

individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

#### References Cited

A complete list of all references cited in this document is available upon request from the Asheville Field Office (see ADDRESSES section).

#### Author

The primary author of this document is John A. Fridell (see ADDRESSES section).

**Authority** The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: January 18, 2001.

#### H. Dale Hall,

*Acting Regional Director, Fish and Wildlife Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 223

[Docket No. 010118020-1020-01; I.D. 010801A]

RIN 0648-AO86

#### Endangered and Threatened Species: Threatened Status for One Evolutionarily Significant Unit of Steelhead in California and Oregon

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

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

**SUMMARY:** NMFS' completed Endangered Species Act (ESA) status reviews for steelhead (*Oncorhynchus mykiss*) populations in Washington, Oregon, Idaho, and California resulted in proposed listings for several steelhead Evolutionarily Significant Units (ESUs), including a Klamath Mountains Province (KMP) steelhead ESU. Steelhead in this ESU inhabit coastal river basins between the Elk River in Oregon and the Klamath River in California, inclusive. After reviewing additional information, including biological data on the species' status and an assessment of protective efforts, NMFS concluded in 1998 that this ESU did not warrant listing. However, the U.S. District Court for the Northern District of California (Court) recently

overturned that decision and remanded the rule to the agency. The District Court concluded that NMFS erred in relying on the expected effects of future conservation measures when making its final listing determination. In light of the Court's order and of the need to formally solicit any new information regarding the status of KMP steelhead, the agency now re-proposes to list the KMP steelhead ESU as a threatened species under the ESA.

**DATES:** Public hearings on this proposal will be held on February 22, 2001, in Gold Beach, OR, and Eureka, CA. Comments on this proposal must be received no later than 5 p.m. Pacific time, on March 5, 2001. Comments will not be accepted if submitted via e-mail or the Internet.

**ADDRESSES:** Two public hearings on this proposal will be held: (1) on Thursday, February 22, 2001, from 6:30 p.m. to 9 p.m. at the Gold Beach City Hall, City Council Chambers, 29592 Ellensburg Avenue, Gold Beach, OR; and (2) on Thursday, February 22, 2001, from 6:30 p.m. to 9 p.m. at the Eureka Inn, 518 7th Street, Eureka, CA.

Comments on this proposed rule and requests for reference materials should be sent to the Chief, Protected Resources Division, NMFS, Northwest Region, 525 NE Oregon Street, Suite 500, Portland, OR 97232-2737. Comments may also be sent via facsimile (fax) to (503) 230-5435, but will not be accepted if submitted via e-mail or the Internet.

#### FOR FURTHER INFORMATION CONTACT:

Garth Griffin, 503-231-2005, Craig Wingert, 562-980-4021, or Chris Mobley, 301-713-1401.

#### SUPPLEMENTARY INFORMATION:

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

The first petition to address steelhead in the Klamath Mountains Province or "KMP" (named after a geological province in southwest Oregon and northwest California) was received on May 5, 1992, and dealt with winter steelhead in the Illinois River, a tributary to Oregon's Rogue River. The agency conducted a status review of this population (NMFS, 1993) and published a May 20, 1993, determination (58 FR 29390) wherein NMFS concluded that Illinois River winter steelhead did not warrant listing because they did not represent a "species" under the ESA. However, NMFS recognized that this population was part of a larger ESU whose extent had not yet been determined, but whose status might warrant listing because of declining trends in steelhead abundance observed in several southern Oregon streams.

In its May 20, 1993, finding regarding Illinois River winter steelhead, NMFS announced that it would conduct an expanded status review to identify all coastal steelhead ESUs within California, Oregon, and Washington and to determine whether any identified ESUs warranted listing under the ESA (58 FR 29390). Subsequently, on February 16, 1994, NMFS received a petition from the Oregon Natural Resources Council and from 15 co-petitioners to list all steelhead (or specific ESUs, races, or stocks) within the States of California, Oregon, Washington, and Idaho. In response to this petition, NMFS announced the expansion of its status review of steelhead to include inland steelhead populations occurring in eastern Washington and Oregon and the State of Idaho (59 FR 27527, May 27, 1994).

