

Dated: October 31, 2005.

**Kenneth L. Marcus,**

*Staff Director/Acting General Counsel.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 223 and 224

[Docket No. 040525161-5274-05; I.D. No. 052104F]

RIN No. 0648-AR93

#### Endangered and Threatened Species: Request for Comment on Alternative Approach to Delineating 10 Evolutionarily Significant Units of West Coast *Oncorhynchus mykiss*

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

**ACTION:** Proposed rule; request for comment.

**SUMMARY:** In June 2004, we (NMFS) proposed that 10 Evolutionarily Significant Units (ESUs) of West Coast *Oncorhynchus mykiss* be listed as endangered or threatened species under the Endangered Species Act (ESA). We have reconsidered the preliminary decision to apply the Pacific salmon ESU Policy to these stocks and seek comment on our proposed application of the joint NMFS/U.S. Fish and Wildlife Service (FWS) "Policy Regarding the Recognition of Distinct Vertebrate Population Segments under the ESA" (DPS Policy) to the delineation of *Oncorhynchus mykiss* distinct population segments (DPSs).

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

**ADDRESSES:** You may submit comments and information by any of the following methods. Please identify submittals as pertaining to the "Proposed Steelhead DPSs and Listings."

- E-mail:

SteelheadDPS.nwr@noaa.gov. Include "Proposed Steelhead DPSs and Listings" in the subject line of the message.

- Internet: Comments may also be submitted electronically through the Federal e-Rulemaking portal at: <http://www.regulations.gov>.

- Mail: Submit written comments and information to Chief, NMFS, Protected Resources Division, 1201 NE Lloyd

Boulevard, Suite 1100, Portland, Oregon 97232.

- Hand Delivery/Courier: You may hand-deliver written comments to our office during normal business hours at the street address given above.

- Fax: 503-230-5441

#### FOR FURTHER INFORMATION CONTACT:

Craig Wingert, NMFS, Southwest Region, (562) 980-4021, Dr. Scott Rumsey, NMFS, Northwest Region, (503) 872-2791, or Marta Nammack, NMFS, Office of Protected Resources, (301) 713-1401. Copies of the **Federal Register** notices, additional steelhead-related documents, and a list of all the references cited in this notice are available on the Internet at <http://www.nwr.noaa.gov>.

#### SUPPLEMENTARY INFORMATION:

##### Background

##### *Policies for Delineating Species under the ESA*

Section 3 of the ESA defines the term species to include "any subspecies of fish or wildlife or plants, and any *distinct population segment* of any species of vertebrate fish or wildlife which interbreeds when mature" [emphasis added]. In 1991 we issued a policy for making species determinations for Pacific salmon ("ESU Policy;" 56 FR 58612; November 20, 1991). Under this policy a group of Pacific salmon populations is considered an ESU if it is substantially reproductively isolated from other conspecific populations, and it represents an important component in the evolutionary legacy of the biological species. Under that policy, the biological ESU is considered to be a "distinct population segment" and thus a "species" under the ESA. In 1996, we and FWS adopted a joint policy for recognizing DPSs under the ESA (DPS Policy; 61 FR 4722; February 7, 1996). The DPS Policy adopts similar but slightly different criteria from the ESU Policy for determining when a group of organisms constitutes a DPS: it must be discrete from other populations, and it must be significant to its taxon. A group of organisms is discrete if it is "markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, and behavioral factors." Although the ESU Policy does not specifically apply to steelhead, the DPS Policy states that NMFS will continue to implement the ESU Policy with respect to Pacific salmonids (inclusive of *O. mykiss*).

