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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 110427267-2708-02]

RIN 0648-BB04

# Endangered and Threatened Species: Designation of a Nonessential Experimental Population for Middle Columbia River Steelhead above the Pelton Round Butte Hydroelectric Project in the Deschutes River Basin, Oregon

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

ACTION: Final rule.

SUMMARY: We, the National Marine Fisheries Service (NMFS), are issuing a final rule to authorize the continued release of Middle Columbia River (MCR) steelhead (Oncorhynchus mykiss) that are currently being reintroduced as part of an ongoing reintroduction effort into the upper Deschutes River basin in portions of Jefferson, Crook, and Deschutes Counties, Oregon, and designate them as a nonessential experimental population (NEP) under the Endangered Species Act (ESA) of 1973. The geographic boundaries of the NEP extend upstream from Round Butte Dam on the Deschutes River (about river mile (RM) 110, river kilometer (rkm) 177) and all accessible reaches of the Deschutes River and its tributary Whychus Creek; on the Crooked River from its confluence with the Deschutes River upstream to Bowman Dam (RM 70, rkm 113) and all accessible tributaries between these points; and on the Metolius River from its confluence with the Deschutes River upstream to all accessible tributaries between these points.

This NEP designation will have an expiration date 12 years from the effective date of this final rule. We anticipate providing a notice in the Federal Register about 1 year before the NEP designation is set to expire to provide adequate notice to the public.

DATES: The effective date of this rule is [Insert date of publication in the FEDERAL REGISTER].

ADDRESSES: This final rule, along with the Final Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), is available at http://www.regulations.gov. Comments and supporting documentation used in the preparation of this final rule are also available for inspection, by appointment, during normal business hours at the National Marine Fisheries Service, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232.

FOR FURTHER INFORMATION CONTACT: Scott Carlon, NMFS, 1201 NE Lloyd Blvd., Portland, OR 97232 (503-231-2379) or Marta Nammack, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 (301-713-1401).

SUPPLEMENTARY INFORMATION:

Context

On March 25, 1999, we listed the Middle Columbia River (MCR) steelhead distinct population segment (DPS) as threatened under the Endangered Species Act (ESA) (16 U.S.C. 1531–1544) (64 FR 14517). The MCR steelhead DPS range covers approximately 35,000 square miles (90,650 sq km) of the Columbia plateau of eastern Oregon and eastern Washington. The Deschutes River in central Oregon is one of six major river basins supporting steelhead in this DPS. Since 1968, the Pelton Round Butte Hydroelectric Project (hereafter, Pelton Round Butte Project) on the Deschutes River has blocked steelhead from accessing nearly 200 miles (322 km) of historical spawning and rearing habitat.

In this rulemaking, we are authorizing the continued release of the MCR steelhead currently being reintroduced to the upper Deschutes River basin and designating this population as a NEP. This reintroduction is a requirement of the new hydropower license for the Pelton Round Butte Project in Central Oregon, and thus will continue regardless of this designation. The licensees, Portland General Electric Company and the Confederated Tribes of the Warm Springs Reservation of Oregon, are conducting the reintroduction program in cooperation with the State of Oregon, NMFS, the U.S. Forest Service (USFS), the U.S. Fish and Wildlife Service (FWS), U.S. Bureau of Land Management (BLM), Jefferson and Deschutes Counties, Oregon, and 10 other stakeholder groups. This reintroduction is one of many recovery actions being implemented by NMFS, Federal and state agencies, and other partners throughout the threatened species' historical range. While passage and reintroduction have commenced under the authority of a license issued under the Federal Power Act, we are authorizing the continued release of the steelhead and designating the population as a NEP. We are also providing alternative protective measures for the NEP, under the authority of the ESA.