On March 16, 1995, NMFS identified a KMP steelhead ESU and published a proposed rule to list it as a threatened species under the ESA (60 FR 14253). The proposed ESU included steelhead populations inhabiting coastal river basins between the Elk River in Oregon and the Klamath River in California, inclusive. Subsequent to this proposal, the agency completed a coastwide status review of steelhead (NMFS, 1996a) that identified a total of 15 steelhead ESUs in the states of Washington, Oregon, Idaho, and California. By August 9, 1996, the agency had proposed 10 steelhead ESUs, including KMP steelhead, for listing as threatened or endangered under the ESA (61 FR 41541). While the agency had proposed listing KMP steelhead prior to the other ESUs, unresolved issues and practical considerations made it more prudent to consider a final determination on KMP steelhead in the context of final listing decisions for all West Coast steelhead ESUs.

On August 18, 1997, NMFS published a final rule listing five ESUs as threatened and endangered under the ESA (62 FR 43937). In a separate document published on the same day, NMFS determined that substantial scientific disagreement remained for five proposed ESUs, including the KMP steelhead ESU (62 FR 43974, August 18, 1997). In accordance with section 4(b)(6)(B)(i) of the ESA, NMFS deferred its decision on these five steelhead ESUs for 6 months for the purpose of soliciting additional data. During this 6-month period of deferral, NMFS' scientist evaluated new information regarding the status of these proposed steelhead ESUs. This new information resulted in the updating of status review documents for these five ESUs (NMFS, 1997; NMFS, 1998).

Based on a review of the updated information for these ESUs and of a review and evaluation of Federal, state, and local conservation efforts being made to reduce the threats to these ESUs, NMFS issued a final rule on March 19, 1998 (63 FR 13347) listing two ESUs as threatened (Lower Columbia River and Central Valley California) and a notice of determination that three ESUs (KMP, Oregon Coast, and Northern California) did not warrant listing. The latter determination was based on the best available scientific and commercial data that these ESUs had been at a lower risk of extinction than they were at the time of the proposed listing determinations. Even though the risks confronting these ESUs had been reduced to a point at which listing was not warranted, NMFS still expressed concerns about the status of these three ESUs in the notice of determination and, therefore, identified them as candidate species, which the agency would continue to monitor and re-assess by 2002.

#### The Recent District Court Ruling

On October 25, 2000, the U.S. District Court for the Northern District of California (Court) issued a finding that NMFS' March 19, 1998, determination regarding the KMP steelhead ESU was arbitrary and capricious (*Federation of Fly Fishers v. Daley*, Civ. No. C-99-0981-SI). The Court vacated NMFS' "not warranted" determination and remanded the case to NMFS for further consideration. In vacating the agency's decision, the Court held that the ESA does not allow NMFS to consider the expected effects of future conservation actions or to rely exclusively on voluntary conservation efforts. Hence, the Court's finding essentially reinstates NMFS' original proposal to list KMP steelhead as a threatened species under the ESA. Due to time constraints imposed by the Court, NMFS will be able to accept public comments only until March 5, 2001, on this listing re-proposal so that new information can be efficiently evaluated and a final agency determination be promulgated by March 31, 2001.

#### Life History of KMP Steelhead

Biological information for West Coast steelhead and the KMP ESU, in particular, can be found in agency assessments conducted by NMFS (NMFS, 1993, 1994, 1996a, 1997, 1998) and in previous **Federal Register** documents (60 FR 14253, March 16, 1995; 61 FR 41541, August 9, 1996). Steelhead exhibit one of the most complex suites of life history traits of any salmonid species. Individuals may

exhibit anadromy (meaning they migrate as juveniles from fresh water to the ocean, and then return to spawn in fresh water) or freshwater residency (meaning they reside their entire life in fresh water). Resident forms are usually referred to as "rainbow" or "redband" trout, while anadromous life forms are termed "steelhead." Few detailed studies have been conducted regarding the relationship between resident and anadromous *O. mykiss*, and, as a result, the relationship between these two life forms is poorly understood. The scientific name for the biological species that includes both steelhead and rainbow trout has been changed from *Salmo gairdneri* to *O. mykiss*. This change reflects the premise that all trouts from western North America share a common lineage with Pacific salmon. Nonanadromous *O. mykiss* may co-occur with the anadromous form. The KMP steelhead ESU includes both life forms. However, only the anadromous form is under the jurisdiction of NMFS; the U.S. Fish and Wildlife Service (USFWS) maintains ESA authority over resident life forms.

