacts to other Federally listed fish species:* In July 2008, the Service sponsored an expert science panel workshop to assess potential impacts of a proposed bull trout reintroduction on Federally listed salmon and steelhead in the Clackamas River. The expert panel also provided information on critical monitoring and management actions to reduce uncertainty and risk to Federally listed salmon and steelhead from a reintroduction of bull trout. The results from this workshop are fully presented in the draft EA, which is available for inspection in person at the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section) and online at: <http://www.regulations.gov> or <http://www.fws.gov/oregonfwo/>.

Although our analysis indicates a low likelihood for population level impacts to Federally listed salmon and steelhead populations, if the Service and the State determine, in consultation with NMFS, that the reintroduction efforts are not consistent with the recovery of salmon or steelhead, the reintroduction program will be discontinued and bull trout will be removed from the experimental population area. Prior to releasing bull trout into the Clackamas River, the Service will evaluate the potential effects of the release on listed salmon and steelhead and will complete any required interagency cooperation with NMFS pursuant to section 7(a)(2) of the Act.

Monitoring and Evaluation

After the initial release of bull trout, we will monitor their presence, absence, and movement at least annually and document spawning behavior or presence of young-of-year fish. Depending on available resources, monitoring may occur more frequently, especially during the first few years of reestablishment efforts. This monitoring will be primarily conducted through passive integrated transponder (PIT) tags, snorkeling, and radio-telemetry by ODFW employees with the assistance of the Service. Monitoring the status of the donor population will also occur annually. Annual reports that summarize the implementation and monitoring activities that took place during the previous year will be collaboratively developed by the Service and ODFW. We will fully evaluate the reestablishment efforts every 7 years, the life-span of a long-lived bull trout, to determine whether to continue or terminate such efforts.

In addition to monitoring reintroduced bull trout and the donor

stock, we also plan to monitor the response of the existing native fish community, particularly Federally listed salmon and steelhead, to the reintroduced bull trout. To facilitate this type of monitoring, the Service, together with other members of the CRBTWG, plan to conduct baseline biological surveys in 2009.

Findings

Based on the best scientific and commercial data available (in accordance with 50 CFR 17.81), the Service finds that releasing bull trout into the Clackamas River subbasin will further the conservation of the species but that this population is not essential to the continued existence of the species in the wild.

Peer Review

A final draft of the CRBTWG's Feasibility Assessment was provided to the State of Oregon Independent Multidisciplinary Science Team (IMST) for peer review. The IMST is an impartial scientific review panel charged with advising the State of Oregon on matters of science related to fish recovery, water quality improvements, and enhancing watershed health. The IMST, appointed by the Governor, provides independent, scientific analysis and evaluation of State actions and policies under the Oregon Plan for Salmon and Watersheds (Oregon Plan). The charge of the IMST is to focus on science, maintain its independence, operate by consensus, and report its findings and conclusions in written reports and reviews.

The Service, along with USFS and ODFW, presented a summary of the goals, analyses, and intended use of the Feasibility Assessment at the IMST's October 16, 2006 public meeting. The IMST received a draft of the Feasibility Assessment for review on November 28, 2006. The IMST review of the draft Feasibility Assessment was by an IMST subcommittee including four scientists. The subcommittee held a public meeting on December 13, 2006, to discuss the Feasibility Assessment and to prepare a draft review. The draft review was discussed and unanimously adopted (one member absent from vote) at the January 18, 2007 IMST public meeting. Comments on the draft Feasibility Assessment were provided to the Service, USFS, and ODFW on January 30, 2007. Comments were subsequently posted on the IMST Web site: <http://www.fsl.orst.edu/imst/>, and addressed in the final Feasibility Assessment (Shively *et al.*, 2007, Appendix F).

The IMST peer review of the science in the final Feasibility Assessment, much of which was incorporated into this proposed rule, meets our responsibilities under our policy on peer review, published on July 1, 1994 (59 FR 34270).

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

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 notice 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. We certify that this rule would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

If this proposal is adopted, the area affected by this rule includes the Clackamas River subbasin and the mainstem of the Willamette River, from

Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel, in Oregon. Because NEP designations do not establish substantial new regulation of activities, we do not expect this rule would have any significant effect on recreational, agricultural, or development activities. Although the entire NEP boundary encompasses a large area, the section of the NEP area where we can anticipate the establishment of an experimental population of bull trout is mainly public land owned by the USFS. In addition, NEPs occurring outside the National Refuge System or the National Park System are treated as proposed for listing under the provisions of section 7 (other than section 7(a)(1)). In these instances, NEPs provide additional flexibility because Federal agencies are not required to consult with us under section 7(a)(2). Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(4) requires Federal agencies to confer (rather than consult) with the Service on actions that are likely to jeopardize the continued existence of a proposed species. The results of a conference are advisory in nature and do not restrict agencies from carrying out, funding, or authorizing activities.

