rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.''

This proposed rule does not directly or indirectly impact any environmental resources and will not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review. *See* 23 CFR 771.116(b). FRA has concluded that no such unusual circumstances exist with respect to this proposed regulation and the proposal meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to effect historic properties. *See* 16 U.S.C. 470. FRA has also determined that this rulemaking does not approve a project resulting in use of a resource protected by Section 4(f). *See* Department of Transportation Act of 1966, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

Unfunded Mandates Reform Act of 1995

Under Section 201 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1531, each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act, 2 U.S.C. 1532, further requires that before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. The proposed rule would not result in the expenditure, in the aggregate, of $100,000,000 or more in any one year (adjusted annually for inflation), and thus preparation of such a statement is not required.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, FRA encourages commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

List of Subjects in 49 CFR Part 214

Railroad Workplace Safety.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 214 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 214—RAILROAD WORKPLACE SAFETY

■ 1. The authority citation for part 214 continues to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 21301–21302, 21304, 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 2. In § 214.322, add paragraph (i) to read as follows:

§ 214.322 Exclusive track occupancy, electronic display.

* * * * *

(i) For purposes of complying with paragraph (h) of this section, electronic display systems may use multi-factor authentication for digital authentication of the subject.

■ 3. Amend § 214.505 by revising the introductory text of paragraph (a) and by adding paragraph (i) to read as follows:

§ 214.505 Required environmental control and protection systems for new on-track roadway maintenance machines with enclosed cabs.

(a) With the exception of machines subject to paragraph (i) of this section, the following new on-track roadway maintenance machines shall be equipped with operative heating systems, operative air conditioning systems, and operative positive pressurized ventilation systems:

* * * * *

(i) Paragraph (a) of this section is not applicable to machines that are incapable of performing work functions other than by remote operation and are equipped with no operating controls (*i.e.,* drone roadway maintenance machines) if the following conditions are met.

(1) If a drone roadway maintenance machine is operated from the cab of a separate machine, that separate machine must comply with paragraph (a) of this section.

(2) If a drone roadway maintenance machine is operated outside of the main cab of the separate machine in a manner that will expose the operator to air contaminants, as outlined in 29 CFR 1910.1000, Air contaminants, the employee shall be protected in compliance with 29 CFR 1910.134, Personal respiratory protection.

(3) No person is permitted on the drone roadway maintenance machine while the equipment is operating.

(4) Each drone roadway maintenance machine must be clearly identified by stenciling, marking, or other written notice in a conspicuous location on the machine indicating the potential hazards of the machine being operated from a distance or that the machine may move automatically.

Issued in Washington, DC.

Quintin C. Kendall,

Deputy Administrator.

[FR Doc. 2020–27096 Filed 12–10–20; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 201125–0320]

RIN 0648–BK00

Endangered and Threatened Species: Designation of Nonessential Experimental Population of Central Valley Spring-Run Chinook Salmon in the Upper Yuba River Upstream of Englebright Dam, CA

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

ACTION: Proposed rule; availability of a draft environmental assessment; request for comments.

SUMMARY: We, NMFS, propose a rule to designate and authorize the release of a nonessential experimental population (NEP) of Central Valley (CV) spring-run Chinook salmon (*Oncorhynchus*

tshawytscha) under the Endangered Species Act (ESA) in the upper Yuba River and its tributaries upstream of Englebright Dam, California and establish take exceptions for the NEP for particular activities. A draft environmental assessment (EA) has been prepared on this proposed action and is available for comment.

DATES: Comments on this proposed rule and EA, must be received no later than January 11, 2021.

ADDRESSES: You may submit comments on this proposed rule, identified by NOAA–NMFS–2020–0139 by any of the following methods:

- *Electronic submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0139* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Jonathan Ambrose, National Marine Fisheries Service, 650 Capitol Mall, Suite 5–100, Sacramento, California 95814.
- *Phone:* (916) 930–3717; Fax: (916) 930–3629.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS 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, or Adobe PDF file formats only.

You may access a copy of the draft EA by the following:

- Visit NMFS' National Environmental Policy Act (NEPA) website at: *http://www.westcoast.fisheries.noaa.gov/publications/nepa/nepa_documents.html.*

FOR FURTHER INFORMATION CONTACT: Jonathan Ambrose, by phone at (916) 930–3717, or by mail at National Marine Fisheries Service, 650 Capitol Mall, Suite 5–100, Sacramento, CA 95814; or by mail at National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

SUPPLEMENTARY INFORMATION:

Background Information Relevant to Experimental Population Designation

NMFS listed the CV spring-run Chinook salmon Evolutionarily Significant Unit (ESU) [1] as threatened under the ESA, 16 U.S.C. 1531 *et seq.,* on September 16, 1999 (64 FR 50394), and reaffirmed this status in a final rule on June 28, 2005 (70 FR 37160) and 5-year reviews announced on August 15, 2011 (76 FR 50447) and May 26, 2016 (81 FR 33468). The listed ESU of CV spring-run Chinook salmon currently includes all naturally spawned populations of spring-run Chinook salmon in the Sacramento River and its tributaries, as well as the Feather River Hatchery (FRH) spring-run Chinook salmon program. On January 9, 2002 (67 FR 1116), NMFS issued protective regulations under section 4(d) of the ESA for CV spring-run Chinook salmon that apply the take prohibitions of section 9(a)(1) of the ESA, except for listed exceptions (see 50 CFR 223.203). Critical habitat has been designated for CV spring-run Chinook salmon (70 FR 52488, September 2, 2005), and includes most of the occupied riverine habitat within their extant range. CV spring-run Chinook salmon are also listed as a threatened species by the State of California under the California Endangered Species Act (CESA), California Fish and Game Code, Division 3, Chapter 1.5.