Historically, steelhead were distributed throughout the North Pacific Ocean from the Kamchatka Peninsula in Asia to the northern Baja California Peninsula. Presently, the species distribution extends from the Kamchatka Peninsula, east and south along the Pacific coast of North America, to at least Malibu Creek in southern California. Within the KMP ESU, the species inhabits coastal river basins between the Elk River in Oregon and the Klamath River in California, inclusive.

Steelhead typically migrate to marine waters after spending 2 years in fresh water. They then reside in marine waters for typically 2 or 3 years prior to returning to their natal stream to spawn as 4- or 5-year-olds. Unlike other Pacific salmon, steelhead are iteroparous, meaning they are capable of spawning more than once before they die. However, it is rare for steelhead to spawn more than twice before dying; most that do so are females. Biologically, steelhead can be divided into two reproductive ecotypes, based on their state of sexual maturity at the time of river entry and the duration of their spawning migration. These two ecotypes are termed "stream maturing" and "ocean maturing." Stream maturing steelhead enter fresh water in a sexually immature condition and require several months to mature and spawn. Ocean maturing steelhead enter fresh water with well developed gonads and spawn shortly after river entry. These two reproductive ecotypes are more

commonly referred to by their season of freshwater entry (i.e., summer (stream maturing) and winter steelhead (ocean maturing)). The KMP steelhead ESU contains populations of both winter and summer steelhead. In addition, the Rogue and Klamath River Basins are distinctive in that they are two of the few basins producing "half-pounder" steelhead. This life history type refers to immature steelhead that return to fresh water after only 2-4 months in the ocean, generally overwinter in fresh water, then outmigrate again the following spring (Snyder, 1925; Kesner and Barnhart, 1972; Everest, 1973; Barnhart, 1986).

#### Consideration as a "Species" Under the ESA

To qualify for listing as a threatened or endangered species, the identified populations of steelhead must be considered "species" under the ESA. The ESA defines "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." NMFS published a policy (56 FR 58612, November 20, 1991) describing how the agency will apply the ESA definition of "species" to Pacific salmonid species. This policy provides that a salmonid population will be considered distinct, and hence a species, under the ESA, if it represents an ESU of the biological species. A population must satisfy two criteria to be considered an ESU: (1) It must be reproductively isolated from other conspecific population units and (2) it must represent an important component in the evolutionary legacy of the biological species. The first criterion, reproductive isolation, needs not be absolute, but must be strong enough to permit evolutionarily important differences to accrue in different population units. The second criterion is met if the population contributes substantially to the ecological/genetic diversity of the species as a whole. Guidance on the application of this policy is contained in Waples (1991), a NOAA Technical Memorandum entitled "Definition of 'Species' Under the Endangered Species Act: Application to Pacific Salmon," which is available upon request (see **ADDRESSES**). The genetic, ecological, and life history characteristics, as well as human-induced genetic changes that NMFS assessed to identify the number and geographic extent of steelhead ESUs on the West Coast, including the KMP steelhead ESU, are discussed in detail in NMFS' steelhead status reviews (NMFS, 1993, 1994, 1996a, 1997, 1998) and in

listing proposals (60 FR 14253, March 16, 1995; 61 FR 41541, August 9, 1996).