The principal activities on private property near the expected reestablishment area in the NEP are agriculture, ranching, and recreation. The presence of bull trout would likely not affect the use of lands for these purposes because there would be no new or additional economic or regulatory restrictions imposed upon States, non-Federal entities, or members of the public due to the presence of bull trout. Therefore, this rulemaking is not expected to have any significant adverse impacts to recreation, agriculture, or any development activities.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

(1) This rule would not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 et seq., that, if adopted, this rulemaking would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. Small governments would not be affected because the proposed NEP designation would not place additional

requirements on any city, county, or other local municipalities.

(2) This rule would not produce a Federal mandate of \$100 million or greater in any year (*i.e.*, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act). This proposed NEP designation for bull trout would not impose any additional management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. This rule would allow for the taking of reintroduced bull trout when such take is incidental to an otherwise legal activity, such as recreation (*e.g.*, fishing, boating, wading, swimming), forestry, agriculture, hydroelectric power generation, and other activities that are in accordance with Federal, State, and local laws and regulations. Therefore, we do not believe that establishment of this NEP would conflict with existing or proposed human activities or hinder public use of the Clackamas River or its tributaries.

A takings implication assessment is not required because this rule: (1) Would not effectively compel a property owner to suffer a physical invasion of property, and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This rule would substantially advance a legitimate government interest (conservation and recovery of a listed fish species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In keeping with Department of the Interior policy, we requested information from and coordinated development of this proposed rule with the affected resource agencies in Oregon. Achieving the recovery goals for this species will contribute to its eventual delisting and return to State management. No intrusion on State policy or administration is expected, roles or responsibilities of Federal or State governments would not change, and

fiscal capacity would not be substantially directly affected. The proposed special rule operates to maintain the existing relationship between the State and the Federal Government and is being undertaken in coordination with the State of Oregon. We have cooperated with ODFW in the preparation of this proposed rule. Therefore, this proposed rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment pursuant to the provisions of Executive Order 13132.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988 (February 7, 1996; 61 FR 4729), the Office of the Solicitor has determined that this rule would not unduly burden the judicial system and would meet the requirements of sections (3)(a) and (3)(b)(2) of the Order.

Paperwork Reduction Act

Office of Management and Budget (OMB) regulations at 5 CFR 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

In compliance with all provisions of the National Environmental Policy Act of 1969 (NEPA), we have analyzed the impact of this proposed rule. Based on this analysis and any new information resulting from public comment on the proposed action, we will determine if there are any significant impacts or effects caused by this rule. We have prepared a draft EA on this proposed action and have made it available for public inspection: (1) in person at the Oregon Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT** section) and (2) online at <http://www.regulations.gov> or <http://www.fws.gov/oregonfwo/>. All appropriate NEPA documents will be finalized before this rule is finalized.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, “Government-to-Government Relations

with Native American Tribal Governments” (59 FR 229511), Executive Order 13175, and the Department of the Interior Manual Chapter 512 DM 2, we have considered possible effects on Federally recognized Indian Tribes and have determined that 2 percent of the acreage included in the Clackamas River subbasin, including the upper Clackamas and Oak Grove Fork drainage, is owned and managed by the Confederated Tribes of the Warm Springs Reservation (CTWSROO). Furthermore, donor stock for the reintroduction will, in part, originate from a section of the Metolius River located on the CTWSRO. Since 2007, the CTWSRO has been an active participant in the CRBTWG discussions on bull trout recovery in the Clackamas River basin. The Service is continuing to consult, on a government-to-government basis, with the CTWSRO regarding this proposed action.

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

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule 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.

Clarity of This Regulation (E.O. 12866)

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, *etc.*

References Cited

A complete list of all references cited in this proposed rule is available upon request from the Oregon Fish and

Wildlife Office (*see FOR FURTHER INFORMATION CONTACT*).

Author

The primary authors of this proposed rule are Rebecca Toland and Chris Allen of the Oregon Fish and Wildlife Office (*see FOR FURTHER INFORMATION CONTACT*).

