

provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This proposed rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this proposed rule under Department of Homeland Security Management Directive 0023.1 and Commandant Instruction M16475.ID which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that this is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. Therefore, this rule is categorically excluded, under section 2.B.2. Figure 2–1, paragraph 32(e), of the Instruction because it simply promulgates the operating regulations or procedures for drawbridges. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 33 CFR Part 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR Part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

2. Revise § 117.835 to read as follows:

§ 117.835 Perquimans River

The draw of the US17 Bridge, mile 12.0, at Hertford, NC shall open on signal from 8 a.m. to 10 p.m. from May 1 through September 30; and from 10 a.m. to 8 p.m. from October 1 through April 30, if two hours notice is given. The draw need not be opened at all other times.

Dated: February 17, 2009.

Fred M. Rosa, Jr.,

*Rear Admiral, U.S. Coast Guard, Commander,
Fifth Coast Guard District.*

[FR Doc. E9–5408 Filed 3–12–09; 8:45 am]

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PRESIDIO TRUST

36 CFR Part 1012

Legal Process: Testimony by Employees and Production of Records

AGENCY: Presidio Trust.

ACTION: Proposed Rule.

SUMMARY: The Presidio Trust proposes a regulation, limited to the Presidio Trust's organization and management, governing access to Presidio Trust information and records in connection with legal proceedings in which neither the United States nor the Presidio Trust is a party. This proposed rule will establish guidelines for use in determining whether Presidio Trust employees (as defined in the proposed rule) will provide testimony or records relating to their official duties. It also will establish procedures for requesters to follow when making demands on or requests to a Presidio Trust employee for official documents or to provide testimony. This proposed rule will standardize the Presidio Trust's practices, promote uniformity in decisions, conserve the ability of the Presidio Trust to conduct official business, preserve its employee resources, protect confidential information, provide guidance to requestors, minimize involvement in matters unrelated to the Presidio Trust's mission and programs, avoid wasteful allocation of agency resources and avoid spending public time and money for private purpose.

DATES: Submit written comments on or before April 20, 2009.

ADDRESSES: Send written comments to Karen A. Cook, General Counsel, Presidio Trust, 34 Graham Street, P.O. Box 29052, San Francisco, CA 94129–0052.

FOR FURTHER INFORMATION CONTACT:

Karen A. Cook, General Counsel, Presidio Trust, 34 Graham Street, P.O. Box 29052, San Francisco, CA 94129–0052. Telephone: 415.561.5300.

SUPPLEMENTARY INFORMATION: The Presidio Trust, a wholly-owned federal government corporation, on occasion receives subpoenas and other requests for documents and requests for Presidio Trust employees (as defined in the proposed rule) to provide testimony or

evidence in judicial, legislative or administrative proceedings in which the Presidio Trust is not a party. Sometimes these subpoenas or requests are for Presidio Trust records that are exempt from disclosure under the Freedom of Information Act. The Presidio Trust also receives requests for Presidio Trust employees to appear as witnesses and to provide testimony relating to materials contained in the Presidio Trust's official records or provide testimony or information acquired during the performance of the employees' official duties.

Although many other federal agencies currently have regulations in place to address these types of requests, and the Presidio Trust itself has rules governing requests for information under the Freedom of Information Act, the Presidio Trust has not adopted regulations governing subpoenas and other information requests for document production and testimony of Presidio Trust employees in judicial, legislative or administrative proceedings in which the Presidio Trust is not a party. Issues about such requests that have arisen in recent years warrant adoption of regulations governing their submission, evaluation and processing. Responding to these requests is not only burdensome, but may also result in a significant disruption of a Presidio Trust employee's work schedule, involve the Presidio Trust in issues unrelated to its responsibilities and/or impede the Presidio Trust's accomplishment of its budgetary goals. In order to resolve these issues, many agencies have issued regulations, similar to this proposed regulation, governing the circumstances and manner for responding to demands for testimony or for the production of documents. Establishing uniform procedures for submission, evaluation and response to such demands will ensure timely notice and promote centralized decision making. The United States Supreme Court upheld this type of regulation in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

Briefly summarized, the proposed rule will prohibit disclosure of official records or testimony by the Presidio Trust's employees unless there is compliance with the rule. The proposed rule sets out the information that requesters must provide and the factors that the Presidio Trust will consider in making determinations in response to requests for testimony or the production of documents.

