

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 223**

[Docket No. 121210693–3985–01]

RIN 0648–BC68

**Endangered and Threatened Species: Designation of a Nonessential Experimental Population of Central Valley Spring-Run Chinook Salmon Below Friant Dam in the San Joaquin River, CA**

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

**ACTION:** Final rule and notice of availability of a final environmental assessment.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), designate a nonessential experimental population of Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) under the Endangered Species Act (ESA) in portions of the San Joaquin River, California, and establish take exceptions for the nonessential experimental population for particular activities inside the experimental population's geographic range and limited take exceptions outside the experimental population geographic range. This document also announces the availability of a final environmental assessment (EA) that analyzed the environmental impacts of promulgating the experimental population rule and associated take exceptions.

**DATES:** The final rule is effective January 30, 2014.

**ADDRESSES:** The Final Environmental Assessment and other reference materials regarding this final rule can be obtained via the Internet at [http://www.westcoast.fisheries.noaa.gov/central\\_valley/san\\_joaquin/san\\_joaquin\\_reint.html](http://www.westcoast.fisheries.noaa.gov/central_valley/san_joaquin/san_joaquin_reint.html) or by submitting a request to the Assistant Regional Administrator, California Central Valley Area Office, West Coast Region, NMFS, 650 Capitol Mall, Suite 5–100, Sacramento, CA 95814.

**FOR FURTHER INFORMATION CONTACT:** Elif Fehm-Sullivan, National Marine Fisheries Service, 650 Capitol Mall, Suite 5–100, Sacramento, CA 95814 (916–930–3723) or Dwayne Meadows, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 (301–427–8403).

**SUPPLEMENTARY INFORMATION:****Background Information Relevant to Experimental Population Designation**

In 1988, a coalition of environmental groups, led by the Natural Resources Defense Council (NRDC), filed a lawsuit challenging renewal of long-term water service contracts between the United States and the Central Valley Project (CVP) Friant Division contractors (NRDC, *et al.*, v. Kirk Rodgers, *et al.*). After more than 18 years of litigation, a Settlement was reached (Settlement) on September 13, 2006. The Settling Parties, including NRDC, Friant Water Users Authority (now the Friant Water Authority (FWA)), and the U.S. Departments of the Interior and Commerce, agreed on the terms and conditions of the Settlement, which was subsequently approved by the U.S. Eastern District Court of California on October 23, 2006. The Settlement establishes two primary goals: (1) Restoration Goal—To restore and maintain fish populations in “good condition” in the mainstem San Joaquin River below Friant Dam to its confluence with the Merced River, including naturally reproducing and self-sustaining populations of salmon and other fish; and (2) Water Management Goal—To reduce or avoid adverse water supply impacts on all of the Friant Division long-term contractors that may result from the interim and restoration flows provided for in the Settlement. Paragraph 14 of the Settlement indicates that the Restoration Goal shall include the reintroduction of Central Valley spring-run Chinook salmon (hereafter, CV spring-run Chinook salmon) to the San Joaquin River between Friant Dam and its confluence with the Merced River. The settlement is implemented through the San Joaquin River Restoration Program (SJRRP).

In 2009, as part of the Omnibus Public Land Management Act, Congress enacted the San Joaquin River Restoration Settlement Act (Pub. L. 111–11, 123 Stat. 1349) (SJRRSA), which ratified the terms of the Settlement and provided additional authorities to the Department of the Interior to facilitate successful implementation of the Settlement. The SJRRSA provides that if the Secretary of Commerce (Secretary) concludes that a program to reintroduce CV spring-run Chinook salmon into the San Joaquin River can be implemented consistent with other requirements of the ESA, the reintroduction “shall be [conducted] pursuant to § 10(j)” of the ESA.

**Supplemental Information**

This is a final rule stemming from a proposed rule that was published January 16, 2013 (78 FR 3381). This final rule implements the experimental population area to include the San Joaquin River just upstream from its confluence with, but not including, the Merced River upstream to Friant Dam; all sloughs, channels, floodways, and waterways that allow for CV spring-run Chinook salmon access along the San Joaquin River; and portions of the Kings River, when high water years connect the Kings River with the San Joaquin River. This experimental area is part of the species' historical range. The San Joaquin River experimental population is all CV spring-run Chinook salmon, including fish that have been released or propagated, naturally or artificially, within the defined experimental population area.

The CV spring-run Chinook salmon Evolutionarily Significant Unit (ESU; 70 FR 37160; June 28, 2005) is listed as threatened under the ESA, and its threatened status was recently confirmed following completion of a 5-year review (NMFS, 2011). The CV spring-run Chinook salmon ESU includes all naturally spawned populations of spring-run Chinook salmon in the Sacramento River and its tributaries, as well as the Feather River Fish Hatchery (FRFH) spring-run Chinook salmon program. We have issued protective regulations under section 4(d) of the ESA for CV spring-run Chinook salmon that prohibit their “take” unless otherwise authorized (50 CFR 223.203).

**Statutory and Regulatory Framework for Experimental Population Designation**

Section 10(j) of the ESA (16 U.S.C. 1539(j)) defines an experimental population as a population that has been authorized for release by the Secretary but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species. The Secretary may authorize the release of “experimental” populations of listed species outside of their current range if the release would “further the conservation” of the listed species. Section 10(j) also requires that before authorizing the release of an experimental population, the Secretary identify the experimental population by regulation and determine, based on the best available information, whether the experimental population is “essential to the continued existence” of the listed species (16 U.S.C. 1539(j)(2)(B)).

The U.S. Fish and Wildlife Service (USFWS) promulgated regulations to guide its implementation of section 10(j) (see 50 CFR 17.80 through 17.84). While we do not have regulations governing the designation of experimental populations, we considered their regulations where appropriate in making the required determinations under section 10(j) and in formulating this rule to designate and release an experimental population of CV spring-run Chinook salmon into the San Joaquin River upstream of the Merced River confluence. Although the USFWS regulations do not govern our regulatory action, the record demonstrates that this rule would be consistent with the criteria of those regulations.

Using the best available information, the following three key elements of ESA section 10(j) were analyzed in formulating this rule:

*Element 1:* Whether release of an experimental population of CV spring-run Chinook salmon into the San Joaquin River would further the conservation of the species;

*Element 2:* An appropriate means to identify the experimental population; and

*Element 3:* Whether the experimental population is essential to the continued existence of the species in the wild.

We discuss in more detail below how we considered each of these three elements.

In addition to the requirements of ESA section 10(j), we considered whether any additional measures were necessary to address management concerns under local conditions and to comply with Section 10011 and 10004 of the SJRRSA. Also, we considered a process for data collection and periodic review of the status of the experimental population. These additional considerations are not required under ESA section 10(j), but they provide information as to how our determination was reached, as well as explaining how we intend to assess the effect of the reintroduction on the conservation of the species.

Section 10(j) of the ESA requires that an experimental population be treated as a threatened species under the ESA, with two exceptions that apply if an experimental population is not determined to be essential to the listed species' continued existence (i.e., nonessential): 1) section 7 of the ESA applies in a different manner as described below in this paragraph, and 2) critical habitat shall not be designated for that experimental population. If the experimental population is determined to be nonessential, then section 10(j) requires that we apply the section 7

consultation provisions as if the population is a species proposed for listing. This means that the section 7(a)(2) consultation requirement does not apply to any experimental population of CV spring-run Chinook salmon that we determine is nonessential. The only provisions of section 7 that apply to a nonessential experimental population (NEP) outside of a National Park or Wildlife Refuge are sections 7(a)(1) and 7(a)(4). Section 7(a)(1) requires that Federal agencies use their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of threatened and endangered species. Section 7(a)(4) requires Federal agencies to confer, rather than consult, with us on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory in nature.