On December 31, 2013, a final rule was published in which NMFS designated a nonessential experimental population of CV spring-run Chinook salmon in portions of the San Joaquin River, California, under ESA section 10(j) (78 FR 79622).

In 2014, we adopted a final recovery plan for the CV spring-run Chinook salmon ESU (79 FR 42504, July 22, 2014). The Central Valley Recovery Plan identifies re-establishing populations of CV spring-run Chinook salmon above impassable barriers to unoccupied historical habitats as an important recovery action (NMFS 2014). More specifically, the Central Valley Recovery Plan explains that re-establishing populations above impassable barriers, such as Englebright Dam, would aid in recovery of the ESU by increasing abundance, spatial structure and diversity and by reducing the risk of extinction to the ESU as a whole.

To facilitate and encourage future reintroduction efforts into the upper Yuba River, NMFS is proposing a rule to (a) designate and authorize the release of an NEP of CV spring-run Chinook salmon pursuant to ESA section 10(j) in the upper Yuba River and its tributaries upstream of Englebright Dam, and (b) establish take prohibitions for the NEP and exceptions for particular activities.

Statutory and Regulatory Framework for Experimental Population Designation

Section 10(j) of the ESA (16 U.S.C. 1539(j)), allows the Secretary of Commerce to authorize the release of any population of a listed species outside their current range if the release furthers their conservation. An experimental population is a population that is geographically separate from nonexperimental populations of the same species. Before authorizing the release of an experimental population the Secretary must determine whether or not the population is essential to the continued existence of the listed species.

An experimental population is treated as a threatened species, except that non-essential populations do not receive the benefit of certain protections normally applicable to threatened species (ESA section 10(j)(2)(C)). Below we discuss the impact of treating experimental populations as threatened species and of exceptions that apply to NEPs.

For endangered species, section 9 of the ESA prohibits take of those species. For a threatened species, ESA section 9 does not specifically prohibit take of those species, but the ESA instead authorizes NMFS to adopt regulations under section 4(d) that prohibit take, or that it deems necessary and advisable for species conservation. The proposed experimental population of CV spring-run Chinook salmon must generally be treated as a threatened species. Therefore, we propose to issue tailored protective regulations under ESA section 4(d) for the proposed experimental population of CV spring-run Chinook salmon to identify take prohibitions to provide for the conservation of the species with exceptions for particular activities.

Section 7 of the ESA provides for Federal interagency cooperation and consultation on Federal agency actions. Section 7(a)(1) directs all Federal agencies, in consultation with NMFS as applicable depending on the species, to use their authorities to further the purposes of the ESA by carrying out

[1] The ESA defines ''species'' to include ''any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature'' (16 U.S.C. 1532(16); see also 50 CFR 424.02). For Pacific salmon, NMFS determined that an ESU will be considered a distinct population segment and thus a species (56 FR 58612, November 20, 1991). A group of Pacific salmon is considered an ESU if it (1) is substantially reproductively isolated from other nonspecific population units; and (2) represents an important component in the evolutionary legacy of the species.

programs for the conservation of listed species. Section 7(a)(2) requires all Federal agencies, in consultation with NMFS as applicable depending on the species, to insure any action they authorize, fund or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 applies equally to endangered and threatened species.

Although ESA section 10(j) provides that an experimental population must generally be treated as a threatened species, for the purposes of ESA section 7, if the experimental population is determined to be a NEP, section 10(j)(C)(i) requires that we treat the experimental population as a species proposed to be listed, rather than a species that is listed (except when it occurs within a National Wildlife Refuge or National Park, in which case it is treated as listed). ESA Section 7(a)(4) requires Federal agencies to confer (rather than consult under ESA section 7(a)(2)) with NMFS on actions likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory recommendations, if any, on ways to minimize or avoid adverse effects rather than mandatory terms and conditions under ESA section 7(a)(2) consultations (compare 50 CFR 402.10(c) with 50 CFR 402.14(i)(1)(iv)). ESA section 7(a)(1) also applies to nonessential experimental populations. As described above, section 7(a)(1) requires Federal agencies, in consultation with NMFS as applicable depending on the species, to use their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of threatened and endangered species. ESA section 7(a)(2) consultation requirements would not apply to any Federal agency action affecting a NEP in the NEP area, except when the NEP occurs within a National Wildlife Refuge or National Park. Section 7(a)(2) consultation requirements would still apply to any Federal agency action in the NEP area that may affect CV spring-run Chinook salmon or designated critical habitat outside of the NEP area or other ESA-listed species or designated critical habitat for those species.