This proposed rule will ensure a more efficient use of the Presidio Trust's resources, minimize the possibility of involving the Presidio Trust in issues

unrelated to its mission or responsibilities, promote uniformity in responding to such subpoenas and similar requests, and maintain the impartiality of the Presidio Trust in matters that are in dispute between other parties. It will also serve the Presidio Trust's interest in protecting sensitive, confidential and privileged information and records that are generated in fulfillment of the Presidio Trust's responsibilities.

The proposed rule is internal and procedural rather than substantive. It will not create a right to obtain official records or the official testimony of a Presidio Trust employee nor will it create any additional right or privilege not already available to the Presidio Trust to deny any demand or request for testimony or documents. Failure to comply with the procedures set out in these proposed regulations would be a basis for denying a demand or request submitted to the Presidio Trust.

This rulemaking is in compliance with the Administrative Procedure Act (5 U.S.C. 553) and allows for a 30-day comment period. Interested persons are invited to submit written comments to the Presidio Trust on this proposed regulation, to be received on or before April 20, 2009. Prior to issuing its final rule, the Presidio Trust will review all comments received and consider any modifications to this proposal that appear warranted.

Executive Order 12866—Regulatory Planning and Review

This proposed rule has been reviewed under Executive Order 12866 issued September 30, 1993 on Regulatory Planning and Review. This proposed rule will not have an annual effect of \$100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This proposed rule will neither interfere with an action taken or planned by another agency nor raise new legal or policy issues. This proposed rule will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Therefore, it has been determined that this is not an economically significant rule.

Executive Order 12988—Civil Justice Reform

This proposed rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. This proposed rule has been written so as to minimize

litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities. Additionally, the Presidio Trust has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full implementation of this proposed rule. Nonetheless, in the event that such a conflict was to be identified, the proposed rule would preempt State or local laws or regulations found to be in conflict. However, in that case, (1) no retroactive effect would be given to this proposed rule; and (2) the proposed rule does not require the use of administration proceedings before parties may file suit in court challenging its provisions.

Executive Order 13132—Federalism

This proposed rule conforms with the Federalism principles set out in Executive Order 13132 and would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it has been determined that this proposed rule does not have federalism implications.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) as well as Executive Order 12875, the Presidio Trust has assessed the effects of this proposed rule on State, local, and Tribal governments and the private sector. This proposed rule does not compel the expenditure of \$100 million or more in any one year by any State, local, or Tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Executive Order 13175—Consultation With Indian Tribal Governments

Pursuant to Executive Order 13175 of November 6, 2000, the Presidio Trust has assessed the impact of this proposed rule on Indian Tribal governments and has determined that the proposed rule does not significantly or uniquely affect communities of Indian Tribal governments. The Presidio Trust has also determined that this proposed rule does not impose substantial direct compliance costs or Tribal implications on Indian tribal governments, and therefore advance consultation with Tribes is not required.

Regulatory Flexibility Act and Executive Order 13272—Consideration of Small Entities

This proposed rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*) and Executive Order 13272 of August 13, 2002. This proposed rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act and Executive Order 13272, because the proposed rule will not impose recordkeeping requirements on them; it will not affect their competitive position in relation to large entities; and it will not affect their cash flow, liquidity or ability to remain in the market.

Certification

The Presidio Trust certifies that this proposed rule is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act or Executive Order 13272.

Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 *et seq.*), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Because this proposed rule is a rule of agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties it is not a "rule" as defined by the Congressional Review Act (5 U.S.C. 804(3)(C)) and is not subject to it.