Section 7 of the ESA does not apply to activities undertaken on private land unless they are authorized, funded, or carried out by a Federal agency. The take exceptions outlined below associated with the experimental population will provide sufficient protections to reduce effects of existing or anticipated Federal or State actions, or private activities within or adjacent to the experimental population area.

*Element 1:* Whether release of an experimental population of CV spring-run Chinook salmon into the San Joaquin River would further the conservation of the species.

The ESA defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary." In making the determination whether release of an experimental population would "further the conservation" of CV spring-run Chinook we considered the following factors: (1) the effects of gathering broodstock on the extant populations of the ESU; (2) the potential for the released population to survive in the foreseeable future; and (3) the potential contribution of an experimental population to the recovery of the Central Valley spring-run Chinook salmon ESU.

We first considered the most appropriate source of fish within the CV spring-run Chinook salmon ESU to be used to establish an experimental population. Reintroduction efforts have the best chance for success when the donor population has life history characteristics and genetic diversity compatible with the anticipated environmental conditions of the habitat

into which fish will be reintroduced. Populations found in watersheds closest to the reintroduction area are most likely to have adaptive traits that will lead to a successful reintroduction, and therefore, only spring-run Chinook salmon populations found in the California Central Valley will be used in establishing the experimental population in the San Joaquin River. The selection of which source population(s) will be utilized for the SJRRP reintroduction effort will be dependent upon the genetic diversity needs of the broodstock, the specific conditions of the proposed donor population(s) at the time, and whether the collection will jeopardize the continued existence of the species.

Functionally independent populations of CV spring-run Chinook salmon occur in Deer, Mill, and Butte creeks and on the Feather River. The Feather River CV spring-run Chinook salmon population is also supplemented by operation of the FRFH. All of these populations are genetically unique from one another. Additional dependent or establishing populations occur in the Sacramento River Basin, but these are not known to be genetically unique. The Deer and Mill creek populations have been at a high risk of extinction and special care and consideration will be used when considering these fish as a donor source for reintroduction into the San Joaquin River. The Butte Creek CV spring-run Chinook salmon population is considered to be at a low risk of extinction and has the largest run size of the three major CV spring-run Chinook salmon populations in the Central Valley (NMFS, 2011). Thus it may be possible to remove fish from this population in years with high adult returns.

Through our ESA section 10 permitting authority and the section 7 consultation process, we will also ensure that the use of CV spring-run Chinook salmon from any donor populations for release into the San Joaquin River is not likely to jeopardize the continued existence of the species in the wild. Recently NMFS issued a permit under section 10(a)(1)(A) of the ESA along with a section 7 Biological Opinion (2012) that reached a non-jeopardy conclusion on the first 5 years of broodstock collection from FRFH.

As noted above, there are several choices for source populations for this experimental population. A captive broodstock program is being established as part of the SJRRP to augment and supplement the establishment of an experimental population in the San Joaquin River. Initially we will be using FRFH fish for captive broodstock and

direct release to the river. We would later consider diversifying the donor stock with fish from naturally spawning populations in other streams if and when those populations can sustain the removal of fish. Any collection of CV spring-run Chinook salmon would be subject to approval of a permit under ESA section 10(a)(1)(A), which includes analysis under the National Environmental Policy Act (NEPA) and ESA Section 7.

Over time, we expect the captive broodstock at the San Joaquin River conservation hatchery will produce sufficient numbers of eggs and juveniles to support reintroduction actions, and will reduce or eliminate the need for fish to be taken from existing hatchery or natural populations in the Sacramento River basin. If we consider using CV spring-run Chinook salmon from naturally spawning populations, we will remove only small numbers when such collections would not jeopardize the continued existence of the species and will contribute to the enhancement or propagation of the species. FRFH fish used for the reintroduction will be genetically screened to avoid hybrids. The FRFH is planning to produce sufficient fish to allow for eggs or juveniles to be collected for the reintroduction, in addition to the hatchery production needed for the Feather River. The consistent availability of hatchery produced fish, combined with existing protections for wild populations, can allow collection of fish for reintroduction of CV spring-run Chinook salmon to the San Joaquin River with no adverse impact on the ESU.

In determining whether release of the experimental population would further the conservation of CV spring-run Chinook salmon, we also considered the potential for the released population to survive in the foreseeable future. The California Central Valley drainage as a whole is estimated to have supported spring-run Chinook salmon returns as large as 600,000 fish between the late 1880s and 1940s (CDFG, 1998). However, the CV spring-run Chinook salmon runs in the San Joaquin River were extirpated as a direct result of the completion of Friant Dam and the associated operation of the Friant-Kern and Madera irrigation canals, which caused the river to run dry in many locations. As a result of these impacts, the last substantial CV spring-run Chinook salmon spawning cohort (numbering >1,900) returned in 1948 (Yoshiyama *et al.*, 1996). Central Valley spring-run Chinook salmon were originally most abundant in the San

Joaquin River basin where the run ascended to high-elevation streams fed by snow-melt where they over-summered until the fall spawning season (Yoshiyama *et al.*, 1996). Construction of other low elevation dams in the foothills of the Sierra Nevada on the American, Mokelumne, Stanislaus, Tuolumne, and Merced rivers largely extirpated CV spring-run Chinook salmon in these watersheds as well.

NMFS' Draft Recovery Plan for Central Valley salmonids characterizes the San Joaquin River basin below Friant Dam as having a high potential to support a spawning population of reintroduced CV spring-run Chinook salmon with implementation of the SJRRP. The Settlement establishes a framework for accomplishing the Restoration Goal including channel and structural modifications along the San Joaquin River below Friant Dam and releases of water from Friant Dam downstream to the river's confluence with the Merced River. Based on the available information, we believe that implementation of these actions will create habitat conditions in the San Joaquin River from Friant Dam to its confluence with the Merced River sufficient to support the establishment of CV spring-run Chinook salmon populations.

In addition to actions undertaken by the SJRRP, there are many Federal and State laws and regulations that will also aid in the establishment and survival of the experimental population through the protection of aquatic and riparian habitat. Section 404 of the Clean Water Act (CWA) (33 U.S.C. 1344) requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt. This permit program provides avoidance, minimization, and mitigation measures for the potential adverse effects of dredge and fill activities within the nation's waterways. CWA section 401 (33 U.S.C. 1341) requires an application for a Federal license or permit to provide a certification for the relevant state(s) that any discharges from the facility will comply with applicable state water quality standards. In addition, CWA Section 402 (33 U.S.C. 1342) establishes the National Pollutant Discharge Elimination System permit program to regulate point source discharges of pollutants into waters of the United States. Also, the Magnuson-Stevens Fishery Conservation and Management Act, as amended (16 U.S.C. 1801 *et seq.*), requires that essential fish habitat (EFH) be identified and Federal action agencies must consult with NMFS on

any activity which they fund, permit, or carry out that may adversely affect EFH. Freshwater EFH for Pacific salmon in the California Central Valley includes waters currently or historically accessible to salmon within the Central Valley ecosystem as described in Myers *et al.* (1998), which includes the area where this NEP is located.