NMFS has designated three experimental populations (78 FR 2893, January 15, 2013; 78 FR 79622, December 31, 2013; 79 FR 40004, July 11, 2014) and promulgated regulations, codified at 50 CFR part 222, subpart E, to implement section 10(j) of the ESA (81 FR 33416, May 26, 2016). NMFS' implementing regulations include the following provisions.

50 CFR 222.501(b) defines an ''essential experimental population'' as a population whose loss would reduce the likelihood of the survival of the species in the wild.''All other experimental populations are classified as nonessential.

50 CFR 222.502(b) provides, before authorizing the release of an experimental population, the Secretary must find that such release will further the conservation of the species. In addition, 50 CFR 222.502(b) provides:

In making such a finding, the Secretary shall utilize the best scientific and commercial data available to consider:

(1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;

(2) The likelihood that any such experimental population will become established and survive in the foreseeable future;

(3) The effects that establishment of an experimental population will have on the recovery of the species; and

(4) The extent to which the introduced population may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area.

50 CFR 222.502(c) describes four components that must be provided in any NMFS regulations designating an experimental population under ESA section 10(j):

(1) Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location; actual or anticipated migration; number of specimens released or to be released; and other criteria appropriate to identify the experimental population(s);

(2) A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild;

(3) Management restrictions, protective measures, or other special management concerns of that population, as appropriate, which may include, but are not limited to, measures to isolate and/or to contain the experimental population designated in the regulation from nonexperimental populations and protective regulations established pursuant to section 4(d) of the ESA; and

(4) A process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

In addition, as described above, ESA section 10(j)(1) defines an ''experimental population'' as any population authorized for release under paragraph (2), when the population is separate geographically from the nonexperimental populations of the same species. Accordingly, we must establish that there are such times and places when the experimental population is wholly geographically separate. Similarly, the statute requires that we identify the experimental population; the legislative history indicates that the purpose of this requirement is to provide notice as to which populations of listed species are experimental (see Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep No. 97–835, at 34 (1982)).

Status of the Species

Life history and the historical population trend of CV spring-run Chinook salmon are summarized by Healy (1991), USFWS (1995), Yoshiyama *et al.,* (1998), Yoshiyama *et al.,* (2001), and Moyle (2002). Section 4(f) of the ESA requires the Secretary of Commerce to develop recovery plans for all listed species unless the Secretary determines that such a plan will not promote the conservation of a listed species. Prior to developing the Central Valley Recovery Plan (NMFS 2014), we assembled a team of scientists from Federal and State agencies, consulting firms, non-profit organizations and academia. This group, known as the Central Valley Technical Recovery Team (CVTRT), was tasked with identifying population structure and recommending recovery criteria (also known as delisting criteria) for ESA-listed salmon and steelhead in the Sacramento River and San Joaquin Rivers and their tributaries. The CVTRT recommended biological viability criteria at the ESU level and population level (Lindley *et al.,* 2007) for recovery planning consideration. The CVTRT identified the current risk level of each population based on the gap between recent abundance and productivity and the desired recovery goals. The CVTRT concluded that the greatest risk facing the ESUs resulted from the loss of historical diversity following the construction of major dams that blocked access to historical spawning and rearing habitat (Lindley *et al.,* 2007).

The CVTRT also recommended spatial structure and diversity metrics for each population (Lindley *et al.,* 2004). Spatial structure refers to the

geographic distribution of a population and the processes that affect the distribution. Populations with restricted distribution and few spawning areas are at a higher risk of extinction from catastrophic environmental events (*e.g.,* a volcanic eruption) than are populations with more widespread and complex spatial structure. A population with complex spatial structure typically has multiple spawning areas which allows the expression of diverse life history characteristics. Diversity is the combination of genetic and phenotypic characteristics within and between populations (McElhany *et al.,* 2000). Phenotypic diversity allows more diverse populations to use a wider array of environments and protects populations against short-term temporal and spatial environmental changes. Genotypic diversity, on the other hand, provides populations with the ability to survive long-term changes in the environment by providing genetic variations that may prove successful under different situations. The combination of phenotypic and genotypic diversity, expressed in a natural setting, provides populations with the ability to utilize the full range of habitat and environmental conditions and to have the resiliency to survive and adapt to long-term changes in the environment.

In 2016, NMFS completed a periodic review as required by the ESA section 4(c)(2)(A), and concluded that the CV spring-run Chinook salmon ESU should remain listed as threatened (81 FR 33468, May 26, 2016). An analysis conducted by NMFS' Southwest Fisheries Science Center (Johnson and Lindley, 2016) indicated that the extant independent populations of the CV spring-run Chinook salmon ESU remained at a moderate to low extinction risk since the last status review (Williams *et al.,* 2011). The analysis noted some improvements in the viability of the ESU, particularly with respect to the increased spatial diversity of the dependent Battle Creek and Clear Creek populations. The analysis identified as key threats the recent catastrophic declines of many of the extant populations, high pre-spawn mortality during the 2012–2015 drought in California, uncertain juvenile survival due to drought and ocean conditions, as well as straying of CV spring-run Chinook salmon from the FRH (Johnson and Lindley, 2016).