List of Subjects in 50 CFR 17

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

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Amend § 17.11(h) by revising the entry for “Trout, bull” under “FISHES” in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
* FISHES	*	*	*	*	*		*
* Trout, bull	* <i>Salvelinus confluentus</i> .	* U.S.A. (AK, Pacific NW into CA, ID, NV, MT) Canada (NW Territories).	* U.S.A., coterminous (lower 48 States), except where listed as an experimental population.	* T	* 637, 639E, 659, 670		* 17.44(w), 17.44(x)
* Trout, bull	* <i>Salvelinus confluentus</i> .	* U.S.A. (AK, Pacific NW into CA, ID, NV, MT) Canada (NW Territories).	* Clackamas River subbasin and the mainstem Willamette River, from Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel.	* XN	*	* NA	* 17.84(v)
*	*	*	*	*	*		*

3. Amend § 17.84 by adding a new paragraph (v) to read as follows:

§ 17.84 Special rules—vertebrates.

* * * * *

(v) Bull Trout (*Salvelinus confluentus*).

(1) *Where are populations of this fish designated as nonessential experimental populations (NEP)?*

(i) The NEP area for the bull trout is within the species’ historical range and is defined as follows: the entire Clackamas River subbasin as well as the mainstem Willamette River, from

Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel.

(ii) Bull trout are not currently known to exist in the Clackamas River subbasin or the mainstem Willamette River, from Willamette Falls to its points of confluence with the Columbia River, including Multnomah Channel, in Oregon. Should any bull trout be found in the Willamette River within the NEP boundary, the U.S. Fish and Wildlife Service (Service) will assume the fish to be part of the reintroduced population, unless the fish is tagged or otherwise known to be from another population. Given the presence of suitable overwintering and forage habitat in the upper portion of the Clackamas River, as well as the geographic distance from spawning and rearing habitat in the upper Clackamas River to any overwintering and foraging habitat in the lower Clackamas and Willamette rivers, we do not expect the reintroduced fish to become established outside the NEP. Bull trout found outside of the NEP boundary but known to be part of the NEP will assume the status of bull trout within the geographic area in which they are found.

(iii) We do not intend to change the NEP designations to "essential experimental," "threatened," or "endangered" within the NEP area. Additionally, we will not designate critical habitat for the NEP, as provided by 16 U.S.C. 1539(j)(2)(C)(ii).

(2) What take is allowed of this species in the NEP area?

(i) Bull trout may be taken within the NEP area, provided that such take is:

(A) Not willful, knowing, or due to negligence;

(B) Incidental to and not the purpose of carrying out an otherwise lawful activity, such as recreation (e.g., fishing, boating, wading, trapping, or swimming), agriculture, hydroelectric power generation, and other activities

that are in accordance with Federal, State, Tribal, and local laws and regulations; and

(C) If due to fishing, consistent with Oregon Department of Fish and Wildlife (ODFW) fishing regulations that have been coordinated with the Service.

(ii) Any person with a valid permit issued by the Service under § 17.32 and a valid State permit issued by ODFW may take bull trout for educational purposes, scientific purposes, the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the Act.

(3) What take of this species is not allowed in the NEP area?

(i) Except as expressly allowed in paragraph (v)(2) of this section, all the provisions of § 17.31(a) and (b) apply to the fish identified in paragraph (v)(1) of this section.

(ii) Any manner of take not described under paragraph (v)(2) of this section or Oregon Revised Statute (ORS) 498.002 and Oregon Angling Regulations pursuant to ORS 498.002 is prohibited in the NEP area. Should State statutes or regulations change, take prohibitions will change accordingly. Any changes to State recreational fishing regulations pertaining to the experimental population of bull trout in the Clackamas Basin will be made by the State in collaboration with the Service. We may refer unauthorized take of this species to ODFW law enforcement authorities or Service law enforcement authorities for prosecution.

(iii) You may not possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever any of the identified fishes, or parts thereof, that are taken or possessed in a manner not expressly allowed in paragraph (v)(2), or in violation of the applicable State fish and wildlife laws or regulations or the Act.

(iv) You may not attempt to commit, solicit another to commit, or cause to be

committed any offense except the take expressly allowed in paragraph (v)(2).

(4) How will the effectiveness of the reestablishment be monitored?