##### *Previous Federal ESA Actions Related to West Coast Steelhead*

In 1996, we completed a comprehensive status review of West Coast steelhead (Busby *et al.*, 1996) that resulted in proposed listing determinations for 10 steelhead ESUs, 5 as endangered and 5 as threatened species (61 FR 41541; August 9, 1996). On August 18, 1997, we listed five of the ESUs, two as endangered and three as threatened (62 FR 43937) and announced a 6-month extension of final listing determinations for the other five ESUs, pursuant to section 4(b)(6)(B)(i) of the ESA (62 FR 43974). On March 10, 1998, we proposed to list two additional steelhead ESUs as threatened (63 FR 11798). On March 19, 1998, we listed as threatened two of the steelhead ESUs that were deferred in August 1997 and designated the other three proposed ESUs as candidate species (63 FR 13347). On March 25, 1999, we listed as threatened the two ESUs proposed in March 1998 (64 FR 14517). On February 11, 2000, we proposed to list the Northern California steelhead ESU as threatened (65 FR 6960) and listed that ESU as threatened on June 7, 2000 (65 FR 36074). Under these listing decisions, there are currently 10 listed steelhead ESUs, two endangered (Southern California and Upper Columbia River) and eight threatened (South-Central California, Central California Coast, California Central Valley, Northern California, Upper Willamette River, Lower Columbia River, Middle Columbia River, and Snake River Basin).

In our 1997 steelhead listings (62 FR 43937), we noted uncertainties about the relationship of resident and anadromous *O. mykiss*, yet concluded that the two forms are part of a single ESU where the resident and anadromous *O. mykiss* have the opportunity to interbreed. FWS disagreed that resident *O. mykiss* should be included in the steelhead ESUs and advised that the resident fish not be listed. Accordingly, we decided to list only the anadromous *O. mykiss* at that time. That decision was followed in each of the subsequent steelhead listings described in the preceding paragraph.

In 2001, the U.S. District Court in Eugene, Oregon, set aside the 1998 threatened listing of the Oregon Coast coho ESU (*Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001)) (Alsea decision). In the Oregon Coast coho listing (63 FR 42587; August 10, 1998), we did not include in the listing 10 hatchery stocks determined to be part of the Oregon Coast coho ESU. The court upheld our policy of

considering an ESU to be a DPS, but ruled that once we had delineated a DPS, the ESA did not allow listing a subset of that DPS. In response to the Alsea decision and several listing and delisting petitions, we announced we would conduct an updated status review of 27 West Coast salmonid ESUs, including the 10 listed steelhead ESUs (67 FR 6215, February 11, 2002; 67 FR 48601, July 25, 2002; 67 FR 79898, December 31, 2002).

On June 14, 2004, we proposed to continue applying our ESU Policy to the delineation of DPSs of *O. mykiss*, and to list the 10 *O. mykiss* ESUs including the resident fish that co-occur with the anadromous form (69 FR 33102). We proposed to list one ESU in California as endangered (Southern California), and nine ESUs in California, Oregon, Washington, and Idaho as threatened (South-Central California, Central California Coast, California Central Valley, Northern California, Upper Willamette River, Lower Columbia River, Middle Columbia River, Snake River Basin, and Upper Columbia). In the proposed rule, we noted that the Alsea decision required listing of an entire ESU/DPS, in contrast to our prior steelhead-only listings, and stated the scientific principles and working assumptions that we used to determine whether particular resident groups were part of an *O. mykiss* ESU that included anadromous steelhead (69 FR 33102). We proposed that where resident (rainbow trout) and anadromous (steelhead) *O. mykiss* occur in the same stream, they are not “substantially reproductively isolated” from one another and are therefore part of the same ESU.

Following an initial public comment period of 90 days, we twice extended the public comment period for an additional 36 and 22 days (69 FR 53031, August 31, 2004; 69 FR 61348, October 18, 2004), respectively. During the comment period, we received numerous comments disagreeing with our proposal to include resident populations in the subject *O. mykiss* ESUs (in general and for specific resident populations) and criticizing how we considered resident *O. mykiss* in evaluating the risk to the continued existence of the whole ESU.

On June 7, 2005, FWS wrote to NMFS (FWS, 2005), stating its concerns about the factual and legal bases for our proposed listing determinations for 10 *O. mykiss* ESUs, specifying issues of substantial disagreement regarding the relationship between anadromous and resident *O. mykiss*. On June 28, 2005, we published a notice in the **Federal Register** announcing the ESA statutory

6-month extension of the final listing determinations for the subject *O. mykiss* ESUs to resolve the substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determinations (70 FR 37219). As a result of these comments, we are re-opening the comment period to consider whether the final rule should delineate 10 steelhead-only DPSs, list one DPS in California as endangered (Southern California), and list the remaining nine DPSs in California, Oregon, Washington, and Idaho as threatened (South-Central California, Central California Coast, California Central Valley, Northern California, Upper Willamette River, Lower Columbia River, Middle Columbia River, Snake River Basin, and Upper Columbia).