### KMP Steelhead ESU Determination

The KMP steelhead ESU has been described in NMFS' status review documents and **Federal Register** notices cited earlier; no new scientific information has been received to indicate that the ESU should be redefined. This ESU includes both winter and summer steelhead inhabiting coastal river basins between the Elk River in Oregon and the Klamath River in California, inclusive. Half-pounder juveniles (described previously under "Life History of KMP Steelhead") also occur in this geographic area. Geologically, this region includes the Klamath Mountains Geological Province, which is not as erosive as the Franciscan formation terrains south of the Klamath River Basin. Dominant vegetation along the coast is redwood forest, while some interior basins are much drier than the surrounding areas. The region is characterized by many endemic plant species. Elevated stream temperatures are a factor affecting steelhead and other species in some of the larger river basins. With the exception of major river basins, such as the Rogue and Klamath, most rivers in this region have a short duration of peak flows. Strong and consistent coastal upwelling begins at about Cape Blanco and continues south into the central California coast, resulting in a relatively productive nearshore marine environment. Protein electrophoretic analyses of coastal steelhead have indicated genetic discontinuities between the steelhead of this region and those to the north and south (Hatch, 1990; NMFS, 1993 and 1994). Chromosomal studies have also identified a distinctive karyotype that has been reported only from populations within this ESU.

The relationship between hatchery steelhead populations and naturally spawned steelhead within this ESU was also assessed in a NMFS' status review update (NMFS, 1998). Based on this assessment, NMFS' steelhead Biological Review Team (BRT) concluded that seven steelhead hatchery stocks are part of this ESU because they were established from indigenous natural populations. In Oregon these stocks are Applegate River, Oregon Department of Fish and Wildlife (ODFW) stock 162 (winter run); Upper Rogue River, ODFW stock 152 (winter run); Upper Rogue River, ODFW stock 152 (summer run); and Chetco River, ODFW stock 196 (winter run). In California, the stocks are Iron Gate Hatchery stock (winter run); Trinity River Hatchery stock (winter

run); and Rowdy Creek Hatchery stock. The majority of the BRT also concluded that these hatchery stocks were not likely to be essential for the recovery of the ESU (i.e., if the ESU were listed).

### Status of the KMP Steelhead ESU

Section 3 of the ESA defines the term "endangered species" as "any species that is in danger of extinction throughout all or a significant portion of its range." The term "threatened species" is defined as "any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." In its previous status reviews for West Coast salmon and steelhead, NMFS has identified a number of factors that should be considered in evaluating the level of risk faced by an ESU, including (1) absolute numbers of fish and their spatial and temporal distribution, (2) current abundance in relation to historical abundance and current carrying capacity of the habitat, (3) trends in abundance, (4) natural and human-influenced factors that cause variability in survival and abundance, (5) possible threats to genetic integrity (e.g., from strays or outplants from hatchery programs), and (6) recent events (e.g., a drought or changes in harvest management) that have predictable short-term consequences for abundance of the ESU.

Based on these factors and on the best available scientific information, NMFS' BRT first reviewed the status of the KMP steelhead in 1994 (NMFS, 1994) and determined that it was likely to become endangered in the foreseeable future. The agency subsequently proposed this ESU for listing as a threatened species (60 FR 14253, March 16, 1995), noting that available information indicated that most of the steelhead populations in the KMP ESU were in significant decline and not self-sustaining. After completing a coastwide status review in 1996, the agency restated its proposal to list the ESU as threatened and highlighted concerns for summer steelhead as well as the apparent replacement of natural fish with hatchery-produced fish. The status of the ESU was last reassessed in a 1997 status review update (NMFS, 1997), wherein the NMFS' BRT analyzed new information and once again concluded that the KMP ESU was likely to become endangered in the foreseeable future. The BRT expressed concern about the lack of reliable and recent data for many populations and the almost universal decline of native summer steelhead populations in this ESU. Although the percentage of naturally spawning hatchery fish was

considered low to moderate in Oregon streams in the ESU, the BRT had major concerns regarding stray hatchery fish in the Klamath and Trinity River Basins. In addition, the BRT cited significant risks resulting from habitat loss and degradation (e.g., due to dams, logging, water withdrawals, and mining) within the range of this ESU.

In addition to the BRT's assessment, the agency also considered existing and recently implemented conservation efforts focused on KMP steelhead. Significant state efforts in Oregon and California (including harvest restrictions, monitoring, and habitat improvements) appeared to have reduced threats to this species. In addition, NMFS believed that biological risks associated with habitat modification and degradation on Federal lands had decreased as a result of the Northwest Forest Plan (Forest Ecosystem Management Assessment Team (FEMAT), 1993). While NMFS remained concerned about habitat conditions on non-Federal lands within the range of the ESU, the agency noted that the majority of lands were actually under Federal ownership. After reviewing all of the available types of information, NMFS concluded in March 1998 that the KMP steelhead ESU did not warrant listing as a threatened species but instead should be classified as a candidate species and its status re-evaluated by 2002. However, the recent ruling by the Court on October 25, 2000, states that NMFS erred in arriving at this determination and requires the agency to re-assess this ESU.