At the state level, the California Fish and Game Code section 1600, *et seq.* and the California Environmental Quality Act (Pub. Resources Code sections 21000, *et seq.*) (CEQA) set forth criteria for the incorporation of avoidance, minimization, and feasible mitigation measures for on-going activities as well as for individual projects. Section 1600, *et seq.* was enacted to provide conservation for the state's fish and wildlife resources and includes requirements to protect riparian habitat resources on the bed, channel, or bank of streams and other waterways.

Section 1600, *et seq.* prohibits an entity from: (1) substantially diverting or obstructing the natural flow of any river, stream, or lake; (2) substantially changing or using any material from the bed, channel, or bank of, any river, stream, or lake; or (3) depositing or disposing of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake, without first notifying the California Department of Fish and Wildlife (CDFW) of the activity. CDFW (previously called California Department of Fish and Game until December 31, 2012) then has the opportunity to determine whether the activity may substantially adversely affect an existing fish or wildlife resource and, if the activity may have such an effect, to issue a final agreement that includes reasonable measures necessary to protect the resource (California Fish and Game Code Section 1602). Under CEQA, no public agency shall approve or carry out a project without identifying all feasible mitigation measures necessary to reduce impacts to a less than significant level, and shall incorporate such measures absent overriding considerations. In addition, protective measures, including programs for strategic screening and participation in habitat conservation programs, will be implemented in conjunction with SJRRP activities and are intended to provide a net benefit to the reintroduction.

This rule incorporates all reasonably feasible management restrictions, protective measures, prohibitions, and exceptions to the prohibitions to avoid and minimize the impacts of any taking allowed by this regulation. The

combination of SJRRP actions, implemented to achieve the Restoration Goal, the protective measures in this rule, as well as compliance with existing laws, statutes, and regulations, including in particular those that provide specific protections for aquatic and riparian habitats, provides these measures, and is expected to result in the survival of the experimental population in the San Joaquin River into the foreseeable future.

The third consideration in determining whether release of the experimental population would further the conservation of the CV spring-run Chinook salmon ESU is the potential contribution of the experimental population toward recovery of the ESU. NMFS' Draft Recovery Plan for Central Valley salmonids contains specific management strategies for recovering CV spring-run Chinook salmon that include securing existing populations and reintroducing populations into historically occupied habitats, including the San Joaquin River. Establishing an experimental population of CV spring-run Chinook salmon in the San Joaquin River that persists into the foreseeable future is expected to reduce the species' overall extinction risk from natural and anthropogenic factors by increasing its abundance, productivity, spatial structure, and diversity within the Central Valley. These expected improvements in the overall viability of CV spring-run Chinook salmon, in addition to other actions being implemented throughout the Central Valley, will contribute to the species' recovery. In light of the foregoing, we conclude that release of the experimental population would further the conservation of CV spring-run Chinook salmon.

*Element 2.* Identification of the experimental population.

Section 10(j) of the ESA requires that the experimental population be designated only when, and at such times, as it is geographically separate from nonexperimental populations of the same species. We are designating the experimental population area for the experimental population of CV spring-run Chinook salmon as the San Joaquin River from its confluence upstream of the Merced River to Friant Dam, including all sloughs, channels, and waterways that connect the San Joaquin River and provide passage for the species. In addition, the experimental area includes portions of the Kings River in high water years that provide connectivity between the Kings River and the San Joaquin River. The experimental population area is within the species' historical range, but it is

presently unoccupied by CV spring-run Chinook salmon.

False pathways (waterways that salmon follow that do not lead to spawning habitat) that fish may use as a result of restored flows have not yet been identified; however, the SJRRP includes actions to prevent or reduce straying to false pathways, and this experimental population designation assumes that the SJRRP will take appropriate action to reduce losses of the experimental population caused by undesirable straying. In addition, we will be using other means of identifying fish that are reintroduced, such as marking fish with specific fin clips (e.g., coded-wire tags, genetic testing) or other methods and field sampling.

*Element 3.* Whether the experimental population is essential to the continued existence of the species.

Because we do not have regulations implementing ESA section 10(j), we considered the USFWS regulations (50 CFR 17.80(b)), which define an essential experimental population as one "whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild." While we are not bound by the definition of "essential" in the USFWS regulations, we have determined it is appropriate for use in this rule.

In making the determination whether the experimental population of CV spring-run Chinook salmon is essential, we used the best available information as required by ESA section 10(j)(2)(B). Furthermore, we considered the geographic location of the experimental population in relation to other populations of CV spring-run Chinook salmon, and the likelihood of survival of these populations without the existence of the experimental population. The San Joaquin River is geographically separated from the watersheds that support extant populations of CV spring-run Chinook salmon in the Sacramento River basin.

We expect that CV spring-run Chinook salmon reintroduced to the San Joaquin River will imprint on this river and would therefore be unlikely to stray, beyond natural levels, into the Sacramento River basin and interact with extant populations found in that watershed. Natural straying rates would be expected to be low such that existing populations would not depend on supplementation of individuals from the experimental population to persist. The ESU includes four independent populations, one of which is supplemented by a hatchery, and several dependent or establishing populations. Given current protections and restoration efforts, these

populations are persisting or expanding, without the presence of a population in the NEP area. Thus it is expected that the experimental population will exist as a population independent from those in the Sacramento River basin and will not contribute to the survival of those populations.

Based on these considerations, we conclude that the loss of the experimental San Joaquin River population of CV spring-run Chinook salmon is not likely to appreciably reduce the likelihood of the survival of the species in the wild. Accordingly, this population will be considered nonessential under this designation.

#### **Additional Management Restrictions, Protective Measures, and Other Special Management Considerations**

The ESA defines "take" to mean: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. For threatened species such as the NEP of CV spring-run Chinook salmon, the ESA does not automatically prohibit take, but ESA section 4(d) (16 U.S.C. 1533(d)) provides that the Secretary of Commerce shall issue protective regulations he or she deems necessary and advisable for the species' conservation. Such protective regulations may, if appropriate, include the take prohibitions of section 9 of the ESA and exceptions to those take prohibitions.

In addition to take prohibitions in regulations promulgated under ESA section 4(d), section 7 and section 10 of the ESA provide for exceptions or authorizations of take of listed species under certain circumstances. The consultation process under section 7 of the ESA provides an exception for incidental take of listed species under certain circumstances. Section 7(a)(2) of the ESA provides that each Federal agency shall, through consultation with and with the assistance of the Secretary of Commerce, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat designated for such species. The formal consultation process results in NMFS issuing a biological opinion with an incidental take statement. The incidental take statement, among other things, specifies the amount or extent of incidental taking of listed species as a result of the proposed action, reasonable and prudent measures that NMFS considers necessary and appropriate to minimize the impact of such incidental

taking, and terms and conditions that the Federal agency or applicant must comply with in order to implement the reasonable and prudent measures. Under the terms of section 7(b)(4) and section 7(o)(2) of the ESA, any such incidental taking is not considered to be prohibited taking under the ESA, provided that such taking is in compliance with the terms and conditions of the incidental take statement. Section 10 of the ESA provides NMFS with authority to issue permits under certain circumstances for any otherwise prohibited act or taking. NMFS may issue permits for scientific purposes or to enhance the propagation or survival of the affected species, including, but not limited to, acts necessary for the establishment and maintenance of experimental populations pursuant to ESA section 10(j); or taking that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity (i.e., incidental take permits).