#### Application of the Joint DPS Policy for Determination of Species

In its June 7, 2005, letter recommending that the final listing determinations for the 10 *O. mykiss* ESUs under review be extended, FWS suggested that we ensure that our delineation of *O. mykiss* ESUs complies with the DPS Policy. We agree, in this case, that it is appropriate that we consider departing from our past practice of applying the ESU Policy to *O. mykiss* stocks, and instead apply the DPS Policy in determining “species” of *O. mykiss* for listing consideration. Such an approach would also be consistent with use of the DPS Policy by the agencies in defining DPSs of Atlantic salmon (*Salmo salar*; 65 FR 69459; November 17, 2000). The primary difference in the application of the two policies is that the ESU Policy relies on “substantial reproductive isolation” as the primary factor in delineating a group of organisms, while the DPS Policy relies on “marked separation” to delineate the group. Within a discrete group of *O. mykiss* populations, the resident and anadromous life forms of *O. mykiss* remain “markedly separated” as a consequence of physical, physiological, ecological, and behavioral factors. Despite the apparent lack of reproductive isolation between the two forms within a given population or group of populations, under the DPS Policy anadromous and resident *O. mykiss* may not warrant delineation as part of the same DPS.

In order to provide sufficient notice to the public to allow for informed comment, we provide the following analysis of how the proposed application of the DPS Policy to *O. mykiss* stocks would affect the proposed listings.

#### Proposed Evaluation of Discreteness under the DPS Policy

Under the DPS Policy a population segment may be considered discrete if it satisfies either one of the following conditions:

(1) It is markedly separated from other populations of the same biological taxon as a consequence of physical, physiological, ecological, or behavioral factors; or

(2) It is delimited by international governmental boundaries across which there is a significant difference in exploitation control, habitat management or conservation status.

The discreteness of the 10 West Coast steelhead DPSs under consideration relative to other population groups of the *O. mykiss* species is well documented by the previous NMFS status reviews that delineated steelhead ESUs (e.g., NMFS, 1997; Busby *et al.*, 1996, 1997, 1999; Adams, 2000; Good *et al.*, 2005). These reviews concluded that the ESUs respectively are substantially reproductively isolated based on established phylogenetic groupings, available population genetic data, differences in migration and spawn timing, patterns in the duration of freshwater and marine residence, and geographic separation of populations. These traits that established the substantial reproductive isolation of the respective steelhead ESUs under the ESU Policy also satisfy the “discreteness” criterion of the DPS Policy. In the following paragraphs we address the question of whether the co-occurring anadromous and resident life forms within these proposed steelhead DPSs are themselves discrete or warrant inclusion in the same DPS.

Under the ESU Policy we have previously determined that where resident and anadromous *O. mykiss* co-occur there is likely to be interbreeding between the two life-history forms, and that co-occurring resident and anadromous *O. mykiss* below long-standing impassable barriers are part of the same ESU. This conclusion was based on empirical studies that show that resident and anadromous *O. mykiss* are similar genetically when they co-occur with no physical barriers to migration or interbreeding (Chilcote, 1976; Currens *et al.*, 1987; Leider *et al.*, 1995; Busby *et al.*, 1996; Pearsons *et al.*, 1998), and the observation that individuals can occasionally produce progeny of the alternate life-history form (Shapovalov and Taft, 1954; Burgner *et al.*, 1992; Mullan *et al.*, 1992; Zimmerman and Reeves, 2000; Kostow, 2003; Ardren, 2000; Blouin, 2000; Pearsons *et al.*, 2003; Marshal and

Foley, 2004; Narum *et al.*, 2004; Seamons *et al.*, 2004).

