

§§ 223.215–223.300

50 CFR Ch. II (10–1–22 Edition)

222, subpart C, of this chapter (General Permit Procedures) or through a similar authorization.

(2) Paragraph (a) of this section does not apply to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply with paragraph (a) of this section.

(3) Paragraph (a) of this section does not apply to commercial fishing vessels lawfully engaged in actively setting, retrieving or closely tending commercial fishing gear. For purposes of this section, commercial fishing means taking or harvesting fish or fishery resources to sell, barter, or trade. Commercial fishing does not include commercial passenger fishing operations (i.e. charter operations or sport fishing activities).

(4) Paragraph (a) of this section does not apply to state, local, or Federal government vessels operating in the course of official duty.

(5) Paragraph (a) of this section does not affect the rights of Alaska Natives under 16 U.S.C. 1539(e).

(6) This section shall not take precedence over any more restrictive conflicting Federal regulation pertaining to humpback whales, including the regulations at 36 CFR 13.1102–13.1188 that pertain specifically to the waters of Glacier Bay National Park and Preserve.

(c) *General measures.* Notwithstanding the prohibitions and exceptions in paragraphs (a) and (b) of this section, to avoid collisions with threatened humpback whales, vessels must operate at a slow, safe speed when near a humpback whale. “Safe speed” has the same meaning as the term is defined in 33 CFR 83.06 and the International Regulations for Preventing Collisions at Sea 1972 (see 33 U.S.C. 1602), with respect to avoiding collisions with humpback whales.

[81 FR 62021, Sept. 8, 2016]

§§ 223.215–223.300 [Reserved]

§ 223.301 Special rules—marine and anadromous fishes.

(a) *Middle Columbia River steelhead (Oncorhynchus mykiss.)* (1) The Middle Columbia River steelhead located in the geographic areas identified in para-

graph (a)(4) of this section comprise a nonessential, experimental population (NEP).

(2) *Take of this species that is allowed in the NEP area.* (i) Taking of Middle Columbia River (MCR) steelhead that is otherwise prohibited by paragraph (a)(3) of this section and 50 CFR 223.203(a), provided that the taking is unintentional; not due to negligent conduct; and incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Examples of otherwise lawful activities include recreational fishing, recreation, agriculture, forestry, municipal usage, and other similar activities, which are carried out in accordance with Federal, state, and local laws and regulations as well as applicable tribal regulations.

(ii) Handling of MCR steelhead in the NEP area by NMFS, Oregon Department of Fish and Wildlife (ODFW) and the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS) employees and authorized agents acting on their behalf for scientific purposes and by the Portland General Electric Company (PGE) and CTWS employees and authorized agents acting on their behalf for the purpose of monitoring and evaluating the ongoing reintroduction under the Federal Energy Regulatory Commission (FERC) license for the Pelton Round Butte Hydroelectric Project (FERC No. 2030).

(iii) Taking of MCR steelhead incidental to any activities related to or associated with the operation and maintenance of Pelton Round Butte Hydroelectric Project's (FERC Project No. 2030) Round Butte Dam by PGE or CTWS as administered under a license issued by FERC. Acceptable forms of taking of steelhead include, but are not limited to, mortality, stranding, injury, impingement at Round Butte Dam facilities, or delay in up- or downstream passage associated with or caused by any of the following activities. Activities related to the operation and maintenance of Round Butte Dam include, but are not limited to:

- (A) Hydroelectric generation;
- (B) Maintenance of project facilities;
- (C) Provision of upstream and downstream fish passage,
- (D) Fish handling at fish separation and counting facilities;

- (E) Fish conservation activities;
 - (F) Fish handling, tagging, and sampling in connection with FERC approved studies; and
 - (G) Approved resource protection, mitigation, and enhancement measures.
- (iv) Handling MCR steelhead by Deschutes Valley Water District employees and agents acting on their behalf for the purpose of monitoring and evaluating the Opal Springs Hydroelectric Project (FERC No. 5891).
- (v) Take incidental to any activities related to or associated with the operation and maintenance of the Opal Springs Hydroelectric Project (FERC Project No. 5891) as administered under a license issued by FERC and the Settlement Agreement Concerning License Amendment for Fish Passage, dated October 2011.
- (vi) Take of MCR steelhead by any person with a valid permit issued by NMFS and a valid permit issued by the ODFW for educational purposes, scientific purposes, and the enhancement of propagation or survival of the species, zoological exhibition, and other conservation purposes consistent with the ESA.
- (3) *Take of this species that is not allowed in the NEP area.* (i) Except as expressly allowed in paragraph (a)(2) of this section, the taking of MCR steelhead is prohibited within the NEP geographic area, as provided in 50 CFR 223.203(a).
- (ii) No person shall possess, sell, deliver, carry, transport, ship, import, or export, by any means whatsoever, MCR steelhead taken in violation of this paragraph (a)(3)(ii) and 50 CFR 223.203(a).
- (4) *Geographic extent of the non-essential experimental population of Middle Columbia River steelhead.* (i) The geographic range of this experimental population is all accessible reaches upstream of Round Butte Dam on the Deschutes River, including tributaries Whychus Creek, Crooked River and Metolius River. More specifically, the geographic range includes all accessible reaches of the Deschutes River downstream to Round Butte Dam; the Whychus Creek subbasin; the Metolius River subbasin; and the Crooked River subbasin from Bowman Dam down-

stream (including the Ochoco and McKay Creek watersheds) to its point of confluence with the Deschutes River.