#### **Prohibited Take and Exceptions to Prohibited Take Within the Experimental Population Area**

In conjunction with our designation and authorization of the release of a CV spring-run Chinook salmon NEP in the San Joaquin River, we are also promulgating protective regulations under section 4(d) of the ESA that apply to the NEP. To ensure that the NEP has protections from activities that are not lawful under Federal, State or local laws and regulations, we are applying all take prohibitions listed under ESA sections 9(a)(1)(A) through 9(a)(1)(G), except for section 9(a)(1)(C) which involves the irrelevant issue of take upon the high seas, to the experimental population when it is within the experimental population area. Such activities include those resulting in direct intentional take or harm or illegal activities that result in incidental take or harm, including angling. These prohibitions apply to all CV spring-run Chinook salmon in the experimental population area that have intact adipose fins as well as those that are adipose fin-clipped.

In addition, the unintentional take of CV spring-run Chinook salmon in the experimental population area that is caused by otherwise lawful activities is excepted from the take prohibitions under section 9. Examples of otherwise lawful activities include, but are not limited to, recreation, agriculture, municipal usage, flood control, water management, and other similar activities which are carried out in accordance with Federal, State, and local laws and regulations. Take that is intentional, or incidental to unlawful

activities or negligent conduct is not excepted. The intent of the action that results in take is a consideration in this exception. Negligent conduct includes the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness. Similarly, this rule excepts handling of fish in the experimental population for salvage/rescue and scientific research subject to specific requirements. We are providing an exception from the section 9 take prohibitions for specified scientific research activities conducted by the State of California that is consistent with the existing state research programs excepted under the current ESA section 4(d) rule established for threatened salmonids (codified at 50 CFR 223.203), making use of the system already in place. Federal, State, and private-sponsored research activities for scientific research or enhancement purposes that are not covered under the exception described above, may take CV spring-run Chinook salmon in the NEP pursuant to the specifications of an ESA section 10 permit. Section 9(a)(1)(B) take prohibitions will not apply to ongoing research activities if an application for an ESA section 10(a)(1)(A) permit is received by NMFS, preferably through the NMFS online application Web site. Because the cycle for the existing State research program, described above, may not coincide with the effective date of this rule, an exception for take resulting from the research activities proposed in the Monitoring and Assessment Plan developed by the SJRRP and approved by NMFS, has been included.

As described above, there is an exception to the take prohibitions under this rule applicable to take that is unintentional and incidental to carrying out an otherwise lawful activity. Within the experimental population area, persons or entities diverting or receiving water pursuant to applicable State and Federal laws would be carrying out an otherwise lawful activity. Therefore, this exception would apply to incidental take of CV spring-run Chinook salmon by those persons or entities, and this rule would not impose any water supply reductions, additional storage releases or bypass flows unwillingly on them. Questions regarding whether specific activities will constitute a violation of the section 9 take prohibition, and general inquiries regarding prohibitions, exceptions, and

permits, should be directed to NMFS (see **ADDRESSES**).

As noted above, we prohibit the intentional take of CV spring-run Chinook salmon in the experimental population area by angling. We intend to work with CDFW to review fishing regulations in the geographic area in order to minimize the impact of this prohibition on current angling on other species. In the future, if the experimental population becomes established, we may consider allowing limited harvest of CV spring-run Chinook salmon in the experimental population area through a Fishery Management and Evaluation Plan developed by CDFW and approved by NMFS.

#### **Limited Take Exceptions Outside of the Experimental Population Area**

The SJRSSA established two twin objectives relating to the impacts associated with the CV spring-run Chinook salmon reintroduction. First the SJRSSA established that the reintroduction of CV spring-run Chinook salmon to the San Joaquin River must not impose more than *de minimus* water supply reductions, additional storage releases, or bypass flows on unwilling third parties. Second, the SJRSSA provides that nothing in the SJRSSA diminishes ESA protections for listed species other than the reintroduced population of CV spring-run Chinook salmon. This final rule is therefore framed to achieve these twin objectives by specifying how the take prohibitions and exceptions apply to activities in the NEP area and activities downstream of the NEP area, as described further below. Further, nothing in this rule precludes imposing protections under the ESA for other listed species when those protections provide incidental benefits to such reintroduced CV spring-run Chinook salmon.

The SJRSSA defines "third party" to mean persons or entities diverting or receiving water pursuant to applicable State and Federal laws. This includes CVP contractors outside of the Friant Division of the CVP and the State Water Project (SWP) contractors. Because some of these third parties operate outside of the experimental population area, this rule also includes limited take exceptions outside of the experimental population area when avoidance of take of CV spring-run Chinook salmon reintroduced by the SJRRP would result in more than *de minimus* impact to water supply reductions, additional storage releases, or bypass flows on unwilling third parties. These limited take exceptions apply to fish that have

been released or propagated, naturally or artificially, within the experimental population area in the San Joaquin River above the confluence with the Merced River. Outside of the experimental population area, CV spring-run Chinook salmon will continue to be covered by the take prohibitions and exceptions applicable to the non-experimental part of the ESU (50 CFR 223.203), but additional limited take exceptions will now apply to meet the *de minimus* conditions of the SJRRSA. In the lower San Joaquin River and its tributaries, including the Merced River, downstream from its confluence with the Merced River to Mossdale County Park in San Joaquin County, take of CV spring-run Chinook salmon is excepted if the avoidance of such take would impose more than *de minimus* impact on water supply reductions, additional storage releases, or bypass flows on unwilling third parties. This exception applies to CV spring-run Chinook salmon that may occur in the lower San Joaquin River and its tributaries, and is not specifically limited to reintroduced CV spring-run Chinook salmon.

This exception does not diminish current protections for CV spring-run Chinook salmon downstream of the NEP area for the following reasons. First, past and recent status reviews have concluded that CV spring-run Chinook salmon have been largely extirpated in this area. Therefore, NMFS generally has not consulted under ESA section 7 on the effects on this species of proposed actions in the lower San Joaquin River and its tributaries. However, connectivity with the south Delta does not prohibit potential individual CV spring-run Chinook salmon from straying to these waterways. After reintroduction of CV spring-run Chinook salmon into the experimental population area, CV spring-run Chinook salmon that originate from the experimental population area will migrate through the lower San Joaquin River. In the lower San Joaquin River and its tributaries it will be difficult to differentiate whether any individual CV spring-run Chinook salmon originated from the experimental population area or strayed from the area outside the San Joaquin River. These fish will more likely have originated from the experimental population area because of the numbers of fish to be released for the reintroduction and the close proximity of the Lower San Joaquin River and its tributaries to the experimental population area.