Analysis of the Statutory Requirements

1. Will authorizing release of an experimental population further the conservation of the species?

Section 3(3) of the ESA, 16 U.S.C. 1532(3), 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.'' We discuss in more detail below each of the factors we considered in determining if authorizing release of an experimental population in the upper Yuba River and its tributaries upstream of Englebright Dam would further the conservation of CV spring-run Chinook salmon.

As described above, under 50 CFR 222.502(b), NMFS must consider several factors in finding whether authorizing release of an experimental population will further the conservation of the species, including any possible adverse effects on extant populations of the species as a result of removal of individuals for introduction elsewhere; the likelihood that the experimental population will become established and survive in the foreseeable future; the effects that establishment of the experimental population will have on the recovery of the species; and the extent to which the experimental populations may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area. We describe authorizing release as reintroduction below, because spring-run Chinook salmon historically used habitat in the upper Yuba River upstream of Englebright Dam (NMFS 2014).

We discuss possible adverse effects on extant populations below in relation to a donor source for reintroduction into the upper Yuba River.

Regarding the likelihood that reintroduction efforts will be successful in the foreseeable future, important questions are: What are the most appropriate sources of broodstock to establish the experimental population, and are the sources available? Reintroduction efforts have the best chance for success when the donor population has life-history characteristics compatible with the anticipated environmental conditions of the habitat into which fish will be reintroduced (Araki *et al.,* 2008). Populations found in watersheds closest to the reintroduction area are most likely to have adaptive traits that will lead to a successful reintroduction. Therefore, only CV spring-run Chinook salmon populations found in Central Valley will be used in establishing the experimental populations in the NEP area.

We preliminarily identify a donor source for reintroduction into the upper Yuba River as CV spring-run Chinook salmon produced from the FRH. The Yuba River is a tributary to the Feather River, and CV spring-run Chinook salmon from the FRH are the geographically closest donor source that could be used with minimal impact to the wild population for reintroduction into the upper Yuba River. The donor stock raised at the FRH may include CV spring-run Chinook salmon from either the Feather or Yuba River. NMFS, in consultation with the California Department of Fish and Wildlife, may later consider diversifying the donor stock with CV spring-run Chinook salmon from other nearby streams if those populations can sustain removal of fish. Any collection of CV spring-run Chinook salmon would be subject to a Hatchery and Genetic Management Plan (HGMP) in relation to a hatchery source and approval of a permit under ESA section 10(a)(l)(A), which includes analysis under NEPA and ESA section 7.

Use of donor stock from the FRH for the initial phases of a reintroduction program will minimize the number of individuals needed from existing populations. Supplementation to the donor stock, if necessary, would be dependent upon genetic diversity needs and the extent of adverse effects to other populations. It is anticipated that over time, the FRH would produce juveniles and adults for a future reintroduction program in sufficient numbers to enable the return of a sufficient number of adults to establish a self-sustaining population in the upper Yuba River. Once a self-sustaining population is established, it is anticipated that the FRH contribution of CV spring-run Chinook salmon would be phased out.

We also consider the suitability of habitat available to the experimental population. NMFS initiated a habitat assessment of the upper Yuba River and determined conditions were suitable for Chinook salmon spawning, adult holding, and juvenile rearing (Stillwater Sciences 2013). The relative abundance of habitat types, habitat quality and environmental conditions vary between the North, Middle, and South Yuba Rivers. Under current conditions when compared to one another, habitat suitability is best in the North Yuba River. The Middle Yuba River maintains significant quantities of suitable habitat and habitat conditions are less suitable in the South Yuba River. Habitat conditions in the Middle and South Yuba Rivers could improve with anticipated additional instream flow releases from dams in the upper

watersheds as part of the Federal Energy Regulatory Commission's relicensing process pursuant to the Federal Power Act.

In addition, there are Federal and State laws and regulations that will help ensure the establishment and survival of the experimental population by protecting aquatic and riparian habitat in the NEP area. Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344, establishes a program to regulate the discharge of dredged or fill material into waters of the United States, which generally requires avoidance, minimization, and mitigation for potential adverse effects of dredge and fill activities within the nation's waterways. Under CWA section 401, 33 U.S.C. 1341, a Federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States, unless a state or authorized tribe where the discharge would originate issues a section 401 water quality certification verifying compliance with existing water quality requirements or waives the certification requirement. In addition, construction and operational storm water runoff is subject to restrictions under CWA section 402, 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System permit program, and state water quality laws.

At the state level, the California Fish and Game Code (CFGC) Fish and Wildlife Protection and Conservation provisions (CFGC section 1600, *et seq.*), the CESA (CFGC section 2050, *et seq.*), and the California Environmental Quality Act (CEQA) (Public Resources Code section 21000, *et seq.*) set forth criteria for the incorporation of avoidance, minimization, and feasible mitigation measures for on-going activities as well as for individual projects. The CFGC Fish and Wildlife Protection and Conservation provisions were enacted to provide conservation for the state's fish and wildlife resources and include requirements to protect riparian habitat resources on the bed, channel, or bank of streams and other waterways. The CESA prohibits the taking of listed species except as otherwise provided in State law. Under the 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 public agencies shall incorporate such measures absent overriding consideration.