NMFS scientists have recently conducted a preliminary survey of new information on KMP steelhead populations that has become available since the BRT last reviewed the species in December 1997 (NMFS, 2000). Available new data for Oregon populations in the KMP steelhead ESU are concentrated in the Rogue River Basin and show no major changes since the last assessment. New information on California steelhead populations in NMFS' possession is also very limited and consist primarily of short-term data from creel and snorkel surveys. This paucity of available data compels the agency to re-propose the ESU as a threatened species at this time. However, the agency is hopeful that data sets currently being compiled in Oregon and California, as well as any new information received in response to this listing proposal, will permit a more rigorous assessment prior to a final listing determination.

### Summary of Factors Affecting the Species

Section 4(a)(1) of the ESA and NMFS' implementing regulations (50 CFR part 424) set forth procedures for listing species. The Secretary of Commerce (Secretary) must determine, through the regulatory process, whether a species is endangered or threatened based upon any one or a combination of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or education purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; or (5) other natural or human-made factors affecting its continued existence. The factors threatening naturally reproducing steelhead are numerous and varied. For KMP steelhead populations, the present depressed condition is the result of longstanding, human-induced factors that serve to exacerbate the adverse effects of natural environmental variability from such factors as drought, floods, and poor ocean conditions.

NMFS has prepared a report that summarizes the factors leading to the decline of steelhead on the West Coast (NMFS, 1996b). This report, available upon request (see **ADDRESSES** section), concludes that all of the factors identified in section 4(a)(1) of the ESA have played a role in the decline of West Coast steelhead. The report further identifies several factors that were considered to have contributed to the decline of the KMP steelhead ESU, including: hatchery introgression, logging, water diversion/extraction, habitat blockages, poaching, agriculture, hydropower development, historic flooding, and mining. As a result of previous listing proposals (60 FR 14253, March 16, 1995; 61 FR 41541, August 9, 1996), NMFS has received numerous comments regarding the relative importance of various factors contributing to the decline of KMP steelhead. These comments will be considered along with any new information resulting from the current listing proposal prior to the agency making a final listing determination for this ESU.

### Efforts Being Made to Protect West Coast Steelhead

Section 4(b)(1)(A) of the ESA requires the Secretary of Commerce to make listing determinations solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species and after taking into account

efforts being made to protect the species. Therefore, in making its listing determinations, NMFS first assesses the status of the species and identifies factors that have led to the decline of the species. NMFS then assesses conservation measures to determine whether they ameliorate risks to the species. In judging the efficacy of existing conservation efforts, NMFS considers the following: (1) The substantive, protective, and conservation elements of such efforts; (2) the degree of certainty such efforts will be reliably implemented; (3) the degree of certainty such efforts will be effective; and (4) the presence of monitoring provisions that determine effectiveness and that permit adaptive management. In some cases, conservation efforts may be relatively new and may not have had time to demonstrate their biological benefit. In such cases, provisions for adequate monitoring and funding of conservation efforts are essential to ensure that intended conservation benefits are realized.

As part of its West Coast steelhead status review, NMFS reviewed an array of protective efforts for steelhead and other salmonids, ranging in scope from regional strategies to local watershed initiatives. NMFS has summarized some of the major efforts in a supplement to the earlier status reviews (NMFS, 1996c). NMFS also reviewed steelhead conservation measures being implemented by the states of California and Oregon at the time of its March 19, 1998, listing determination for the KMP steelhead ESU (63 FR 13347). During the next two months, NMFS will seek to update the current status of conservation efforts affecting KMP steelhead and, in keeping with the recent Court order, will take into account appropriate conservation efforts when assessing the final ESA status of KMP steelhead. NMFS encourages all parties to submit information on such efforts, on particularly existing conservation efforts, or on those that have only recently been implemented (e.g., since 1997) but will likely ameliorate risks faced by KMP steelhead.