Executive Order 13211—Energy Effects

This proposed rule is not a "significant energy action" as defined in Executive Order 13211 of May 22, 2001, because it is not likely to have a significant adverse affect on the supply, distribution or use of energy. The Presidio Trust has determined that this proposed rule is not likely to have any adverse energy effects.

The Paperwork Reduction Act of 1995

This proposed rule contains no paperwork burdens or information collection requirements that are subject to review by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Analysis of Environmental Impact

The Presidio Trust has analyzed this proposed rule in accordance with the

criteria of the National Environmental Policy Act of 1969 and determined that rule does not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Government Paperwork Elimination Act

The Presidio Trust is committed to compliance with the Government Paperwork Elimination Act (GPEA), which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. This proposed rule contains no paperwork burdens or information collection requirements, and is thus in compliance with the GPEA.

Executive Order 12630—No Takings Implication

This proposed rule has been analyzed in accordance with the principles of and criteria contained in Executive Order 12630 issued March 15, 1988, and it has been determined that the proposed rule does not pose a risk of a taking of constitutionally protected private property.

For the reasons set forth in the preamble, the Presidio Trust proposes to amend chapter X of title 36 of the Code of Federal Regulations by adding new part 1012 to read as follows:

PART 1012—LEGAL PROCESS: TESTIMONY BY EMPLOYEES AND PRODUCTION OF RECORDS

Sec.

General Information

1012.1 What does this part cover?

1012.2 What is the Presidio Trust's policy on granting requests for employee testimony or Presidio Trust records?

Responsibilities of Requesters

1012.3 How can I obtain employee testimony or Presidio Trust records?

1012.4 If I serve a subpoena duces tecum, must I also submit a *Touhy* Request?

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1012.8 How will the Presidio Trust process my *Touhy* Request?

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Responsibilities of Employees

1012.10 What must I, as an employee, do upon receiving a request?

1012.11 Must I get approval before testifying as an expert witness other than on behalf of the United States in a Federal proceeding in which the United States is a party or has a direct and substantial interest?

Authority: 16 U.S.C. 460bb appendix; 40 U.S.C. 102; 44 U.S.C. 2901 and 3102.

General Information

§ 1012.1 What does this part cover?

(a) This part describes how the Presidio Trust responds to requests or subpoenas for:

(1) Testimony by employees in State, territorial or Tribal judicial, legislative or administrative proceedings concerning information acquired while performing official duties or because of an employee's official status;

(2) Testimony by employees in Federal court civil proceedings in which the United States or the Presidio Trust is not a party concerning information acquired while performing official duties or because of an employee's official status;

(3) Testimony by employees in any judicial or administrative proceeding in which the United States or the Presidio Trust, while not a party, has a direct and substantial interest;

(4) Official records or certification of such records for use in Federal, State, territorial or Tribal judicial, legislative or administrative proceedings.

(b) In this part, "employee" means a current or former Presidio Trust employee, or Board member, including a contractor or special government employee, except as the Presidio Trust may otherwise determine in a particular case.

(c) This part does not apply to:

(1) Congressional requests or subpoenas for testimony or records;

(2) Federal court civil proceedings in which the United States or the Presidio Trust is a party;

(3) Federal administrative proceedings;

(4) Federal, State, and Tribal criminal court proceedings;

(5) Employees who voluntarily testify, while on their own time or in approved leave status, as private citizens as to facts or events that are not related to the official business of the Presidio Trust. The employee must state for the record that the testimony represents the employee's own views and is not necessarily the official position of the Presidio Trust. See 5 CFR 2635.702(b), 2635.807(b).

(6) Testimony by employees as expert witnesses on subjects outside their official duties, except that they must obtain prior approval if required by § 1012.11.

(d) This part does not affect the rights of any individual or the procedures for obtaining records under the Freedom of Information Act (FOIA), Privacy Act, or statutes governing the certification of official records. The Presidio Trust FOIA and Privacy Act regulations are found at parts 1007 and 1008 of this chapter.