Regarding the effects that establishment of the experimental population will have on the recovery of the species, the Central Valley Recovery Plan characterizes the NEP area as having the potential to support a viable population of Chinook salmon (NMFS 2014). The Central Valley Recovery Plan establishes a framework for reintroduction of Chinook salmon and steelhead to historical habitats upstream of dams. The framework recommends that a reintroduction program should include feasibility studies, habitat evaluations, fish passage design studies, and a pilot reintroduction phase prior to implementation of the long-term reintroduction program. In addition, the Central Valley Recovery Plan contains specific management strategies for recovering CV spring-run Chinook salmon that include securing existing populations and reintroducing this species into historically occupied habitats above rim dams in the Central Valley of California (NMFS 2014). The Central Valley Recovery Plan concludes, and we continue to agree, that establishing an experimental population in the NEP area that persists into the foreseeable future is expected to reduce extinction risk from natural and anthropogenic factors by increasing abundance, productivity, spatial structure, and diversity within California's Central Valley. These expected improvements in the overall viability CV spring-run Chinook salmon, in addition to other actions being implemented throughout the Central Valley, which are described next, will contribute to this species' near-term viability and recovery.

Across the Central Valley, a number of actions are being undertaken to improve habitat quality and quantity for CV spring-run Chinook salmon. Collectively, implementation of the San Joaquin River Restoration Program (*http://www.restoresjr.net/*), Battle Creek Salmon and Steelhead Restoration Project (*http://www.usbr.gov/mp/battlecreek/*), and the Central Valley Flood Protection Plan (DWR 2011) will result in many projects that will improve habitat conditions. The San Joaquin River Restoration Program will improve passage survival and spatial distribution for CV spring-run Chinook salmon in the San Joaquin River corridor. The Battle Creek Salmon and Steelhead Restoration Project will improve passage and rearing survival, spawning opportunities and spatial distribution in Battle Creek. The Central Valley Flood Protection Plan (DWR 2011) will improve juvenile rearing conditions during outmigration by creating and improving access to high quality floodplain habitats.

Climate change is expected to exacerbate existing habitat stressors in California's Central Valley and increase threats to Chinook salmon and steelhead by reducing the quantity and quality of freshwater habitat (Lindley *et al.,* 2007). Significant contraction of thermally suitable habitat is predicted, and as cold water sources contract, access to cooler headwater streams is expected to become increasingly important for CV spring-run Chinook salmon in the Central Valley (Crozier *et al.,* 2018). For this reason and other reasons described above, we anticipate reintroduction of CV spring-run Chinook salmon into headwater streams upstream of Englebright Dam will contribute to their conservation and recovery.

Regarding the extent to which the experimental populations may be affected by existing or anticipated Federal or State actions or private activities within or adjacent to the experimental population area, the NEP and adjacent areas are characterized by snow-covered subalpine zones near the Sierra-Nevada Mountain crest, are largely forested, and have been affected by mining, logging, dams and water diversions, with limited residential development. The NEP area is sparsely populated and ongoing State, Federal and local activities include forest management, limited mining, road maintenance, limited residential development, grazing, and tourism and recreation. These activities are anticipated to have minor impacts to CV spring-run Chinook salmon in the NEP and adjacent areas. Potential impacts are further minimized through application of the aforementioned State and Federal regulations. Dams and water diversions in the NEP area currently limit fish populations in some parts of the NEP area. NMFS anticipates a future reintroduction project will target stream reaches that are not blocked by dams or impaired from inadequate flows due to water diversions. NMFS further anticipates a reintroduction program will specifically target river reaches in the NEP area with abundant high quality habitat.

The habitat improvement actions called for in the Central Valley Recovery Plan, in combination with the protective measures proposed in this rule, as well as compliance with existing Federal, State, and local laws, statutes, and regulations, including those mentioned above, are expected to contribute to the establishment and survival of the proposed experimental population in the upper Yuba River in the foreseeable future. Although the donor source for this reintroduction effort is anticipated to include hatchery-origin individuals from the FRH, based on the factors discussed above, we conclude it is

probable that a self-sustaining experimental population of CV spring-run Chinook salmon will become established and survive in the upper Yuba River. Furthermore, we conclude that such a self-sustaining experimental population of genetically compatible individuals is likely to further the conservation of the species, as discussed above.

2. Identification of the Experimental Population and Geographic Separation From the Nonexperimental Populations of the Same Species

ESA section 10(j)(2)(B) requires that we identify experimental populations by regulation. ESA section 10(j)(1) also provides that a population is considered an experimental population only when, and at such times as, it is wholly separate geographically from the nonexperimental population of the same species. NMFS proposes that the NEP area would extend upstream from Englebright Dam and include the North, Middle, and South Yuba Rivers and their tributaries up to the ridgeline. Under this proposed rule, the experimental population would be identified as the CV spring-run Chinook salmon population when it is geographically located anywhere in the NEP area. Reintroduced CV spring-run Chinook salmon would only be part of the experimental population when they are present in the NEP area, and would not be part of the experimental population when they are outside the NEP area, even if they originated within the NEP area. When reintroduced juvenile CV spring-run Chinook salmon pass downstream of Englebright Dam into the lower Yuba River, through the lower Feather River and Sacramento River and when they migrate further downstream to the Sacramento River Delta and the Pacific Ocean, they would no longer be geographically separated from other extant CV spring-run Chinook salmon populations, and thus the ''experimental population'' designation would not apply, unless and until they return as adults and re-enter the NEP area.