The discreteness criterion of the DPS Policy, however, does not rely on reproductive isolation but on the marked separation of population groups as a consequence of biological factors. Despite the apparent reproductive exchange between resident and anadromous *O. mykiss*, the two life forms remain markedly separated physically, physiologically, ecologically, and behaviorally. Steelhead differ from resident rainbow trout physically in adult size and fecundity, physiologically by undergoing smoltification, ecologically in their preferred prey and principal predators, and behaviorally in their migratory strategy. Where the two life forms co-occur, adult steelhead typically range in size from 40–72 cm in length and 2–5 kg body mass, while adult rainbow trout typically range in size from 25–46 cm in length and 0.5–2 kg body mass (Shapovalov and Taft, 1954; Wydoski and Whitney, 1979; Jones, 1984). Steelhead females produce approximately 2,500 to 10,000 eggs, and rainbow trout fecundity ranges from 700 to 4,000 eggs per female (Shapovalov and Taft, 1954; Buckley, 1967; Moyle, 1976; McGregor, 1986; Pauley *et al.*, 1986), with steelhead eggs being approximately twice the diameter of rainbow trout eggs or larger (Scott and Crossman, 1973; Wang, 1986; Tyler *et al.*, 1996). Steelhead undergo a complex physiological change that enables them to make the transition from freshwater to saltwater (smoltification), while rainbow trout reside in freshwater throughout their entire life cycle. While juvenile and adult steelhead prey on euphausiid crustaceans, squid, herring, and other small fishes in the marine environment, the diet of adult rainbow trout is primarily aquatic and terrestrial insects and their larvae, mollusks, amphipod crustaceans, fish eggs, and minnows (LeBrasseur, 1966; Scott and Crossman, 1973; Wydoski and Whitney, 1979). Finally, steelhead migrate several to hundreds of miles from their natal streams to the ocean, and spend up to 3 years in the ocean migrating thousands of miles before returning to freshwater to spawn (Busby *et al.*, 1996). Rainbow trout, in contrast, may exhibit seasonal migrations of tens of kilometers but generally remain associated with their natal drainages (Meka *et al.*, 1999).

Given the marked separation between the anadromous and resident life-history forms in physical, physiological, ecological, and behavioral factors, we may conclude that the anadromous steelhead populations are discrete from the resident rainbow trout populations

within the DPSs under consideration. If so, we would conclude that the Southern California, South-Central California, Central California Coast, California Central Valley, Northern California, Upper Willamette River, Lower Columbia River, Middle Columbia River, Upper Columbia River, and Snake River Basin steelhead DPSs under consideration satisfy the “discreteness” criterion under the DPS Policy.

#### *Proposed Evaluation of Significance under the DPS Policy*

Under the DPS Policy, if a population group is determined to be discrete, the agency must then consider whether it is significant to the taxon to which it belongs. Considerations in evaluating the significance of a discrete population include: (1) persistence of the discrete population in an unusual or unique ecological setting for the taxon; (2) evidence that the loss of the discrete population segment would cause a significant gap in the taxon’s range; (3) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere outside its historical geographic range; or (4) evidence that the discrete population has marked genetic differences from other populations of the species.

The significance of the 10 West Coast steelhead DPSs under consideration to the *O. mykiss* species is well documented by the previous NMFS status reviews that delineated steelhead ESUs (e.g., NMFS, 1997; Busby *et al.*, 1996, 1997, 1999; Adams, 2000; Good *et al.*, 2005). These reviews concluded that the steelhead population groups respectively represent an important component in the evolutionary legacy of the species based on unique or unusual life-history, genetic, and ecological characteristics and occupied ecoregion(s) (i.e., unique geographic regions defined by climatic, geologic, hydrologic, and floral composition characteristics; Donley *et al.*, 1979; Jackson, 1993; Omernik, 1987). These traits that established the evolutionary importance of the respective steelhead population groups under the ESU Policy also satisfy the “significance” criterion of the DPS Policy. These proposed steelhead DPSs, if lost, would represent: the loss of unusual or unique habitats and ecosystems occupied by the species; a significant gap in the species’ range; and/or a significant loss to the ecological, life-history, and genetic diversity of the taxon. We may conclude, based on our previous ESU determinations, that the Southern California, South-Central California,

Central California Coast, California Central Valley, Northern California, Upper Willamette River, Lower Columbia River, Middle Columbia River, Upper Columbia River, and Snake River Basin steelhead DPSs under consideration satisfy the “significance” criterion under the DPS Policy.