(ii) Round Butte Dam is the downstream terminus of this NEP. When MCR steelhead are below the Round Butte Dam, they will be outside the NEP area and thus considered part of the nonexperimental population.

(5) *Review and evaluation of non-essential experimental population.* As a requirement under its Federal license to operate the Pelton Round Butte Project, Portland General Electric Company and the Confederated Tribes of the Warm Springs Reservation of Oregon will conduct monitoring over the 50-year term of the license. This monitoring will include collecting information on the reintroduction program that NMFS will use in evaluating the NEP designation.

(6) *Time frame for NEP designation.* This NEP designation will expire on January 15, 2025.

(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.

(c) *Okanogan River UCR spring-run Chinook Salmon Experimental Population* (*Oncorhynchus tshawytscha*). (1) The Upper Columbia River (UCR) spring-run Chinook salmon population located in the geographic area identified in paragraph (c)(5) of this section shall comprise the Okanogan River non-essential experimental population (NEP), and shall be treated as a “threatened species” pursuant to 16 U.S.C. 1539(j)(2)(C).

(2) *Prohibitions*. Except as provided in paragraph (c)(3) of this section, the prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species apply to UCR spring-run Chinook salmon in the Okanogan River NEP Area, defined in paragraph (c)(5) of this section.

(3) *Exceptions to the Application of Section 9 Take Prohibitions in the Experimental Population Area*. Take of UCR spring-run Chinook salmon that is otherwise prohibited by paragraph (c)(2) of this section and 50 CFR 223.203(a) in the Okanogan River NEP Area is allowed, except as otherwise noted, provided it falls within one of the following categories:

(i) Any activity taken pursuant to a valid permit issued by NMFS under § 223.203(b)(1) and (7) for scientific research activities;

(ii) Aid, disposal, or salvage of fish by authorized agency personnel acting in compliance with 50 CFR 223.203(b)(3);

(iii) Activities associated with artificial propagation of the experimental population under an approved Hatchery Genetic Management Plan (HGMP)

that complies with the requirements of 50 CFR 223.203(b)(5);

(iv) Any harvest-related activity undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent consistent with tribal harvest regulations and an approved Tribal Resource Management Plan (TRMP) that complies with the requirements of 50 CFR 223.204;

(v) Any harvest-related activity consistent with state harvest regulations and an approved Fishery Management Evaluation Plan (FMEP) that complies with the requirements of 50 CFR 223.203(b)(4); or

(vi) Any take that is incidental to an otherwise lawful activity, provided that the taking is unintentional; not due to negligent conduct; and incidental to, and not the purpose of, the carrying out of the otherwise lawful activity. Otherwise lawful activities include, but are not limited to, agricultural, water management, construction, recreation, navigation, or forestry practices, when such activities are in full compliance with all applicable laws and regulations. Any fish that is incidentally taken in a manner al-

lowed by this paragraph may not be collected and must be immediately returned to its habitat.

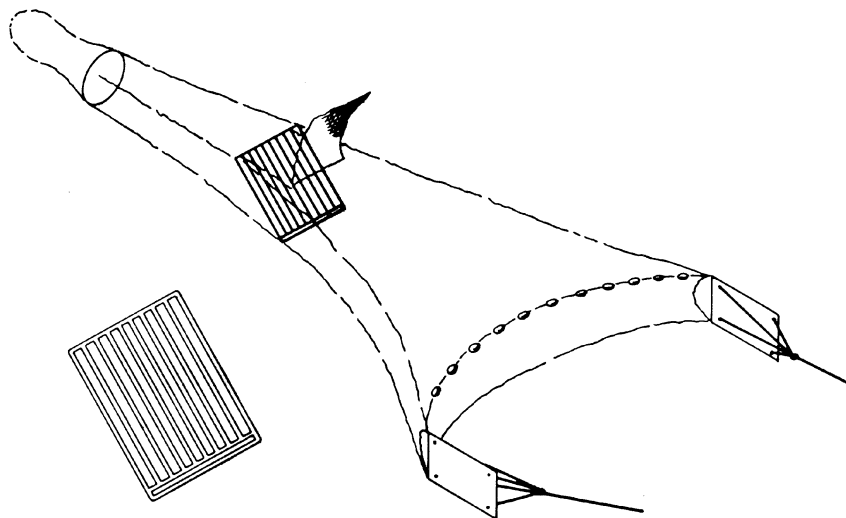
(4) *Prohibited take outside the NEP area.* Outside the Okanogan River NEP Area, UCR spring-run Chinook salmon are not considered to be part of the NEP, irrespective of their origin, and therefore the take prohibitions for endangered UCR spring-run Chinook salmon apply.

(5) *Geographic extent of the Okanogan River NEP Area.* The geographic boundary defining the Okanogan River NEP Area for UCR spring-run Chinook salmon is the mainstem and all tributaries of the Okanogan River between the Canada-United States border to the confluence of the Okanogan River with the Columbia River. All UCR spring-run Chinook salmon in this defined Okanogan River NEP Area are considered part of the NEP, irrespective of where they originated.

[78 FR 2907, Jan. 15, 2013, as amended at 78 FR 79632, Jan. 30, 2014; 79 FR 40015, July 11, 2014]

FIGURES 1–2 TO PART 223 [RESERVED]

FIGURE 3 TO PART 223—MATAGORDA TED



[52 FR 24260, June 29, 1987. Redesignated at 57 FR 40868, Sept. 8, 1992]