Second, California Central Valley (CCV) steelhead, a threatened species, does occur in the lower San Joaquin

River and its tributaries. Owing to similarities in habitat requirements, actions that could adversely affect CV spring-run Chinook salmon would also similarly affect CCV steelhead. Therefore, ESA consultation and take avoidance requirements for CCV steelhead would apply whether or not CV spring-run Chinook salmon were present. Should NMFS decide to consult on CV spring-run Chinook salmon and avoidance measures were required over and above those required for CCV steelhead, then NMFS would not require or implement these measures, if such measures would result in more than a *de minimus* impact on water supply reductions, additional storage releases, or bypass flows, on unwilling third parties. This determination would be made on a case basis as part of the ESA section 7 or section 10 processes. Take avoidance or minimization measures that would have a *de minimus* or no effect on water supply reductions, additional storage releases, or bypass flows associated with the aforementioned third parties, could still be required through the ESA section 7 or section 10 processes. Such measures might include best management practices such as sediment containment, in-water work windows, or bank revegetation associated with stream construction activities.

As stated above, the definition of "third parties" in the SJRRSA section 10011(c) includes CVP contractors outside of the Friant Division of the CVP and the SWP contractors. This rule prescribes the process by which the *de minimus* requirement in the SJRRSA will be implemented through the NMFS June 2009 Biological Opinion on the Long-term Operations of the CVP and SWP (NMFS 2009 Biological Opinion) or future and successive biological opinions on these operations. The aforementioned NMFS 2009 Biological Opinion identifies operational triggers intended to avoid or minimize take of listed anadromous fish, including CV spring-run Chinook salmon. The successful reintroduction of CV spring-run Chinook salmon to the San Joaquin River potentially could result in application of operational triggers more frequently or could result in reaching allowed take thresholds, and thereby impact water supply.

NMFS will develop a technical memorandum (tech memo) annually containing a share of take calculation in coordination with and with opportunity for comment by interested parties. The purpose of this tech memo is to ensure that avoidance of take of CV spring-run Chinook salmon originating from reintroduction to the San Joaquin River

does not cause more than a *de minimus* impact on water supply, additional storage releases, and bypass flows associated with the operations of the CVP and SWP. NMFS will annually calculate and document the proportionate contribution of CV spring-run Chinook salmon originating from the reintroduction to the San Joaquin River and deduct or otherwise adjust for this share of CV spring-run Chinook salmon take when applying the operational triggers and incidental take statements associated with the NMFS 2009 Biological Opinion or subsequent future biological opinions, or section 10 permits. Section 11.2.1 (Decision Making Procedures) of the aforementioned NMFS 2009 Biological Opinion (with 2011 amendments) provides for an annual adjustment process. In preparing the tech memo, NMFS will consider whether the presence of such fish will modify the application of operational triggers more frequently, reach allowed take thresholds that otherwise would not have been reached, or cause changes to project operations by other factors. These adjustments will ensure that the reintroduction will not impose more than *de minimus* water supply reductions, additional storage releases, or bypass flows on unwilling third party water users. NMFS will use best available commercial or scientific information to inform these calculations. Depending on available information and relevance to operational triggers, these calculations may include incidental take of CV spring-run Chinook salmon that originate from the reintroduction to the San Joaquin river that may occur due to: (1) elevated water temperatures and poor water quality, (2) entrainment at unscreened diversions, (3) predation associated with diversion waterways and facilities, (4) reverse flow conditions in the Delta as a result of CVP/SWP pumping, and (5) direct loss at the CVP/SWP South Delta pumping and salvage facilities. This exception does not diminish ESA protections for existing listed species because it is limited to spring-run Chinook salmon that originate from the reintroduction to the San Joaquin River.

#### Process for Periodic Review

The ESA requires that NMFS conduct a status review every 5 years for all listed species under its responsibility. This requirement will ensure that NMFS is tracking the status of the reintroduced spring-run Chinook population and the ESU, and will develop information to assess the effectiveness of this rule, and if necessary, will trigger revision to the

regulation through the rulemaking process. This will ensure that the reintroduction of spring-run Chinook to the San Joaquin River is providing for the conservation of the species as expected, and that the experimental population is not essential to the continued survival of the species.

Monitoring and analysis is necessary to gauge the progress of the reintroduction program and to provide information for decision-making and adaptive management. Fish passage, fish biology, aquatic habitat, and conservation hatchery facility operations will be the primary focus of the monitoring (FMP, 2009).

Fish passage monitoring will focus on addressing a variety of issues important to successful reintroduction. These issues include measuring fish passage success, smolt injury and mortality rates, and adult river passage to spawning areas. Passive integrated transponder tags and radio tags will be used to evaluate and monitor fish passage effectiveness. Biological evaluation and monitoring will concentrate on adult escapement and spawning success, competition with resident species, predation, disease transfer, smolt production, harvest, and sustainability of natural runs. Habitat monitoring will focus on long-term trends in the productive capacity of the reintroduction area (i.e., habitat availability, habitat effectiveness, riparian condition) and natural production (the number, size, productivity, and life history diversity) of CV spring-run Chinook salmon in the experimental population area.

Monitoring at the conservation hatchery facility will focus on multiple issues important to the quality of fish collected and produced for use in the reintroduction program. Monitoring activities will consist mainly of tracking broodstock sources; disease history and treatment; pre-release performance such as survival, growth, and fish health by life stage; the numerical production advantage provided by the conservation hatchery facility program relative to natural production; and success of the conservation hatchery facility program in meeting the program's objectives.

While this monitoring is being conducted for adaptive management purposes to make the reintroduction effort successful, we will also use the information to determine if the experimental population designation is causing any harm or benefit to CV spring-run Chinook salmon that are part of the threatened ESU and their habitat, and then, based on this and other available information, determine if any changes to the experimental population

designation may be warranted. Any contribution that an experimental population might make to the overall viability of CV spring-run Chinook salmon would be considered in future status assessments required under the ESA.

#### Summary of Comments and Responses

The public comment period for the proposed rule and draft Environmental Assessment (EA) was open from January 16 until March 4, 2013. Public scoping meetings were held January 24, January 25, and February 5, 2013 to obtain public comment and to help us better understand their concerns with the proposed experimental population designation, take and take exceptions, and associated Draft EA. During the comment period, NMFS received written comments on the rule and draft EA from 29 different entities representing various agencies, non-governmental organizations, and individuals. A summary of the comments and our responses to those comments are presented here. The summary begins with the comments we received in response to the specific questions that we posed with the proposed rule.

#### Comments and Responses:

The geographic boundary of the designated experimental population

*Comment 1:* Two commenters thought that the location should be larger to include the lower San Joaquin River, its tributaries, and the entire Delta to include water users in these areas to be excepted from take of CV spring-run Chinook salmon. One commenter, based on incorrect interpretation, wanted the location to be smaller to exclude all back water, sloughs, and flood control channels that salmon may be able to swim into, so that less regulatory burden would be placed on flood management and maintenance activities. Clarification was requested as to whether the Merced River was included in the NEP area. Four comments were received in favor of keeping the experimental population area as defined in the proposed rule.

*Response:* The comments were noted; but the proposed NEP area was not changed for the reasons discussed below. Including the tributaries and the delta within the experimental population area was not an option, as the ESA is very clear that the experimental population must be wholly geographically isolated from other populations of the species. There is some current evidence, as seen in the discussions in section 3 in the EA

associated with this rule, that there are spring-running fish within the tributaries of the San Joaquin River, and therefore those areas cannot be included in the designation. The NEP description has been modified to delineate that the Merced River is not included in the NEP. The experimental population area does include all backwater, sloughs and flood control channels that salmon may be able to access upstream of the confluence of the Merced River. By including all of the possible locations that salmon may be able to access we are protecting water users and land owners from having undue regulatory burden placed upon them if there were no experimental population designation.