The proposed NEP area provides the requisite level of geographic separation because CV spring-run Chinook salmon are currently extirpated from this area due to the presence of Englebright Dam, which blocks their upstream migration. Straying of fish from other spring-run Chinook populations into the NEP area is not possible due to the presence of this dam. As a result, the geographic description of the CV spring-run Chinook ESU does not include the NEP area. The ''experimental population'' designation is geographically based and does not travel with the fish outside of the NEP area.

NMFS anticipates that CV spring-run Chinook salmon used for the initial stages of a reintroduction program would be marked, for example, with specific fin clips and/or coded-wire tags to evaluate stray rates and allow for brood stock collection of returning adults that originated from the experimental population. Any marking of individuals of the experimental population, such as clips or tags, would be for the purpose of evaluating the effectiveness of a near-term and long-term fish passage program, and would not be for the purpose of identifying fish from the NEP area other than for brood stock collection of returning adults. As discussed above, the experimental population is identified based on the geographic location of the fish. Indeed, if the reintroduction is successful as expected, and fish begin reproducing naturally, their offspring would not be distinguishable from fish from other Chinook salmon populations. Outside of the NEP area, *e.g.,* downstream of Englebright Dam in the lower Yuba, lower Feather and Sacramento Rivers, or in the ocean, any such unmarked fish (juveniles and adults alike) would not be considered members of an experimental population. They would be considered part of the CV spring-run Chinook salmon ESU currently listed under the ESA. Likewise, any fish that were marked for reintroduction in the NEP area would not be considered part of the experimental population once they left the NEP area; rather, they would be considered part of the ESU currently listed under the ESA.

3. Is the experimental population essential to the continued existence of the species?

As discussed above, ESA section 10(j)(2)(B) requires the Secretary to determine whether experimental populations would be ''essential to the continued existence'' of the listed species. The statute does not elaborate on how this determination is to be made. However, as noted above, Congress gave some further attention to the term when it described an essential experimental population as one whose loss ''would be likely to appreciably reduce the likelihood of survival of that species in the wild.'' (Joint Explanatory Statement, supra, at 34). NMFS regulations incorporated this concept into its definition of an essential experimental population at 50 CFR 222.501(b), which provides, in relevant part, ''The term essential experimental population means an experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild.''

In determining 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 CV spring-run Chinook salmon ESU includes four independent populations and several dependent or establishing populations. Given current protections and restoration efforts, these populations are persisting without the presence of a population in the NEP area. It is expected that the experimental population will exist as a separate population from those in the Sacramento River basin and will not be essential to the survival of those populations. Based on these considerations, we conclude that the loss of the experimental population of CV spring-run Chinook in the NEP area is not likely to appreciably reduce the likelihood of the survival of the species in the wild. Accordingly, NMFS is proposing to designate this experimental population as nonessential. Under section 10(j)(2)(C)(ii) of the ESA, we cannot designate critical habitat for a nonessential experimental population.

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

As indicated above, ESA section 10(j)(2)(C) requires that experimental populations be treated as threatened species, except that for nonessential experimental populations, certain portions of ESA section 7 do not apply and critical habitat cannot be designated. Congress intended that the Secretary would issue regulations, under ESA section 4(d), deemed necessary and advisable to provide for the conservation of experimental populations as for any threatened species (Joint Explanatory Statement, supra, at 34). In addition, when amending the ESA to add section 10(j), Congress specifically intended to provide broad discretion and flexibility to the Secretary in managing experimental populations so as to reduce opposition to releasing listed species outside their current range (H.R. Rep. No. 567, 97th Cong. 2d Sess. 34 (1982)). Therefore, we propose to exercise the authority to issue protective regulations under ESA section 4(d) for

the proposed experimental population of CV spring-run Chinook salmon to identify take prohibitions necessary to provide for the conservation of the species and otherwise provide assurances to people in the NEP area.

The ESA defines ''take'' to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). Concurrent with the proposed ESA section 10(j) experimental population designation, we propose protective regulations under ESA section 4(d) for the experimental population that would prohibit take of CV spring-run Chinook salmon that are part of the experimental population, except in the following circumstances in the NEP area:

1. Any take by authorized governmental entity personnel acting in compliance with 50 CFR 223.203(b)(3) 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.

2. Any take that is incidental [2] to an otherwise lawful activity and is unintentional, not due to negligent conduct. Otherwise lawful activities include, but are not limited to, recreation, forestry, water management, agriculture, power production, mining, transportation management, rural development, or livestock grazing, when such activities are in full compliance with all applicable laws and regulations.

3. Any take that is pursuant to a permit issued by NMFS under section 10 of the ESA (16 U.S.C. 1539) and regulations in 50 CFR part 222 applicable to such a permit.