### Proposed Determination

In keeping with an October 25, 2000, order by the U.S. District Court for the Northern District of California, NMFS is re-proposing to list the KMP steelhead ESU as a threatened species under the ESA. This proposal is supported by previous agency listing proposals (60 FR 14253, March 16, 1995; 61 FR 41541, August 9, 1996) and BRT reports (NMFS, 1994; NMFS, 1997), which

concluded that steelhead in the KMP ESU are likely to become endangered in the foreseeable future. Also, a preliminary review of updated abundance and trend information available for this ESU indicates that the current biological status of the ESU has changed little since it was last evaluated by the NMFS BRT. The agency believes that many conservation efforts have helped reduced the risks faced by KMP steelhead. However, the recent Court ruling will require that NMFS reconsider the manner in which these efforts factor into a final listing determination for this ESU.

As described in agency status reviews and in the proposed listing determination cited above, NMFS defines the KMP steelhead ESU to include all native, naturally spawned populations of steelhead (and their progeny) residing in streams between the Elk River (Oregon) and Klamath River Basins (California), inclusive. NMFS scientists have previously examined the relationship between hatchery and natural populations of steelhead in this ESU and also assessed whether any hatchery populations are essential for their recovery (NMFS, 1998). At this time, NMFS does not believe any specific hatchery populations warrant listing. Also, NMFS is proposing to list only the anadromous life forms of *O. mykiss*.

### Prohibitions and Protective Measures

Section 4(d) of the ESA requires NMFS to issue protective regulations it finds necessary and advisable to provide for the conservation of threatened species. Section 9 of the ESA prohibits violations of protective regulations for threatened species promulgated under section 4(d). The 4(d) protective regulations may prohibit, with respect to the threatened species, some or all of the acts which section 9 of the ESA prohibits with respect to endangered species. These section 9 prohibitions and 4(d) regulations apply to all individuals, organizations, and agencies subject to U.S. jurisdiction. If NMFS determines that the KMP steelhead ESU warrants listing as a threatened species, then the agency will develop and promulgate a 4(d) protective regulation for the ESU in a separate rulemaking. The process for completing the 4(d) rule will provide the opportunity for public comment on the proposed protective regulations.

In the case of threatened species, NMFS has flexibility under section 4(d) to tailor the protective regulations to provide for the conservation of the species. NMFS has recently published 4(d) regulations for 14 threatened ESUs

of salmon and steelhead (65 FR 42422, July 10, 2000) that adopt an array of limits on take prohibitions. Some of the broad categories of activities addressed by these limits include: scientific research; fish harvest; artificial propagation; habitat restoration; screening water diversions; routine road maintenance; and municipal, residential, commercial, and industrial development and redevelopment. By receiving NMFS approval under a limit, governments and individuals obtain assurance that their activities, when implemented in accordance with the criteria in the 4(d) rule, do not violate ESA "take" prohibitions and will not be subject to enforcement actions.

Section 7(a)(2) of the ESA requires Federal agencies to consult with NMFS to ensure that activities they authorize, fund, or conduct are not likely to jeopardize the continued existence of a listed species or adversely modify critical habitat. Examples of Federal actions likely to affect steelhead in the KMP steelhead ESU include authorized land management activities (e.g., timber sales and harvest, and livestock grazing) of the U.S. Forest Service and Bureau of Land Management, operation of hydroelectric and storage projects permitted by the Federal Energy Regulatory Commission, and activities permitted by the U.S. Army Corps of Engineers under the Clean Water Act and River and Harbors Act.

Sections 10(a)(1)(A) and 10(a)(1)(B) of the ESA provide NMFS with authority to grant exceptions to the ESA's "take" prohibitions. Section 10(a)(1)(A) scientific research and enhancement permits may be issued to entities (Federal and non-Federal) for scientific purposes or to enhance the propagation or survival of a listed species. NMFS has issued section 10(a)(1)(A) research/enhancement permits for listed salmon and steelhead for a number of activities, including trapping and tagging, electroshocking to determine population presence and abundance, removal of fish from irrigation ditches, and collection of adult fish for artificial propagation programs.