The extent to which the experimental population would be affected by current or future Federal, State, or private actions within or adjacent to the experimental population area

*Comment 2:* Two responses indicated agreement that other existing laws and regulations will provide protection for the reintroduced fish. Other responses to this question did not address how the experimental population might be affected, rather two commenters raised concerns that they would be affected by the reintroduction if the implementation of the SJRRP is delayed or only partially implemented.

*Response:* Most of the concerns expressed were related to impacts associated with implementation of the SJRRP as a whole. These impacts have been analyzed in the SJRRP Program Environmental Impact Statement/Report and are beyond the scope of this regulation. The EA was revised to include analysis of the impact of the proposed rule in the event that the SJRRP was only partially implemented and no significant impacts were identified.

Any necessary management restrictions, protective measures, or other management measures that we may have not considered

*Comment 3:* A comment was raised that management restrictions, and protective measures, should be considered and/or be extended to basic flood control problems and to management and maintenance of facilities of the State Plan of Flood Control in the project area. The comment stated that these flood control facilities could be impacted by the restrictions of the ESA. We received two comment letters suggesting that the rule should include a list of all activities for which take exceptions would apply. In addition, one comment letter advocated

reintroduction of CV spring-run Chinook salmon using only volitional straying of fish.

*Response:* We did not adopt the approach of listing all take excepted activities, as it would be virtually impossible to list all the activities that are intended to be covered by the rule language. We have included some examples of common activities that would be covered in the Supplemental Information of this rule. Incidental take that may result from the lawful operation and maintenance of flood control facilities, which are located within the experimental population area, is excepted. Hence, such activities will not be restricted by the reintroduction of spring-run Chinook salmon. The definition of "third parties" in the SJRRSA as it pertains to the 4(d) rule is not written to include flood management activities outside of the NEP area.

In response to advocating volitional reintroduction of CV spring-run Chinook salmon, this approach to reintroduction was analyzed in the No Action Alternative of the EA and rejected because, while restoration of flows to the San Joaquin River make it possible that spring-run Chinook could potentially recolonize the San Joaquin River naturally, there is no evidence that such a volunteer population could meet either the terms of the Settlement or spring-run Chinook recovery objectives.

The extent to which we have provided protections for third parties as required by the SJRRSA

*Comment 4:* We received seven comment letters regarding the ESA 4(d) rule required by the SJRRSA. Some stated that the regulations needed to be more explicitly related to the purpose of the 4(d) rule outlined in section 10011(c)(3) of the SJRRSA including; (1) the rule should include authorization for all take NMFS attributed to CVP and SWP operations, such as indirect take, not only take "at" the export pumps, and (2) the final rule should be as definite as possible about how NMFS will ensure no more than *de minimus* water supply reductions from reintroduction. There was concern by two commenters over the contents of the annual technical memo that the annual schedule for revision was too frequent, and there was little involvement of stakeholders in its development. This commenter wanted to have a larger involvement in the development and execution of the technical memo. One comment stated that the take exception for CVP and SWP operations should apply to all progeny of the reintroduced

fish, especially when they stray to the Sacramento River, and to any CV spring-run Chinook salmon that are spawned in the San Joaquin river or its tributaries.

*Response:* The paragraphs of the regulation that describe take exceptions to achieve the *de minimus* requirement (now (b)(5)(i) and (b)(5)(ii) of 50 CFR 223.301) have been modified to connect, more explicitly, the purpose of these take exceptions to the language of section 10011(c)(3) of the SJRRSA. Section 10011(c)(3) of the SJRRSA requires that the rule issued pursuant to ESA section 4(d) shall provide that the reintroduction of CV spring-run Chinook salmon to the San Joaquin River will not impose more than *de minimus* water supply reductions, additional storage releases, or bypass flows on unwilling third parties [as specifically defined] due to such reintroduction. It does not require that all take be excepted. The regulation has been modified in paragraph (b)(5)(ii) of 50 CFR 223.301 to define the purpose of the annual technical memo, and NMFS' commitment to coordinate with parties outside the agency in the development of this document. The schedule for this document was not changed, because we believe that an annual assessment of the effectiveness of the methodology to achieve the *de minimus* impact requirement is warranted. We acknowledge that over some periods there may be no need to revise this document, but in other years, conditions may change or the progress of the reintroduction may require a change in the methodology. The regulation has been edited to more clearly relate to the population of CV spring-run Chinook salmon reintroduced to the San Joaquin River. This would not include progeny of adult CV spring-run Chinook salmon that were spawned in the San Joaquin River, but then strayed as adults to Sacramento River basin streams to spawn. Some straying occurs naturally in all salmonid populations, but at naturally low levels, to the degree that it is our determination that this would not exceed the *de minimus* impact requirement of SJRRSA section 10011(c)(3). Imprinting procedures for CV spring-run Chinook salmon released to the San Joaquin River will further assure more natural, low levels of straying of adults. However, should this calculation be proven to be incorrect in the future, the annual methodology produced by NMFS to account for the proportionate share of the take by the CVP and SWP can be adjusted to ensure the *de minimus* standard is met.

Whether we should propose the experimental population as nonessential

*Comment 5:* All but one of the four responses to this question supported the nonessential designation. The dissenting view was based on an objection based on an incorrect interpretation that this designation would change the status of individual wild fish that were collected for the reintroduction.

*Response:* The nonessential designation was not changed as all but one response supported this designation. The designation of an experimental population area does not change the status of individual fish found in locations outside of the designated area.

Whether the proposed designation furthers the conservation of the species and whether we have used the best available science in making this determination

*Comment 6:* Five commenters expressed concerns over the impacts of collection of CV spring-run Chinook salmon on the donor/source populations, especially that Mill Creek should not be considered for collection of donor stock. These same 5 commenters questioned the basis for expecting that CV spring-run Chinook salmon could survive in the San Joaquin River, both under present and future restored conditions.

*Response:* Mill Creek fish are included in the collection possibilities because we concluded, based on the best available scientific information, that genetic input from the most diverse range of CV spring-run Chinook salmon populations will give the best chance of survival to founding stock released to the San Joaquin River. Collection of CV spring-run Chinook salmon from Mill Creek, or any other population, will be subject to approval of a permit under ESA section 10(a)(1)(A) which includes analysis under NEPA and ESA section 7. No collection would occur on Mill Creek if such collection would jeopardize the continued existence of CV spring-run Chinook salmon. This process will utilize the best information available at the time, including the 5-year status reviews for the species, the latest of which occurred in 2011 and is cited in the EA.

Additional information was included in the EA to provide a better explanation of available habitat under current conditions of the San Joaquin River, and links were provided to the background reports and literature that led to the Settlement requirement that both spring-run and fall-run Chinook

salmon be reintroduced to the San Joaquin River.

#### *Summary of Additional Comments Received*

Habitat restoration and construction of site specific work within the restoration area

*Comment 7:* Eight comments noted that the habitat restoration and construction of site specific work required under the Settlement has not begun and is delayed. Some postulated that the river is currently not ready for the reintroduction of CV spring-run Chinook salmon. The question was raised as to what is the validity of placing threatened CV spring-run Chinook salmon in the river prior to habitat construction being complete.