Process for Periodic Review

Evaluation of a future reintroduction program is likely to be assessed by certain new monitoring programs developed specifically for this purpose. NMFS anticipates monitoring in the NEP area, including fish passage efficiency, spawning success, adult and smolt injury and mortality rates, juvenile salmon collection efficiencies, competition with resident species, predation, disease and other types of monitoring will be necessary to gauge the success of the program. As data are collected through monitoring efforts, NMFS and other partners in a future reintroduction project can evaluate the success of the program. In addition, results of a reintroduction project will be evaluated during subsequent 5-year status reviews for the CV spring-run Chinook salmon ESU under ESA section 4(c)(2).

Proposed Experimental Population Findings

Based on the best available scientific information, we have determined that the designation and authorization for the release of a NEP of CV spring-run Chinook salmon in the NEP area upstream of Englebright Dam will further the conservation of CV spring-run Chinook salmon. CV spring-run Chinook salmon used to initiate the reintroduction are anticipated to come from the FRH using either donor stock from the Feather or Yuba Rivers, which is part of the CV spring-run Chinook salmon ESU. The collection of donor stock from the FRH will be permitted only after issuance of a permit under section 10(a)(1)(A) of the ESA, which includes analysis under NEPA and ESA section 7. The experimental population fish are expected to remain geographically separate from fish in other populations of the CV spring-run Chinook salmon ESU during the life stages in which they remain in, or are returned to, the NEP area. At all times when members of the experimental population are downstream of Englebright Dam, the experimental population designation will not apply. Establishing an experimental population of CV spring-run Chinook salmon in the NEP area would likely contribute to the viability of the ESU as a whole. Reintroduction is a recommended recovery action in the Central Valley Recovery Plan (NMFS 2014). Designation of CV spring-run Chinook salmon in the NEP area as a nonessential experimental population would ensure that their reintroduction does not impose undue regulatory restrictions on landowners and others because this proposed rule would apply only limited take prohibitions, as compared to the prohibitions that typically apply to CV spring-run Chinook salmon. In particular, the proposed rule expressly provides an exception for take of NEP fish in the NEP area provided that the take is incidental to otherwise lawful activity and unintentional, not due to negligent conduct.

We further determine, based on the best available scientific information, that the proposed experimental population would not be essential to the continued existence of the CV spring-run Chinook salmon ESU, because absence of the experimental population would not be likely to appreciably reduce the likelihood of the survival of the ESU in the wild. However, as described above, the experimental population is expected to contribute to the recovery of the CV spring-run Chinook salmon ESU if reintroduction is successful. We therefore propose that the experimental population would be a nonessential experimental population.

Public Comment

We want the final rule to be as effective and accurate as possible, and the final EA to evaluate the potential issues and reasonable range of alternatives. Therefore, we invite the public, State, Tribal, and government agencies, the scientific community, environmental groups, industry, local landowners, and all interested parties to provide comments on the proposed rule and draft EA (see **ADDRESSES** section above). We request that submitted comments be relevant to the proposed designation of an experimental population in the NEP area. The most helpful comments are as specific as possible, provide relevant information or suggested changes, the basis for the suggested changes, and any additional supporting information where appropriate. For example, comments could tell us the numbers or titles of the sections or paragraphs that are unclearly written, which sections or sentences are too long, or the sections where lists or tables would be useful.

Prior to issuing a final rule, we will take into consideration the comments and supporting materials received. We are interested in all public comments, but are specifically interested in obtaining feedback on:

(1) The best source of ESA-listed fish for establishing an experimental population of CV spring-run Chinook salmon in the NEP area and the scientific basis for such comments.

(2) The proposed NEP area (geographical scope) for the experimental population.

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

(4) Any necessary management restrictions, protective measures, or other management measures that we may not have considered.

(5) The likelihood that the experimental population will become established in the NEP area.

(6) Whether the proposed experimental population is essential or nonessential.

(7) Whether the proposed experimental population designation and release will further the conservation of the species and whether we have

[2] Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant. 50 CFR 402.02

used the best available scientific information in making this determination.

Information Quality Act and Peer Review

Pursuant to the Information Quality Act (Section 515 of Pub. L. 106–554), the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review, which was published 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 proposed rule that meet these criteria.

Classification

Executive Order 12866

This proposed rule has been determined to be not significant under Executive Order 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 notice 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.

We are certifying that this proposed rule, if implemented, would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This proposal would designate and authorize the release of a nonessential experimental population of CV spring-run salmon in the NEP area. While in the NEP area, the experimental population would be protected from some types of take, but we would impose no prohibitions on the take of the experimental population fish that is incidental to otherwise lawful activity and unintentional, not due to negligent conduct (see below). The effect of the proposal would not increase the regulatory burdens associated with the ESA on affected entities, including small entities, to conduct otherwise lawful activities as a result of reintroduction of CV spring-run Chinook salmon to the NEP area. If this proposal is adopted, the area affected by this rule includes the entire NEP area. Land ownership includes Federal lands and private lands with the primary uses being recreation, forestry, water management, power production, mining, transportation management, rural development, and livestock grazing. Accordingly, the rule, if implemented, may impact those uses.