(e) Nothing in this part is intended to impede the appropriate disclosure under applicable laws of Presidio Trust information to Federal, State, territorial, Tribal, or foreign law enforcement, prosecutorial, or regulatory agencies.

(f) This part only provides guidance for the internal operations of the Presidio Trust, and neither creates nor is intended to create any enforceable right or benefit against the United States or the Presidio Trust.

§ 1012.2 What is the Presidio Trust's policy on granting requests for employee testimony or Presidio Trust records?

(a) Except for proceedings covered by § 1012.1(c) and (d), it is the Presidio Trust's general policy not to allow its employees to testify or to produce Presidio Trust records either upon request or by subpoena. However, if the party seeking such testimony or records requests in writing, the Presidio Trust will consider whether to allow testimony or production of records under this part. The Presidio Trust's policy ensures the orderly execution of its mission and programs while not impeding any proceeding inappropriately.

(b) No Presidio Trust employee may testify or produce records in any proceeding to which this part applies unless authorized by the Presidio Trust under §§ 1012.1 through 1012.11. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

Responsibilities of Requesters

§ 1012.3 How can I obtain employee testimony or Presidio Trust records?

(a) To obtain employee testimony, you must submit:

(1) A written request (hereafter a "*Touhy* Request;" see § 1012.5 and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951)); and

(2) A statement that you will submit a valid check for costs to the Presidio Trust, in accordance with § 1012.6, if your *Touhy* Request is granted.

(b) To obtain official Presidio Trust records, you must submit:

(1) A *Touhy* Request; and

(2) A statement that you agree to pay the costs of search and/or duplication in accordance with the provisions governing requests under the Freedom of Information Act in part 1007 of this

chapter, if your *Touhy* Request is granted.

(c) You must send your *Touhy* Request to both:

- (1) The employee; and
- (2) The General Counsel of the Presidio Trust.

(d) The address of Presidio Trust employees and the General Counsel is: Presidio Trust, 34 Graham Street, P.O. Box 29052, San Francisco, CA 94129–0052.

§ 1012.4 If I serve a subpoena duces tecum, must I also submit a *Touhy* request?

Yes. If you serve a subpoena for employee testimony or if you serve a subpoena *duces tecum* for records in the possession of the Presidio Trust, you also must submit a *Touhy* Request.

§ 1012.5 What information must I put in my *Touhy* Request?

Your *Touhy* Request must:

- (a) Identify the employee or record;
- (b) Describe the relevance of the desired testimony or records to your proceeding and provide a copy of the pleadings underlying your request;
- (c) Identify the parties to your proceeding and any known relationships they have with the Presidio Trust or to its mission or programs;
- (d) Show that the desired testimony or records are not reasonably available from any other source;
- (e) Show that no record could be provided and used in lieu of employee testimony;
- (f) Provide the substance of the testimony expected of the employee; and
- (g) Explain why you believe your *Touhy* Request meets the criteria specified in § 1012.9.

§ 1012.6 How much will I be charged?

We will charge you the costs, including travel expenses, for employees to testify under the relevant substantive and procedural laws and regulations. You must pay costs for record production in accordance with the provisions governing requests under the Freedom of Information Act in part 1007 of this chapter. Estimated Costs must be paid in advance by check or money order payable to the Presidio Trust. Upon determination of the precise costs, the Presidio Trust will either reimburse you for any overpayment, or charge you for any underpayment, which charges must be paid within 10 business days by check or money order payable to the Presidio Trust.

§ 1012.7 Can I get an authenticated copy of a Presidio Trust record?

Yes. We may provide an authenticated copy of a Presidio Trust record, for purposes of admissibility under Federal, State or Tribal law. We will do this only if the record has been officially released or would otherwise be released under parts 1007 or 1008 of this chapter, or this part.

Responsibilities of the Presidio Trust

§ 1012.8 How will the Presidio Trust process my *Touhy* Request?