*Response:* For the purposes of the EA, we assumed that all channel and structural modifications, habitat improvements, and water release, will be implemented as required by the Settlement. Implementing only some of these measures would not achieve the Restoration Goal, and thereby would not fulfill the terms and conditions of the Settlement.

The SJRRP is currently in the process of developing and implementing activities associated with the restoration of Chinook salmon habitat between Friant Dam and the Merced River confluence. These projects are large and complex and will take several years to complete. Timeframes associated with these actions are identified through the SJRRP. Surveys for gravel suitability, temperatures, egg survival, and other fisheries elements have been occurring and are available by referencing the SJRRP Monitoring and Analysis Plan, <http://restoresjr.net/flows/ATR/index.html>. Specific actions, such as riparian habitat restoration, are part of the site-specific channel improvement projects identified in the Settlement and are not part of the EA for an experimental population designation. Any collection and release activities would be subject to approval of a permit under ESA section 10(a)(1)(A), which includes analysis under NEPA and ESA section 7. No collection or release will occur if such collection or release would jeopardize the continued existence of CV spring-run Chinook salmon. In addition, there is currently an interim Salmon Conservation and Research Facility and plans for a permanent facility which will house the broodstock. Those fish collected from donor streams will be collected and used as broodstock, and their offspring will then be either used for the next generation of broodstock, or be placed

into the river. Suitable habitat for CV spring-run Chinook salmon is present below Friant Dam, but lack of flow and other past channel modifications have prevented salmon from accessing these areas. Until full channel and flow restoration is completed, Chinook salmon will need assistance by the agencies to access available habitat.

#### Hybridization

*Comment 8:* We received two comments concerned that fall-run Chinook salmon would hybridize with reintroduced spring-run Chinook salmon or cause fall-run superimposition on spring-run redds in the limited spawning areas below Friant Dam.

*Response:* The SJRRP is evaluating the risk of hybridization and spawning interference between CV fall-run and spring-run Chinook salmon to determine what measures may be necessary to address these concerns. The SJRRP is determining where CV fall-run and spring-run Chinook salmon will spawn, determining the timing of spawning in the Restoration Area for each run, and evaluating exclusion methods (e.g., fall-run exclusion weir). The results of these evaluations will help the program determine if a physical separation weir is necessary to protect spawning CV spring-run Chinook salmon and their eggs. Currently, Hills Ferry Barrier is maintained near the confluence of the Merced River to prevent fall-run Chinook salmon from entering the Restoration Area.

#### Expiration Date of Final Rule

*Comment 9:* There were five comments on the duration or expiration of the experimental population designation.

*Response:* The final rule has no specified expiration date as all feedback on this matter indicated support for no expiration date, as was proposed, or an expiration date that was much later than 2025.

#### Experimental Population Findings

Based on the best available scientific information, we have determined that the designation and release of a NEP of CV spring-run Chinook salmon in the San Joaquin River basin as described in this final rule will further the conservation of CV spring-run Chinook salmon. Fish used for the reintroduction will be obtained from hatchery fish produced for the reintroduction, or fish produced from a conservation hatchery facility from limited collection of wild and hatchery fish. The collection of wild fish will be permitted only after

issuance of permits under section 10(a)(1)(A) of the ESA, which includes analysis under ESA section 7, that ensures that any such collections will not be likely to jeopardize the continued existence of listed species. We have determined that this experimental population is nonessential because it is not essential to the continued existence of CV spring-run Chinook salmon. However, the experimental population is expected to contribute to the recovery of CV spring-run Chinook salmon if the reintroduction is successful. This experimental population designation and release is being implemented in association with the reintroduction efforts called for in the SJRRP and the Settlement. Actions of the SJRRP are intended to provide habitat conditions that will be sufficient to establish a naturally self-sustaining CV spring-run Chinook salmon population in the San Joaquin River while at the same time ensuring that no further protections will be needed and that the reintroduction will meet the applicable requirements of the SJRRSA. The success of the reintroduction of CV spring-run Chinook salmon in the experimental population area will be monitored as part of the SJRRP. We will assess the contribution of the NEP to the status of the species during the required 5 year status review of the CV spring-run Chinook salmon ESU. This information will be used by NMFS to determine if changes to the NEP designation may be warranted.

#### Information Quality Act and Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review pursuant to the Information Quality Act (Section 515 of Public Law No. 106-554) in the **Federal Register** on January 14, 2005 (70 FR 2664). The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. There are no documents supporting this rule that meet this criteria.

#### Classification

##### *Executive Order 12866*

This final rule has been determined to be not significant under E.O. 12866.

*Regulatory Flexibility Act (5 U.S.C. 601 et seq.)*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 801 *et seq.*), whenever a Federal agency is required to publish a notification of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

The Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy at the Small Business Administration, that this rule will not have a significant economic effect on a substantial number of small entities. The factual basis for this certification was published with the proposed rule and is not repeated here. No comments were received regarding the economic impact of this final rule. As a result, a final regulatory flexibility analysis is not required and one was not prepared.

*Executive Order 12630*

In accordance with E.O. 12630, the rule does not have significant takings implications. A takings implication assessment is not required because this rule: (1) Would not effectively compel a property owner to have the government physically invade their property, and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This rule would substantially advance a legitimate government interest (conservation and recovery of a listed fish species) and would not present a barrier to all reasonable and expected beneficial use of private property.

*Executive Order 13132*

In accordance with E.O. 13132, we have determined that this rule does not

have federalism implications as that term is defined in E.O. 13132.

*Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)*

The Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. This rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

*National Environmental Policy Act*

In compliance with all provisions of the National Environmental Policy Act of 1969, we have analyzed the impact on the human environment and considered a reasonable range of alternatives for this rule. We made the draft EA available for public comment along with the proposed rule, received 36 written comment documents, and responded to those comments in an Appendix to the EA. We have prepared a final EA on this action and have made it available for public inspection (see **ADDRESSES** section).

*Government-to-Government Relationship With Tribes (E.O. 13175)*

E.O. 13175, Consultation and Coordination with Indian Tribal Governments, outlines the responsibilities of the Federal Government in matters affecting tribal interests. If we issue a regulation with tribal implications (defined as having a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes), we must consult with those governments or the Federal Government must provide funds necessary to pay direct compliance costs incurred by tribal governments.

There are no tribally owned or managed lands included in the experimental population area. We have invited all possibly impacted tribes (letter dated November, 15, 2010, from Maria Rea, Central Valley Office Supervisor, NMFS) to discuss the rule at

their convenience should they choose to have a government-to-government consultation.

*Energy Supply, Distribution, or Use (E.O. 13211)*

On May 18, 2001, the President issued E.O. 13211 on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates or is expected to lead to the promulgation of final rule or regulation that (1) is a significant regulatory action under E.O. 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy.

This final rule is not expected to significantly affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required. We did not receive any comments regarding energy supplies, distribution, and use.

**References Cited**

A complete list of all references cited in this rule is available upon request from National Marine Fisheries Service office (see **FOR FURTHER INFORMATION CONTACT**).

**List of Subjects in 50 CFR Part 223**

Endangered and threatened species, Exports, Imports.