However, this proposed rule would apply only limited take prohibitions as compared with the prohibitions that typically apply to listed CV spring-run Chinook salmon. In particular, the proposed rule expressly provides an exception for the take of experimental population fish in the NEP area provided that the take is incidental to otherwise lawful activity and unintentional, not due to negligent conduct. Based on the nonexperimental population designation under the proposed rule, there would only be the requirement under ESA section 7 (other than section (a)(1) requiring Federal agencies, in consultation with NMFS as applicable depending on the species, to use their authorities to further the purposes of the ESA by carrying out programs for the conservation of listed species) for Federal agencies to confer with NMFS. The more burdensome requirement to consult, with respect to effects of agency actions on the experimental population is not applicable. Additionally, critical habitat cannot be designated for a nonessential experimental population. Due to the minimal regulatory overlay provided by the nonessential experimental population designation, we do not expect this rule to have any significant effect on recreation, forestry, water management, power production, mining, transportation management, rural development, livestock grazing or other lawful activities within the NEP area.

Because this proposal would require no additional regulatory requirements on small entities and would impose little to no regulatory requirements for activities within the affected area, the Chief Council for Regulation certified that this proposed rule would not have a significant economic effect on a substantial number of small entities. Accordingly, no initial regulatory flexibility analysis is required, and none has been prepared.

Executive Order 12630

In accordance with Executive Order 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required because this proposed 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 proposed 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 Executive Order 13132, we have determined that this proposed rule does not have federalism implications as that term is defined in Executive Order 13132.

Executive Order 13771

This proposed rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

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

OMB regulations at 5 CFR 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 proposed 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 (NEPA), we have analyzed the impact on the human environment and considered a reasonable range of alternatives for this proposed rule. We have prepared a draft EA on this proposed action and have made it

available for public inspection (see **ADDRESSES** section above). All appropriate NEPA documents will be finalized before this rule is finalized.

Government-to-Government Relationship With Tribes (Executive Order 13175)

Executive Order 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 in the NEP area. As part of NMFS's obligations under the National Historic Preservation Act, NMFS inquired with federally recognized and non-federally recognized tribes with potential interest in the NEP area to inform them of the proposed rule and solicit information on cultural resources eligible for listing on the National Register of Historic Places. To date, responses have been limited and no concerns over the proposed rule have been raised. NMFS invites tribes to meet with us to have detailed discussions that could lead to government-to-government consultation meetings with tribal governments. We will continue to coordinate with potentially affected tribes as we gather public comment on this proposed rule and consider next steps.

References Cited

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

Dated: December 2, 2020.

Samuel D. Rauch, III,

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

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

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

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

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 is also issued under 16 U.S.C. 1361 *et seq.;* 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.102, amend the table in paragraph (e) by adding, in alphabetical order, an entry under Fishes for ''Salmon, Chinook (Central Valley spring-run ESU–XN: Yuba)'' to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

(e) * * *

Species [1]			Citation(s) for listing determinations(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
*	*	*	*	*	
FISHES					
*	*	*	*	*	
Salmon, Chinook (Central Valley spring-run ESU–XN: Yuba).	*Oncorhynchus tshawytscha.*	Central Valley spring-run Chinook salmon only when, and at such times as, they are found in the upper Yuba River watershed, upstream of Englebright Dam.	[**Federal Register** citation and date when published as a final rule].	NA	223.301
*	*	*	*	*	

[1] 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. In § 223.301, add paragraph (d) to read as follows:

§ 223.301 Special rules—marine and anadromous fishes.

* * * * *

(d) *Upper Yuba River Central Valley spring-run Chinook Salmon Experimental Population* (*Oncorhynchus tshawytscha*). (1) The Upper Yuba River Central Valley spring-run Chinook salmon population identified in paragraph (d)(2) of this section is designated as a nonessential experimental population under section 10(j) of the ESA and shall be treated as a ''threatened species'' pursuant to 16 U.S.C. 1539(j)(2)(C).

(2) Upper Yuba River Central Valley spring-run Chinook Salmon Experimental Population. All Central Valley spring-run Chinook salmon within the experimental population area in the upper Yuba River watershed upstream of Englebright Dam, as defined here, are considered part of the Upper Yuba River Central Valley spring-run Chinook salmon experimental population. The boundaries of the experimental population area include Englebright Dam and all tributaries draining into Englebright Reservoir up to the ridgeline.

(3) Prohibitions. Except as expressly allowed in paragraph (d)(4) of this section, all prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538 (a)(1)) apply to fish that are part of the Upper Yuba River Central Valley spring-run Chinook salmon nonessential experimental population identified in paragraph (d)(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 (d)(2) of this section are not prohibited by this section:

(i) Any taking of Central Valley spring-run Chinook salmon by authorized governmental entity personnel acting in compliance with 50 CFR 223.203(b)(3) 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.

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

(iii) Any taking of Central Valley spring-run Chinook salmon pursuant to a permit issued by NMFS under section 10 of the ESA (16 U.S.C. 1539) and regulations in part 222 of this chapter applicable to such a permit.

* * * * *

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