

(d) *ESA section 10 permits.* The exceptions of section 10 of the ESA (16 U.S.C. 1539) and other exceptions under the ESA relating to endangered species, including regulations in part 222 of this chapter II implementing such exceptions, also apply to the threatened Southern DPS listed in §223.102. Federal, state, and private-sponsored research activities for scientific research or enhancement purposes that are not covered under Scientific Research and Monitoring Exceptions as described in paragraph (b)(1) of this section or Scientific Research and Monitoring Exemptions as described in paragraph (c)(1) of this section, may take Southern DPS fish pursuant to the specifications of an ESA section 10 permit.

(e) *Affirmative defense.* In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened Southern DPS listed in §223.102, any person claiming that his or her take is excepted via methods listed in paragraph (b) of this section shall have a defense where the person can demonstrate that the exception is applicable and was in force, and that the person fully complied with the exception's requirements at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

[75 FR 30728, June 2, 2010, as amended at 79 FR 20813, Apr. 14, 2014]

§ 223.211 Atlantic sturgeon.

(a) *Prohibitions.* The prohibitions of sections 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species apply to the threatened Gulf of Maine Distinct Population Segment (Gulf of Maine DPS) of Atlantic sturgeon listed in §223.102(c)(29).

(b) [Reserved]

[78 FR 69315, Nov. 19, 2013]

§ 223.212 Southern DPS of spotted seal.

The prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species shall apply to

the Southern Distinct Population Segment of spotted seal listed in §223.102.

[79 FR 20814, Apr. 14, 2014]

§ 223.213 Humpback whales.

The prohibitions of section 9(a)(1)(A) through 9(a)(1)(G) of the ESA (16 U.S.C. 1538) relating to endangered species apply to threatened species of the humpback whale listed in §223.102(e)

[81 FR 62319, Sept. 8, 2016]

§ 223.214 Approaching threatened humpback whales in Alaska.

(a) *Prohibitions.* Except as provided under paragraph (b) of this section, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, within 200 nautical miles (370.4 km) of Alaska, or within inland waters of the state, any of the acts in paragraphs (a)(1) through (a)(3) of this section with respect to threatened humpback whales (*Megaptera novaeangliae*):

(1) Approach, by any means, including by interception (*i.e.*, placing a vessel in the path of an oncoming humpback whale so that the whale surfaces within 100 yards (91.4 m) of the vessel), within 100 yards (91.4 m) of any humpback whale;

(2) Cause a vessel or other object to approach within 100 yards (91.4 m) of a humpback whale; or

(3) Disrupt the normal behavior or prior activity of a whale by any other act or omission. A disruption of normal behavior may be manifested by, among other actions on the part of the whale, a rapid change in direction or speed; escape tactics such as prolonged diving, underwater course changes, underwater exhalation, or evasive swimming patterns; interruptions of breeding, nursing, or resting activities, attempts by a whale to shield a calf from a vessel or human observer by tail swishing or by other protective movement; or the abandonment of a previously frequented area.

(b) *Exceptions.* The following exceptions apply, but any person who claims the applicability of an exception has the burden of proving that the exception applies:

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(1) Paragraph (a) of this section does not apply if an approach is authorized by the National Marine Fisheries Service through a permit issued under part 222, subpart C, of this chapter (General Permit Procedures) or through a similar authorization.

(2) Paragraph (a) of this section does not apply to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply with paragraph (a) of this section.

(3) Paragraph (a) of this section does not apply to commercial fishing vessels lawfully engaged in actively setting, retrieving or closely tending commercial fishing gear. For purposes of this section, commercial fishing means taking or harvesting fish or fishery resources to sell, barter, or trade. Commercial fishing does not include commercial passenger fishing operations (*i.e.* charter operations or sport fishing activities).

(4) Paragraph (a) of this section does not apply to state, local, or Federal government vessels operating in the course of official duty.

(5) Paragraph (a) of this section does not affect the rights of Alaska Natives under 16 U.S.C. 1539(e).

(6) This section shall not take precedence over any more restrictive conflicting Federal regulation pertaining to humpback whales, including the regulations at 36 CFR 13.1102–13.1188 that pertain specifically to the waters of Glacier Bay National Park and Preserve.

(c) *General measures.* Notwithstanding the prohibitions and exceptions in paragraphs (a) and (b) of this section, to avoid collisions with threatened humpback whales, vessels must operate at a slow, safe speed when near a humpback whale. “Safe speed” has the same meaning as the term is defined in 33 CFR 83.06 and the International Regulations for Preventing Collisions at Sea 1972 (see 33 U.S.C. 1602), with respect to avoiding collisions with humpback whales.

[81 FR 62021, Sept. 8, 2016]

50 CFR Ch. II (10–1–20 Edition)

§§ 223.215–223.300 [Reserved]

§ 223.301 Special rules—marine and anadromous fishes.

(a) *Middle Columbia River steelhead (Oncorhynchus mykiss.)* (1) The Middle Columbia River steelhead located in the geographic areas identified in paragraph (a)(4) of this section comprise a nonessential, experimental population (NEP).

(2) *Take of this species that is allowed in the NEP area.* (i) Taking of Middle Columbia River (MCR) steelhead that is otherwise prohibited by paragraph (a)(3) of this section and 50 CFR 223.203(a), provided that the taking is unintentional; not due to negligent conduct; and incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Examples of otherwise lawful activities include recreational fishing, recreation, agriculture, forestry, municipal usage, and other similar activities, which are carried out in accordance with Federal, state, and local laws and regulations as well as applicable tribal regulations.

(ii) Handling of MCR steelhead in the NEP area by NMFS, Oregon Department of Fish and Wildlife (ODFW) and the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS) employees and authorized agents acting on their behalf for scientific purposes and by the Portland General Electric Company (PGE) and CTWS employees and authorized agents acting on their behalf for the purpose of monitoring and evaluating the ongoing reintroduction under the Federal Energy Regulatory Commission (FERC) license for the Pelton Round Butte Hydroelectric Project (FERC No. 2030).

(iii) Taking of MCR steelhead incidental to any activities related to or associated with the operation and maintenance of Pelton Round Butte Hydroelectric Project's (FERC Project No. 2030) Round Butte Dam by PGE or CTWS as administered under a license issued by FERC. Acceptable forms of taking of steelhead include, but are not limited to, mortality, stranding, injury, impingement at Round Butte Dam facilities, or delay in up- or downstream passage associated with or caused by any of the following activities. Activities related to the operation