**Alan D. Risenhoover,**

*Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, part 223 of chapter II, title 50 of the Code of Federal Regulations, is 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. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. Add § 223.102(c)(30) to read as follows:

**§ 223.102 Enumeration of threatened marine and anadromous species.**

\* \* \* \* \*

Species <sup>1</sup>		Where listed	Citation(s) for listing determination	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
(c) * * * (30) Central Valley spring-run Chinook salmon (non-essential experimental population).	<i>Oncorhynchus tshawytscha</i> .	U.S.A.—CA, only when, and at such times, as they are found in the San Joaquin River from Friant Dam downstream to its confluence with the Merced River, delineated by a line between decimal latitude and longitude coordinates: 37.348930° N, 120.975174° W and 37.349099° N, 120.974749° W, as well as all sloughs, channels, floodways, and waterways connected with the San Joaquin River that allow for CV spring-run Chinook salmon access, but excluding the Merced River. Those portions of the Kings River that connect with the San Joaquin River during high water years.	[Insert <b>Federal Register</b> citation] 12/31/13.	N/A

<sup>1</sup> Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

\* \* \* \* \*

■ 3. Add paragraph (b) to § 223.301, to read as follows:

**§ 223.301 Special rules—marine and anadromous fishes.**

\* \* \* \* \*

(b) San Joaquin River Central Valley (CV) spring-run Chinook Salmon Experimental Population (*Oncorhynchus tshawytscha*). (1) The San Joaquin River CV spring-run Chinook salmon population identified in paragraph (b)(2) of this section is designated as a nonessential experimental population under section 10(j) of the ESA.

(2) San Joaquin River CV Spring-run Chinook Salmon Experimental Population. All CV spring-run Chinook salmon, including those that have been released or propagated, naturally or artificially, within the experimental population area in the San Joaquin River as defined here are considered part of the San Joaquin River experimental population. The boundaries of this experimental population area include the San Joaquin River from Friant Dam downstream to its confluence with the Merced River, delineated by a line between decimal latitude and longitude coordinates: 37.348930° N, 120.975174° W and 37.349099° N, 120.974749° W, as well as all sloughs, channels, floodways, and waterways connected with the San Joaquin River that allow for CV spring-run Chinook salmon access, but excluding the Merced River. Those portions of the Kings River that connect with the San Joaquin River during high water years are also part of the experimental population area.

(3) Prohibitions. Except as expressly allowed in paragraph (b)(4) of this section, all prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)), except 9(a)(1)(C), apply to fish that are part of the threatened, nonessential experimental population of CV spring-run Chinook salmon identified in paragraph (b)(2) of this section.

(4) Exceptions to the Application of Section 9 Take Prohibitions in the Experimental Population Area. The following forms of take in the experimental population area identified in paragraph (b)(2) of this section are not prohibited by this section:

(i) Any taking of CV spring-run Chinook salmon provided that it is unintentional, not due to negligent conduct, and incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

(ii) Any taking of CV spring-run Chinook salmon by an employee or designee of NMFS, the USFWS, other Federal resource management agencies, the California Department of Fish and Wildlife, or any other governmental entity if in the course of their duties it is necessary to: aid a sick, injured or stranded fish; dispose of a dead fish; or salvage a dead fish which may be useful for scientific study. Any agency acting under this provision must report to NMFS (see **ADDRESSES** section) the numbers of fish handled and their status on an annual basis.

(iii) Any taking of CV spring-run Chinook salmon for scientific research or enhancement purposes by a person or entity with a valid section ESA 10(a)(1)(A) permit issued by NMFS and a valid incidental take permit,

consistency determination, or other take authorization issued by the CDFW.

(iv) Any taking of CV spring-run Chinook salmon for scientific research purposes by the CDFW provided that:

(A) Scientific research activities involving purposeful take are conducted by employees or contractors of CDFW or as a part of a monitoring and research program overseen by or coordinated with CDFW.

(B) CDFW provides for NMFS' review and approval a list of all scientific research activities involving direct take planned for the coming year, including an estimate of the total direct take that is anticipated, a description of the study design, including a justification for taking the species and a description of the techniques to be used, and a point of contact.

(C) CDFW annually provides to NMFS the results of scientific research activities directed at fish in the experimental population, including a report of the direct take resulting from the studies and a summary of the results of such studies.

(D) Scientific research activities that may incidentally take fish in the experimental population are either conducted by CDFW personnel, or are in accord with a permit issued by the CDFW.

(E) CDFW provides NMFS annually, for its review and approval, a report listing all scientific research activities it conducts or permits that may incidentally take fish in the experimental population during the coming year. Such reports shall also contain the amount of incidental take occurring in the previous year's

scientific research activities and a summary of the results of such research.

(F) Electro fishing in any body of water known or suspected to contain fish in the experimental population is conducted in accordance with NMFS "Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act" (NMFS, 2000a).

(G) CDFW provides NMFS, for its review and approval, the Monitoring and Analysis Plan produced by the San Joaquin River Restoration Program, including an estimate of the direct and indirect take that may result from all scientific research activities in that plan for the period from January 30, 2014 until January 30, 2015.

(H) NMFS' approval of a research program shall be a written approval by the NMFS West Coast Regional Administrator.

(5) Limited Exception to the Application of Section 9(a)(1) Take Prohibitions Outside of the Experimental Population Area. The following forms of take are not prohibited:

(i) Any taking of CV spring-run Chinook salmon in those portions of the lower San Joaquin River and its tributaries, including the Merced River, downstream from its confluence with the Merced River to Mossdale County Park in San Joaquin County, that the

avoidance of which would impose more than *de minimus* water supply reductions, additional storage releases, or bypass flows on unwilling persons or entities diverting or receiving water pursuant to applicable State and Federal laws.

(ii)(A) Any taking of CV spring-run Chinook salmon by the Central Valley Project (CVP) and State Water Project (SWP) that originates from reintroduction to the San Joaquin River that the avoidance of which would impose more than *de minimus* water supply reductions, additional storage releases, or bypass flows on unwilling persons or entities diverting or receiving water pursuant to applicable State and Federal laws.

(B) NMFS will prepare a technical memorandum that describes the methodology to ensure that CV spring-run Chinook salmon originating from reintroduction to the San Joaquin River do not cause more than *de minimus* water supply reductions, additional storage releases, or bypass flows associated with the operations of the CVP and SWP under any ESA section 7 biological opinion or section 10 permit that is in effect at the time for operations of the CVP and SWP. To the maximum extent feasible, NMFS will develop this technical memorandum in coordination with and with opportunity for comment by interested parties. The first technical

memorandum will be completed before CV spring-run Chinook salmon will be released in the San Joaquin River. Prior to January 15 of each succeeding year, NMFS will update the technical memorandum and, if required by the methodology, determine the share of take at the CVP and SWP facilities that originates from the reintroduction to the San Joaquin River. This share of take of CV spring-run Chinook salmon reintroduced to the San Joaquin River will be deducted from or otherwise used to adjust the operational triggers and incidental take statements associated with any biological opinion that is in effect at the time for operations of the CVP and SWP facilities. NMFS will use best available commercial or scientific information to inform these calculations. The technical memorandum and annual determination will ensure that the reintroduction of CV spring-run Chinook salmon will not result in more than *de minimus* water supply reductions, additional storage releases or bypass flows of the CVP and SWP operations under any biological opinion or ESA section 10 permit that is in effect at the time for operations of the CVP and SWP on unwilling persons or entities diverting or receiving water pursuant to applicable State and Federal laws.

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