Section 10(a)(1)(B) of the ESA incidental take permits may be issued to non-Federal entities performing activities which may incidentally take listed species, so long as the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. The types of activities potentially requiring a section 10(a)(1)(B) incidental take permit include the operation and release of artificially propagated fish by state or privately operated and funded hatcheries, state or academic research

not receiving Federal authorization or funding, logging, road building, grazing, and diverting water onto private lands.

#### **Policies on Endangered and Threatened Fish and Wildlife**

On July 1, 1994, NMFS, jointly with USFWS, published a series of policies regarding listings under the ESA, including: (1) a policy regarding peer review of scientific data (59 FR 34270) and (2) a policy to identify, to the maximum extent possible, those activities that would or would not constitute a violation of section 9 of the ESA (59 FR 34272). The intent of the first policy is to ensure that listings are based on the best scientific and commercial data available. Prior to a final listing and concurrent with the public comment period, NMFS will solicit the expert opinions of at least three qualified specialists. Independent peer reviewers will be selected from the academic and scientific community, Native American tribal groups, Federal and state agencies, and the private sector. The intent of the second policy is to increase public awareness of the effect of this listing on proposed and ongoing activities within the species' range. If NMFS determines that the KMP steelhead ESU warrants listing as a threatened species, the agency will identify activities that will be considered likely to result in section 9 violations as well as specific activities (to the extent known) that will not be considered likely to result in section 9 violations once a 4(d) rule has been adopted.

#### **Critical Habitat**

Section 4(a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, NMFS designate critical habitat concurrently with a determination that a species is endangered or threatened. While NMFS has completed an initial analysis of the biological status of steelhead in the KMP steelhead ESU, it has not performed the full analysis necessary for designating critical habitat at this time. If this ESU is listed under ESA, it is NMFS' intent to develop a critical habitat proposal as soon as the analysis can be completed.

#### **Public Comments Solicited**

NMFS has exercised its best professional judgement in developing this proposal to list the KMP steelhead ESU. To ensure that the final action resulting from this proposal will be as accurate and effective as possible, NMFS is soliciting data, comments, and suggestions from the public, other governmental agencies, the scientific

community, industry, and any other interested parties. NMFS is interested in any additional information concerning: (1) biological or other relevant data concerning any threats to steelhead in this ESU; (2) the range, distribution, and population size of steelhead in this ESU; (3) current or planned activities in the range of the ESU and their possible impact on KMP steelhead; (4) steelhead escapement, particularly recent escapement data partitioned into natural and hatchery components; (5) the proportion of naturally reproducing fish that were reared as juveniles in a hatchery; (6) homing and straying of natural and hatchery fish; (7) the reproductive success of naturally reproducing hatchery fish (i.e., hatchery-produced fish that spawn in natural habitat) and their relationship to the proposed ESU; (8) efforts being made to protect native, naturally reproducing populations of steelhead in this ESU; and (9) suggestions for specific regulations under section 4(d) of the ESA that should apply to steelhead in this ESU. Suggested regulations may address activities, plans, or guidelines that, despite their potential to result in the take of listed fish, will ultimately promote the conservation and recovery of threatened steelhead. NMFS will review all public comments and any additional information regarding the status of the KMP steelhead ESU and will complete a final rule by March 31, 2001, as required under the recent Court order.

Joint Commerce-Interior ESA implementing regulations state that the Secretary "shall promptly hold at least one public hearing if any person so requests within 45 days of publication of a proposed regulation to list ... or to designate or revise critical habitat." (see 50 CFR 424.16(c)(3)). A public hearing schedule on this proposal is contained in this notice. Public hearings will provide the opportunity for the public to give comments and to permit an exchange of information and opinion among interested parties. NMFS encourages the public's involvement in such ESA matters. Written comments on the proposed rule should be submitted to NMFS by March 5, 2001. (see **ADDRESSES** and **DATES**).

#### **Special Accommodations**

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other aids should be directed to Garth Griffin or Craig Wingert (see **ADDRESSES**).

## References

A complete list of all cited references is available upon request (see ADDRESSES).