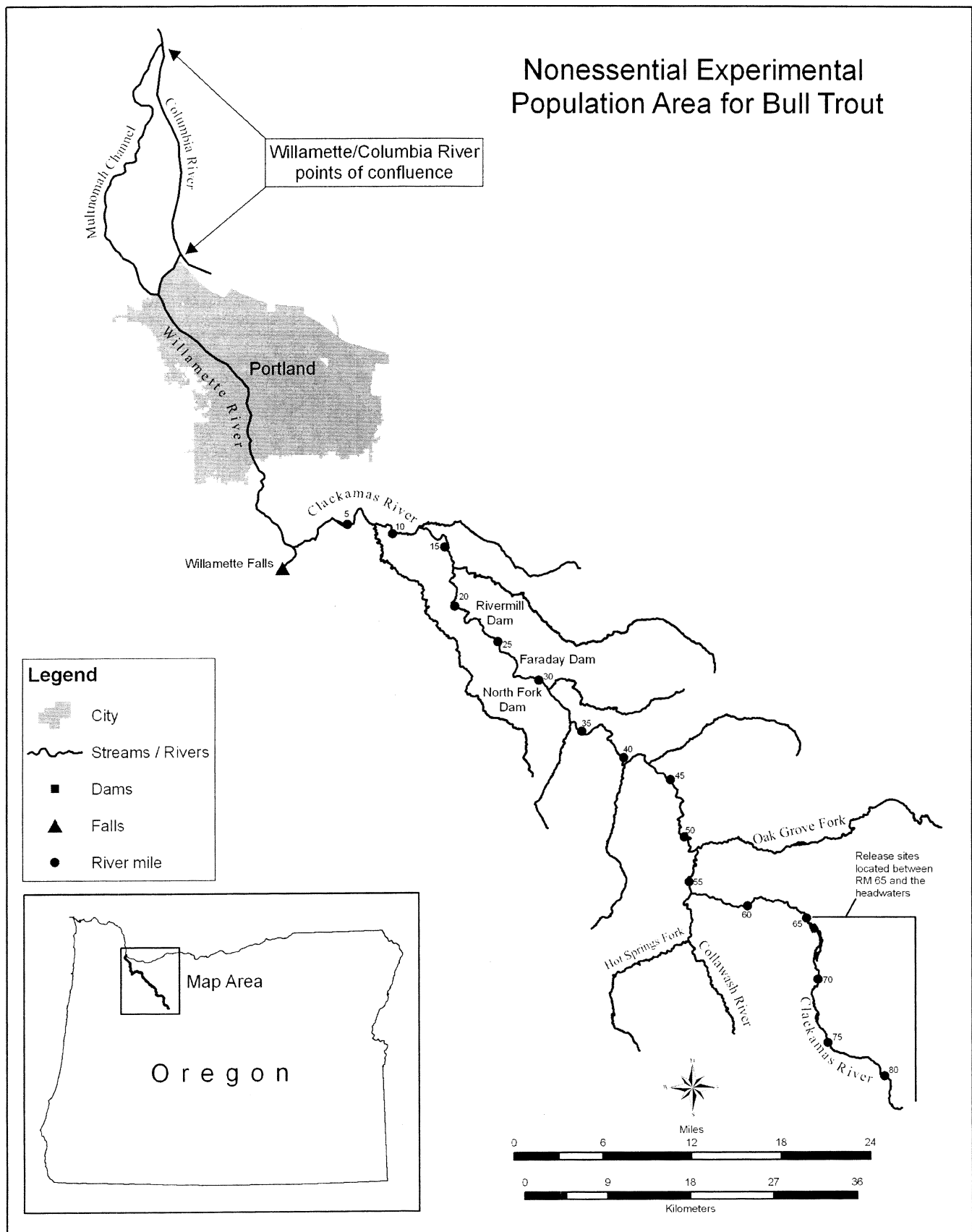
After the initial release of bull trout, we will monitor their presence, absence, and movement at least annually and document any spawning behavior or young-of-year fish that might be present. Depending on available resources, monitoring may occur more frequently, especially during the first few years of reestablishment efforts. This monitoring will be primarily conducted through passive integrated transponder (PIT) tags, snorkeling, and radio telemetry by ODFW employees with assistance from the Service and U.S. Forest Service (USFS). Monitoring of the status of the donor population will also occur annually. Annual reports that summarize the implementation and monitoring activities that took place during the previous year will be collaboratively developed by the Service and ODFW. We will also fully evaluate the reestablishment efforts every 7 years to determine whether to continue or terminate them.

(5) What safeguards are in place to ensure the protection of Federally listed salmon and steelhead in the NEP area?

Although bull trout are opportunistic predators and have been known to prey upon juvenile salmon and steelhead, the potential for significant adverse impacts to salmon and steelhead populations is remote. Nevertheless, if the Service and the State determine, in consultation with the National Marine Fisheries Service (NMFS), that the reintroduction efforts are not consistent with the recovery of Federally listed salmon or steelhead, the reintroduction program will be discontinued and bull trout will be removed from the experimental population area.