(a) The Executive Director will decide whether to grant or deny your *Touhy* Request. The Presidio Trust's General Counsel, or his or her agent, may negotiate with you or your attorney to refine or limit both the timing and content of your *Touhy* Request. When necessary, the General Counsel also will coordinate with the Department of Justice to file appropriate motions, including motions to remove the matter to Federal court, to quash, or to obtain a protective order.

(b) We will limit the Presidio Trust's decision to allow employee testimony to the scope of your *Touhy* Request.

(c) If you fail to follow the requirements of this part, we will not allow the testimony or produce the records.

(d) If your *Touhy* Request is complete, we will consider the request under § 1012.9.

§ 1012.9 What criteria will the Presidio Trust consider in responding to my *Touhy* Request?

In deciding whether to grant your *Touhy* Request, the Executive Director will consider:

- (a) Your ability to obtain the testimony or records from another source;
- (b) The appropriateness of the employee testimony and record production under the relevant regulations of procedure and substantive law, including the FOIA or the Privacy Act; and
- (c) The Presidio Trust's ability to:
 - (1) Conduct its official business unimpeded;
 - (2) Maintain impartiality in conducting its business;
 - (3) Minimize the possibility that the Presidio Trust will become involved in issues that are not related to its mission or programs;
 - (4) Avoid spending public employees' time for private purposes;
 - (5) Avoid any negative cumulative effect of granting similar requests;
 - (6) Ensure that privileged or protected matters remain confidential; and
 - (7) Avoid undue burden on the Presidio Trust.

Responsibilities of Employees

§ 1012.10 What must I, as an employee, do upon receiving a request?

(a) If you receive a request or subpoena that does not include a *Touhy* Request, you must immediately notify your supervisor and the Presidio Trust's General Counsel for assistance in issuing the proper response.

(b) If you receive a *Touhy* Request, you must promptly notify your supervisor and forward the request to the General Counsel. After consulting with the General Counsel, the Executive Director will decide whether to grant the *Touhy* Request under § 1012.9.

(c) All decisions granting or denying a *Touhy* Request must be in writing. The Executive Director must ask the General Counsel for advice when preparing the decision.

(d) Under 28 U.S.C. 1733, Federal Rule of Civil Procedure 44(a)(1), or comparable State or Tribal law, a request for an authenticated copy of a Presidio Trust record may be granted by the person having the legal custody of the record. If you believe that you have custody of a record:

(1) Consult the General Counsel to determine if you can grant a request for authentication of records; and

(2) Consult the General Counsel concerning the proper form of the authentication (as authentication requirements may vary by jurisdiction).

§ 1012.11 Must I get approval before testifying as an expert witness other than on behalf of the United States in a Federal proceeding in which the United States is a party or has a direct and substantial interest?

(a) You must comply with 5 CFR 2635.805(c), which details the authorization procedure for an employee to testify as an expert witness, not on behalf of the United States, in any proceeding before a court or agency of the United States in which the United States is a party or has a direct and substantial interest. This procedure means:

(1) You must obtain the written approval of the Presidio Trust's General Counsel;

(2) You must be in an approved leave status if you testify during duty hours; and

(3) You must state for the record that you are appearing as a private individual and that your testimony does not represent the official views of the Presidio Trust.

(b) If you testify as an expert witness on a matter outside the scope of your official duties, and which is not covered by paragraph (a) of this section, you must comply with 5 CFR 2635.802.

Dated: March 9, 2009.

Karen A. Cook,

General Counsel.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 080229343-81352-02]

RIN 0648-XF87

Endangered and Threatened Wildlife and Plants: Proposed Threatened Status for Southern Distinct Population Segment of Eulachon

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

ACTION: Proposed rule; 12-month petition finding; request for comments.