## Classification

### *National Environmental Policy Act*

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation v. Andrus*, 675 F. 2d 825 (6th Cir. 1981), NMFS has concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act (NEPA). See NOAA Administrative Order 216-6.

### *Executive Order 12866 and Regulatory Flexibility Act*

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act (RFA) are not applicable to the listing process. In addition, this proposed rule is exempt from review under Executive Order 12866.

### *Executive Order 13132—Federalism*

In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, NMFS has conferred with state and local government agencies in the course of assessing the status of the KMP steelhead ESU and considered, among other things, state and local conservation measures. State and local governments have expressed support for the conservation of KMP steelhead and made efforts to reduce risks faced by the ESU. The history and content of this dialogue, as well as the basis for this proposed action, are described in the SUPPLEMENTARY INFORMATION section of this document and in other Federal Register documents preceding this proposed action. (See 61 FR 41541, August 9, 1996; 62 FR 43974, August 18, 1997; and 63 FR 13347, March 19, 1998). NMFS' staff have had numerous discussions with various governmental agency representatives regarding the status of this ESU and have sought working relationships with agencies and others in order to promote salmonid restoration efforts. In addition, NMFS' staff have given presentations to interagency forums and other interested groups considering conservation measures. As the process continues,

NMFS intends to continue engaging in informal and formal contacts with affected state, local, or regional entities, giving careful consideration to all written or oral comments received. As one part of that continued process, NMFS has scheduled public hearings on this proposed action. NMFS also intends to consult with appropriate elected officials in consideration of a final rule.

### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

NMFS has consulted with affected tribes throughout the course of the West Coast steelhead status review. These consultations have included numerous presentations and discussions with tribal officials and representatives, in particular, the Klamath River Basin tribes, regarding the status of the KMP steelhead and conservation efforts directed at this ESU. NMFS will continue to actively engage the affected tribes and will seek their assistance and expertise to complete the agency's KMP steelhead status review. Moreover, the agency will carry out its responsibilities under the Act in a manner that recognizes tribal sovereignty and harmonizes the agency's statutory missions with Federal trust responsibilities to tribes and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species. In keeping with E.O. 13175, NMFS will summarize the history of consultations with affected tribes and describe the manner in which tribal concerns were addressed at the time of the final listing determination for KMP steelhead.

### List of Subjects in 50 CFR Part 223

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

Dated: February 7, 2001.

**William T. Hogarth,**

*Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For the reasons set forth in the preamble, 50 CFR part 223 is proposed to be amended as follows:

## PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

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

**Authority:** 16 U.S.C. 1531 *et seq.*; 16 U.S.C. 742a *et seq.*; 31 U.S.C. 9701.

2. In § 223.102, paragraph (a)(23) is added to read as follows:

### § 223.102 Enumeration of threatened species.

\* \* \* \* \*

(a) \* \* \*

(23) Klamath Mountains Province steelhead (*Oncorhynchus mykiss*). Includes all naturally spawned populations of steelhead (and their progeny) in coastal river basins ranging from the Elk River in Curry County, Oregon, to the Klamath River, inclusive, in Del Norte County, California.

\* \* \* \* \*

[FR Doc. 01-3545 Filed 2-9-01; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Part 622

[I.D. 013001A]

### Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic; Public Hearings

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

**ACTION:** Notice of public hearing; request for comments.

**SUMMARY:** The South Atlantic Fishery Management Council (Council) will hold a public hearing to address issues regarding the use of powerhead gear (or "bangsticks") by recreational and commercial divers fishing in the Exclusive Economic Zone off the east coast of Florida, within the Council's area of jurisdiction, for reef fish species in the management unit of the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP).

**DATES:** Written comments will be accepted until 12 noon, February 26, 2001. For the specific date and time of the hearing see SUPPLEMENTARY INFORMATION.

**ADDRESSES:** Written comments should be sent to Bob Mahood, Executive Director, South Atlantic Fishery Management Council, One Southpark Circle, Suite 306, Charleston, SC 29407-4699; telephone: (843) 571-4366; FAX (843) 769-4520; email address: safmc@noaa.gov. Copies of the Options Paper addressing powerhead gear issues are available from the Council at the same address. The meeting will be held in Atlantic Beach, FL.