(6) **Note:** Map of the NEP area for bull trout in Oregon follows:

BILLING CODE 4310-55-P



* * * * *

Dated: November 19, 2009.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9-29020 Filed 12-8-09; 8:45 am]

BILLING CODE 4310-55-C

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R8-ES-2009-0072]

[92210-1117-0000-B4]

[RIN 1018-AW23]

Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Santa Ana Sucker (*Catostomus santaanae*); Proposed Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to revise the designated critical habitat for the Santa Ana sucker (*Catostomus santaanae*). The areas identified in this proposed rule constitute a revision of the areas designated as critical habitat for the Santa Ana sucker on January 4, 2005. In the 2005 final rule, we designated 8,305 ac (3,361 ha) of critical habitat in Los Angeles County. Approximately 9,605 acres (ac) (3,887 hectares (ha)) of habitat in the Santa Ana River (San Bernardino, Riverside, and Orange Counties) and the San Gabriel River and Big Tujunga Creek (Los Angeles County) in southern California fall within the boundaries of the proposed revised critical habitat designation.

DATES: We will consider comments we receive on or before February 8, 2010. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 25, 2010.

ADDRESSES: You may submit comments by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. FWS-R8-ES-2009-0072.

- U.S. mail or hand-delivery: Public Comments Processing, Attn: FWS-R8-ES-2009-0072; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on <http://www.regulations.gov>. This generally

means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone (760) 431-9440; facsimile (760) 431-5901. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend any final action resulting from this proposal to be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) The reasons we should or should not revise the designation of habitat as “critical habitat” under section 4 of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), including whether the benefit of designation would outweigh any threats to the species caused by the designation, such that the designation of critical habitat is prudent.

(2) Specific information on:

- Areas that provide habitat for the Santa Ana sucker that we did not discuss in this proposed critical habitat rule.

- Areas within the geographical area occupied by the species at the time of listing that contain the physical and biological features essential to the conservation of the species which may require special management considerations or protection, that we should include in the designation and reason(s) why (see **Physical and Biological Features** section below for further discussion.), and

- Areas outside the geographical area occupied by the species at the time of listing that are essential for the conservation of the species and why.

(3) Specific information on our proposed designation of City Creek and the Santa Ana River above Seven Oaks Dam to provide habitat for future reintroduction of the Santa Ana sucker to augment the Santa Ana sucker population in the Santa Ana River. See **Critical Habitat Units** section below.

(4) Specific information on the Santa Ana sucker, habitat conditions, and the presence of physical and biological features essential for the conservation of the species in Subunit 1B below Prado Dam.

(5) Specific information on the sediment contribution from tributaries

to the Santa Ana River below Prado Dam (Subunit 1B).

(6) Specific information on the Santa Ana sucker, habitat conditions, and the presence of potential permanent barriers to movement in Big Tujunga Wash (Subunit 3A), particularly between the Big Tujunga Canyon Road Bridge and the Big Tujunga Dam. See **Critical Habitat Units** section below.

(7) Specific information on in-stream gradient (slope) limitations of the species. In this proposed revised rule, we assume that Santa Ana suckers are unable to occupy stream sections where the in-stream slope exceeds 7 degrees. See **Primary Constituent Elements** (PCEs) section below.

(8) Land-use designations and current or planned activities in the areas proposed as critical habitat, as well as their possible effects on proposed critical habitat.

(9) Comments or information that may assist us in identifying or clarifying the PCEs. See **Primary Constituent Elements** section below for further discussion of PCEs.

(10) How the proposed revised critical habitat boundaries could be refined to more closely circumscribe the areas identified as containing the features essential to the species’ conservation.

(11) Any probable economic, national-security, or other impacts of designating particular areas as critical habitat, and, in particular, any impacts on small entities (e.g., small businesses or small governments), and the benefits of including or excluding areas that exhibit these impacts.

(12) Whether any specific areas being proposed as critical habitat should be excluded under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any particular area outweigh the benefits of including that area under section 4(b)(2) of the Act. See **Exclusions** section below for further discussion.

(13) The potential exclusion of Subunits 1B and 1C under section 4(b)(2) of the Act based on the benefits to the species provided by implementation of the Santa Ana Sucker Conservation Program and whether the benefits of exclusion of this area outweigh the benefits of including this area as critical habitat, and why. See **Exclusions** section below for further discussion.

(14) Information on any quantifiable economic costs or benefits of the proposed revised designation of critical habitat.

(15) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and