#### **Proposed Alternative Species Determinations for Steelhead DPSs**

If we were to apply the DPS Policy to West Coast *O. mykiss*, based on the considerations discussed above, the previously proposed species determinations for 10 West Coast *O. mykiss* ESUs (see 69 FR 33102; June 14, 2004) may be revised to consist of these steelhead-only DPSs. As noted above, the consideration of substantial reproductive isolation for the previously defined steelhead ESUs directly informs the delineation of discrete steelhead-only population units under the DPS Policy. Under this alternative approach the geographic boundaries for the steelhead-only DPSs would not change from those previously delineated for the steelhead or *O. mykiss* ESUs. The steelhead-only DPSs under consideration would include “all naturally spawned populations of anadromous *O. mykiss* (steelhead)” within the geographic boundaries of a given DPS.

On June 28, 2005, we finalized a new policy for the consideration of hatchery-origin fish in ESA listing determinations (“Hatchery Listing Policy,” 70 FR 37204). Under the Hatchery Listing Policy hatchery stocks are considered part of an ESU if they exhibit a level of genetic divergence relative to the local natural population(s) that is no more than what occurs within the ESU (70 FR at 37215; June 28, 2005). Consistent with the June 14, 2004, proposed listing determinations (69 FR 33102; June 14, 2004) and the recent final listing determinations for 16 West Coast salmon ESUs (70 FR 37160; June 28, 2005), hatchery stocks would be included in a steelhead DPS if they are no more than moderately diverged from local, native populations in the watershed(s) in which they are released. The level of divergence for hatchery programs associated with the subject steelhead DPSs is reviewed in the 2003 Salmon and Steelhead Hatchery Assessment Group Report (NMFS, 2003), and the 2004 Salmonid Hatchery Assessment and Inventory Report (NMFS, 2004b). Were we to apply the DPS Policy, the DPS membership of hatchery programs included in the steelhead DPSs would be unchanged from that proposed for the 10 *O. mykiss*

ESUs (see Table 2, 69 FR at 33120; June 14, 2004).

Below we discuss proposed clarifying changes to the proposed Central California Coast and Northern California steelhead DPSs. These proposed clarifying changes are relevant whether we continue to use *O. mykiss* ESUs inclusive of anadromous and resident life forms, or instead we take action on steelhead-only DPSs.

#### *Proposed Central California Coast Steelhead DPS*

The Central California Coast steelhead ESU previously included all naturally spawned populations of steelhead in California streams from the Russian River to Aptos Creek, and the drainages of San Francisco and San Pablo Bays eastward to the Napa River (inclusive), excluding the Sacramento-San Joaquin River Basin (62 FR 43937; August 18, 1997). Recent information, however, indicates that those portions of the ESU in San Francisco Bay and eastward towards the Central Valley were incorrectly described in the 1997 listing notice and need to be clarified. Accordingly, the specification of a proposed Central California Coast steelhead DPS would include all naturally spawned populations of anadromous *O. mykiss* (steelhead) in coastal streams from the Russian River (inclusive) to Aptos Creek (inclusive), and the drainages of San Francisco, San Pablo, and Suisun Bays eastward to Chipps Island at the confluence of the Sacramento and San Joaquin Rivers and in tributary streams to Suisun Marsh including Suisun Creek, Green Valley Creek, and an unnamed tributary to Cordelia Slough (commonly referred to as Red Top Creek), exclusive of the Sacramento-San Joaquin River Basin of the California Central Valley.

#### *Proposed Northern California Steelhead DPS*

The Northern California *O. mykiss* ESU previously included all naturally spawned steelhead in California coastal river basins from Redwood Creek south to the Gualala River (inclusive) (65 FR 36074; June 7, 2000). Recently, however, we have discovered that there is a coastal section between the southern boundary of the proposed Northern California DPS (the Gualala River) and the northern boundary of the proposed Central California Coast steelhead DPS (the Russian River) that contains several small streams that support steelhead. No genetic or other information is currently available for determining which proposed DPS includes these small streams. We believe that the geographic proximity and similarity in

environmental and ecological conditions of these small streams suggests that they would be placed in the Northern California steelhead DPS. Accordingly, we would clarify the geographic boundaries of the Northern California steelhead DPS to include all naturally spawned populations of anadromous *O. mykiss* (steelhead) in California coastal river basins from Redwood Creek southward to, but not including, the Russian River.

