

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 226

[Docket No. 030716175-3175-01; I.D. 071503B]

RIN 0648-AQ77

#### Endangered and Threatened Species: Amendment of the Code of Federal Regulations to Withdraw Critical Habitat Designations Vacated by Court Order

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to remove critical habitat designations for 19 salmon and steelhead Evolutionarily Significant Units (ESUs) in order to comply with an order of a Federal District Court.

**DATES:** The action became effective on April 30, 2002.

**FOR FURTHER INFORMATION CONTACT:** Steve Stone, NMFS Northwest Region (WA, OR, and ID), 503/231-2317; Craig Wingert, NMFS Southwest Region (CA), 562/980-4021; or Lamont Jackson, NMFS Headquarters (Silver Spring, MD), 301/713-1401.

**SUPPLEMENTARY INFORMATION:** On February 16, 2000, NMFS published a final rule designating critical habitat for 19 ESUs of west coast salmon and steelhead under section 4 of the Endangered Species Act (16 U.S.C. 1531 *et seq.*) (65 FR 7764). The designations included more than one hundred and fifty river subbasins covering a total land area of approximately 154,000 square miles (400,400 square kilometers) in WA, OR, ID, and CA. Within each occupied subbasin, NMFS designated as critical habitat those stream areas accessible to listed fish, along with the associated riparian zone. Areas considered inaccessible included areas above long-standing natural impassable barriers and areas above impassable dams, but not areas above ephemeral barriers such as failed culverts.

NMFS determined in 2000 that the critical habitat designations would

impose few if any additional requirements on federal agencies beyond those already imposed by the listing of the species themselves. The ESA's prohibition against any action that is likely to result in the destruction or adverse modification of critical habitat applies only to federal agencies, which are also prohibited from taking any action that is likely to jeopardize the continued existence of listed species. NMFS reasoned that since it was designating only occupied habitat, there would be few or no actions that adversely modified critical habitat that also did not jeopardize the continued existence of the species. Therefore, NMFS determined there would be no economic impact as a result of the designations (65 FR 7764, 7765, February 16, 2000).

The National Association of Homebuilders (NAHB) challenged the critical habitat designations in U.S. District Court in Washington, D.C. as having inadequately considered the economic and other impacts of the designations (*National Association of Homebuilders v. Evans*, Civ. No. 00-2799). NAHB also challenged NMFS' designation of Essential Fish Habitat (EFH) (Pacific Coast Salmon Fishery Management Plan, 2000). While the NAHB litigation was pending, the U.S. Court of Appeals for the Tenth Circuit issued its opinion in *New Mexico Cattlegrowers' Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). In that case, the Court rejected the Fish and Wildlife Service's approach to economic analysis, which was similar to the approach taken by NMFS in the final rule designating critical habitat for 19 ESUs of west coast salmon and steelhead. Subsequent to the Tenth Circuit decision, NMFS entered into and sought judicial approval of a consent decree resolving the NAHB litigation. That decree provided for the withdrawal of the critical habitat designations for the 19 salmon and steelhead ESUs, and dismissed NAHB's challenge to the EFH designations. The District Court approved the consent decree and vacated the critical habitat designations by Court order on April 30, 2002 (2002 WL 1205743, D.D.C. April 30, 2002).

As a result of the Court's decision, the agency is now amending the Code of Federal Regulations to withdraw critical habitat designations for the following 19 ESUs of salmon and steelhead: (1) Puget Sound chinook salmon; (2) Lower Columbia River chinook salmon; (3) Upper Willamette River chinook salmon; (4) Upper Columbia River spring-run chinook salmon; (5) California Central Valley spring-run

chinook salmon; (6) California coastal chinook salmon; (7) Oregon Coast coho salmon; (8) Hood Canal summer-run chum salmon; (9) Columbia River chum salmon; (10) Ozette Lake sockeye salmon; (11) Southern California steelhead; (12) South-Central California coast steelhead; (13) Central California Coast steelhead; (14) Central Valley California steelhead; (15) Upper Columbia River steelhead; (16) Snake River Basin steelhead; (17) Lower Columbia River steelhead; (18) Upper Willamette River steelhead; and (19) Middle Columbia River steelhead.

#### Classification

This final rule implements a Court order and does not involve the exercise of agency discretion and, therefore, under 5 U.S.C. 553(b)(B) good cause exists to waive the notice and comment requirements of the Administrative Procedure Act, as such procedures are unnecessary. Further, in that this rule implements a Court order already in effect, good cause exists under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effective date.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

#### List of Subjects in 50 CFR Part 226

Endangered and threatened species

Dated: September 24, 2003.

**Rebecca Lent,**

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

■ For the reasons set out in the preamble, 50 CFR part 226 is amended as follows:

#### PART 226—[AMENDED]

■ 1. The authority citation of part 226 continues to read as follows:

**Authority:** 16 U.S.C. 1533.

■ 2. Remove Tables 7 through 24.

■ 3. Remove and reserve § 226.212.

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