SUMMARY: We, the NMFS, have completed a review of the status of the Pacific eulachon (*Thaleichthys pacificus*; hereafter “eulachon”) under the Endangered Species Act (ESA) in response to a petition submitted by the Cowlitz Indian Tribe to list eulachon as a threatened or endangered species. After reviewing the best scientific and commercial information available, we have determined that the species is comprised of two or more distinct population segments (DPSs) that qualify as species under the ESA. Moreover, after evaluating threats facing the species, and considering efforts being made to protect eulachon, we have determined that the southern DPS is likely to become endangered within the foreseeable future throughout all of its range. We propose to list it as threatened under the ESA. The southern DPS of eulachon consists of populations spawning in rivers south of the Nass River in British Columbia, Canada, to, and including, the Mad River in California. Within the range of the southern DPS, major production areas or “core populations” for this species include the Columbia and Fraser rivers and may have historically included the Klamath River. We solicit information to inform the development of the final listing rule.

Any protective regulations determined to be necessary and advisable for the conservation of the southern DPS of eulachon under ESA section 4(d) will be proposed in a subsequent **Federal Register** notice. We

solicit information to inform the development of proposed protective regulations and designation of critical habitat in the event the DPS is listed. If the proposed listing is finalized, a recovery plan will also be prepared and implemented for the southern DPS.

DATES: Comments on this proposal must be received by May 12, 2009. A public hearing will be held promptly if any person so requests by April 27, 2009. Notice of the location and time of any such hearing will be published in the **Federal Register** not less than 15 days before the hearing is held.

ADDRESSES: You may submit comments identified by 0648-XF87 by any of the following methods:

- Electronic Submissions: Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail: Submit written comments to Chief, Protected Resources Division, Northwest Region, National Marine Fisheries Service, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. We will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. The eulachon petition, status review, and other reference materials regarding this determination can be obtained via the Internet at: <http://www.nwr.noaa.gov/> or by submitting a request to the Assistant Regional Administrator, Protected Resources Division, Northwest Region, NMFS, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232.

FOR FURTHER INFORMATION CONTACT: Eric Murray, NMFS, Northwest Region (503) 231-2378; or Dwayne Meadows, NMFS, Office of Protected Resources (301) 713-1401.

SUPPLEMENTARY INFORMATION:

Background

On July 16, 1999, we received a petition from Mr. Sam Wright of Olympia, Washington, to list and designate critical habitat for Columbia River populations of eulachon. On November 29, 1999, we determined that, while the petition indicated that

eulachon catches had recently declined in the Columbia River basin, it did not present substantial scientific information indicating that the petitioned action may be warranted (64 FR 66601). That finding was based on observations that the species is likely more abundant than commercial landings indicate and, based on life history attributes (e.g., the species' high fecundity and short life span) and assumptions from catch data and anecdotal reports, has a demonstrated ability to rebound from periods of low abundance. Additionally, the petition did not provide sufficient information regarding the distinctness of eulachon populations in the Columbia River relative to the other populations in the species' range.

On November 8, 2007, we received a petition from the Cowlitz Indian Tribe requesting that we list the eulachon that spawn south of the U.S./Washington-Canada border as threatened or endangered under the ESA. In contrast to our 1999 review, we concluded there was sufficient information showing that eulachon may warrant delineation into DPSs and that eulachon in the petitioned portion of the species' range had substantially declined in abundance. On March 12, 2008, we determined that the petition presented substantial information indicating that the petitioned action may be warranted, and we requested information to assist with a status review to determine if eulachon warranted listing under the ESA (73 FR 13185).

ESA Statutory Provisions

The ESA defines species to include subspecies or a DPS of any vertebrate species which interbreeds when mature (16 U.S.C. 1532(16)). The U.S. Fish and Wildlife Service (FWS) and NMFS have adopted a joint policy describing what constitutes a DPS of a taxonomic species (61 FR 4722; February 7, 1996). The joint DPS policy identifies two criteria for making DPS determinations: (1) the population must be discrete in relation to the remainder of the taxon (species or subspecies) to which it belongs; and (2) the population must be significant to the remainder of the taxon to which it belongs.

A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (1) “it is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation”; or (2) “it is delimited by international