Evaluation of Species' Status  
NMFS' Pacific Salmonid Biological Review Team (BRT) (an expert panel of scientists from several Federal agencies including NMFS, FWS, and the U.S. Geological Survey) reviewed the viability and extinction risk of naturally spawning populations in the 10 steelhead ESUs that were the subject of our June 2004 proposed rule (Good *et al.*, 2005). The BRT evaluated the risk of extinction faced by naturally spawning populations in the 10 *O. mykiss* ESUs corresponding to the steelhead DPSs addressed in this request for comment (Good *et al.*, 2005). Although the ESUs reviewed by the BRT included co-occurring populations of resident *O. mykiss*, little or no population data are available for most resident *O. mykiss* populations. The BRT's findings regarding extinction risk are based on the status of the steelhead populations in the ESUs reviewed. Where available, the BRT incorporated information about resident populations into their analyses of extinction risk. For the Southern California, South-Central California Coast, Central California Coast, California Central Valley, Middle Columbia River, Upper Columbia River, and Snake River Basin *O. mykiss* ESUs the BRT noted that the presence of qualitatively abundant resident populations reduced risks to the ESU's abundance (see NMFS, 2004a; Good *et al.*, 2005). However, the BRT concluded for all the *O. mykiss* ESUs reviewed that the contribution of the resident life-history form to the viability of an *O. mykiss* ESU in-total is unknown, and may not substantially reduce the ESU's level of extinction risk. Therefore, the BRT's extinction risk findings may directly inform evaluations of extinction risk for the steelhead DPSs under consideration.

Were we to apply the DPS Policy, we would assess the effects of hatchery programs on the extinction risk of a DPS in-total (i.e., the collective extinction risk of natural- and hatchery origin components within the DPS) on the basis of the factors that the BRT determined are currently limiting the DPS (e.g., abundance, productivity, spatial structure, and diversity), and

how artificial propagation efforts within the DPS affect those factors. The Artificial Propagation Evaluation Workshop (NMFS, 2004c) reviewed the BRT's findings (NMFS, 2003; Good *et al.*, 2005), evaluated the Salmonid Hatchery Inventory and Effects Evaluation Report (NMFS, 2004b), and assessed the overall extinction risk of DPSs with associated hatchery stocks. The reader is referred to the BRT's report (Good *et al.*, 2005), the Salmonid Hatchery Inventory and Effects Evaluation Report (NMFS, 2004b), and the Workshop Report (NMFS, 2004c) for more detailed descriptions of the viability of individual natural populations and hatchery stocks within these DPSs.

#### **Analysis of Efforts Being Made to Protect Proposed West Coast Steelhead DPSs**

In the proposed rule addressing 10 *O. mykiss* ESUs we reviewed protective efforts ranging in scope from regional conservation strategies to local watershed initiatives (see 69 FR 33102; June 14, 2004). We preliminarily concluded that protective efforts collectively do not provide sufficient certainty of implementation and effectiveness to substantially ameliorate the level of assessed extinction risk for all but one of the steelhead ESUs under consideration (see the June 14, 2004, proposed rule for a summary of the relevant protective efforts (69 FR 33102) benefitting the California Central Valley ESU and a description of the proposed finding that these efforts mitigate the ESU's level of extinction risk (69 FR 33102)). While we acknowledge that many of the ongoing protective efforts are likely to promote the conservation of listed salmonids, most efforts are relatively recent and have yet to indicate their effectiveness. Also, few address conservation needs at scales sufficient to conserve entire ESUs. Under our proposed approach to apply the DPS Policy, we would likely conclude that existing protective efforts lack the certainty of implementation and effectiveness to substantially ameliorate the extinction risk of the steelhead DPSs under consideration (but for the proposed California Central Valley steelhead DPS, as noted above).

#### **Proposed Listing Determinations**

Under our proposed approach to apply the DPS Policy, we would likely conclude that the steelhead DPSs under consideration warrant listing under the ESA, based on the BRT's findings, our analysis of the contributions of artificial propagation, and our evaluation of protective efforts. We likely would list

the proposed Southern California steelhead DPS as an endangered species and list the proposed South-Central California, Central California Coast, California Central Valley, Northern California, Upper Willamette River, Lower Columbia River, Middle Columbia River, Upper Columbia River, and Snake River Basin steelhead DPSs as threatened species. The reader is referred to the final BRT report (Good *et al.*, 2005) and the previous proposed rule (69 FR 33102; June 14, 2004) for a more detailed description of a given DPS's status.

### Prohibitions and Protective Regulations

In the case of threatened species, section 4(d) of the ESA leaves it to the Secretary's discretion whether and to what extent to extend the statutory 9(a) "take" prohibitions for endangered species, and directs the agency to issue regulations it considers necessary and advisable for the conservation of the species. On June 28, 2005, as part of the final listing determinations for 16 West Coast salmon ESUs (70 FR 37160), we amended and streamlined the previously promulgated 4(d) protective regulations for threatened salmon and steelhead. (The reader is referred to the June 2005 final rule for information on the specific changes promulgated).

The amended June 2005 4(d) rule applies to the eight steelhead-only ESUs currently listed as threatened under the ESA. Were we to apply the DPS Policy, the amended 4(d) rule would apply to eight of the steelhead DPSs under consideration: the South-Central California, Central California Coast, California Central Valley, Northern California, Upper Willamette River, Lower Columbia River, Middle Columbia River, and Snake River Basin steelhead DPSs. We would not make any changes in the protective regulations for these proposed threatened steelhead DPSs.

The Upper Columbia River steelhead ESU is currently listed as endangered and subject to the section 9(a) take

prohibitions. As part of the June 2004 proposed listing determinations, we proposed to list the Upper Columbia River *O. mykiss* ESU as threatened, and to extend to it the amended 4(d) protective regulations for threatened species (69 FR 33102; June 14, 2004). Were we to apply the DPS Policy and list an Upper Columbia River steelhead DPS as threatened, we would extend to it the June 2005 amended 4(d) protective regulations. We believe that extending the amended 4(d) protective regulations would be necessary and advisable for the conservation of the steelhead in the Upper Columbia River. Such an extension of the 4(d) protective regulations would result in a reduction of the regulatory burden as the various 4(d) limits were not previously available for activities affecting the endangered Upper Columbia River steelhead ESU.

In the June 2005 amendments to the 4(d) protective regulations we amended the 4(d) limit that provides a temporary exemption for ongoing research and enhancement activities with pending applications (limit § 223.203(b)(2)). The existing deadline associated with this limit will expire December 28, 2005. We believe that ongoing research and enhancement activities that are important to the conservation and recovery of listed salmon and steelhead should not be interrupted. Were we to apply the DPS Policy and list nine steelhead-only DPSs as threatened, we would amend limit § 223.203(b)(2) to again provide a temporary exemption for ongoing research and enhancement activities affecting the subject steelhead DPSs.

### Information Solicited

After considering information provided by the FWS and several public commenters, we have reconsidered the preliminary decision to apply the ESU Policy to these stocks and seek comment on the proposed application of the DPS Policy to the delineation of *O. mykiss* DPSs. To ensure that the final action resulting from the proposed rule to list

10 species of West Coast *O. mykiss* will be as accurate and effective as possible, and informed by the best available scientific and commercial information, we are re-opening the public comment period to solicit additional information, comments, and suggestions from the public, other governmental agencies, the scientific community, industry, and any other interested parties. We are particularly interested in receiving comment on the alternative approach to delineate and list steelhead-only DPSs of *O. mykiss*. Specifically, we seek comment on: the use of the DPS Policy as the basis for listing determinations with respect to *O. mykiss*; our proposed determination under the joint DPS Policy that the proposed steelhead DPSs are discrete from other such population groups of *O. mykiss*, and within these proposed DPSs that the anadromous and resident life forms are discrete and would not warrant delineation within the same DPS; our proposed determination under the DPS Policy that the proposed steelhead DPSs are significant to the *O. mykiss* species; our proposed conclusion that the BRT's risk assessments for *O. mykiss* ESUs directly inform the assessment of extinction risk for steelhead DPSs; and the proposed ESA listing determinations for the steelhead DPSs under consideration. Additionally, we seek comment on the clarifying changes to the proposed Central California Coast and Northern California steelhead DPSs.

### References

A complete list of all references cited herein is available upon request (see ADDRESSES), or can be obtained from the Internet at: <http://www.nwr.noaa.gov>.

**Authority:** 16 U.S.C. 1531 *et seq.*

**Dated:** November 1, 2005.

**James W. Balsiger,**

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

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