The purpose of this designation is to temporarily lift certain ESA liability and consultation requirements to allow time for local landowners and municipalities to develop well-informed conservation measures to support the reintroduction effort in the Upper Deschutes River basin. Information gained during the early stages of the reintroduction effort will help us focus conservation measures on the areas needing support, and how best to provide that support. For example, knowing where the steelhead spawn will inform determinations about what improvements are most important for that specific habitat, and what kinds of activities could be detrimental to spawning steelhead.

The specific stock chosen to initiate steelhead reintroduction is from the Round Butte Hatchery, and was not listed at the time it was chosen. After the new license was issued in June 2005 and reintroduction planning was largely completed, we included the Round Butte Hatchery steelhead stock as part of the threatened group of steelhead (71 FR 834; January 5, 2007).

In the proposed rule (76 FR 28715, May 18, 2011), we stated that the NEP designation would expire after three successive generations of MCR steelhead had been passed above the Pelton Round Butte Project. Three generations equates to about 12 years. At the time of the proposed rulemaking, it was not known when adult steelhead would first be passed above the Pelton Round Butte Project, so the expiration date was also not known. However, adult MCR steelhead from juvenile outplants in the NEP area are now returning to the Pelton Round Butte Project, and the first of these adults were released into the NEP area in late October 2012. Consequently, we can now provide the expiration date, which is 12 years from the effective date of this rule.

Some local landowners and one municipality are working to develop a Habitat Conservation Plan (HCP) for certain activities above the Pelton Round Butte Project. This HCP is likely to be completed sooner than the expiration date for the NEP designation. However, the HCP covers only a subset of the activities and area affected by the reintroduction. Thus, other local entities may consider developing conservation measures to address potential ESA liability. We expect that the fixed-duration NEP designation will encourage local landowners and municipalities to develop conservation measures in a timely manner, as full ESA protections for a threatened species will once again apply to the steelhead after the NEP designation expires. In addition, we expect that information gained during the NEP designation period will help inform conservation measures so that they can be refined through adaptive management.

This NEP will occur in portions of Deschutes, Jefferson, and Crook Counties, Oregon. The geographic boundaries of the NEP would extend upstream from Round Butte Dam on the Deschutes River and all accessible reaches of the Deschutes River (to MCR steelhead) and its tributary, Whychus Creek; on the Crooked River from its confluence with the Deschutes River upstream to Bowman Dam (RM 70, rkm 113) and all accessible tributaries between these points; and on the Metolius River from its confluence with the Deschutes River upstream to all accessible tributaries between these points. While this area is part of its historical range, MCR steelhead fish passage to the area was abandoned in about 1968.

Section 10(j) of the ESA allows the Secretary of Commerce (Secretary) to authorize the release of an experimental population of an endangered or threatened species outside the species' current range if the Secretary determines that the release will further the species' conservation. This designation will further the conservation of the species because it will build support for the reintroduction effort among local landowners, encourage those landowners and municipalities to complete conservation measures within the set time-period, and ensure that the conservation measures are focused on supporting the reintroduction based on information gathered during the NEP designation. Since we listed the MCR steelhead DPS as threatened, there has been great concern and uncertain support for reintroduction by local landowners and municipalities in the Upper Deschutes River basin. Consistent with Congressional intent of section 10(j), the NEP designation provides a flexible management tool to help build support for the reintroduction while promoting species conservation by allowing local landowners and municipalities to focus on developing conservation measures that promote the reintroduction effort. The expiration date supports the determination that this action will further the conservation of the species because it will encourage these entities to complete the needed conservation measures in a time certain.

Without an expiration date, local landowners and municipalities would not have the same incentive to develop and implement conservation measures needed to support the reintroduction. We anticipate providing a notice in the Federal Register about 1 year before the NEP designation is set to expire to provide notice to the public.

The Secretary may designate an experimental population when, and at such times as, the population is wholly separate geographically from nonexperimental populations, as required in ESA section 10(j). In this action, we are designating an experimental population that is geographically separate from the nonexperimental ESA-listed MCR steelhead population, due to the dams that block access both upstream and downstream to the area where the species will have experimental status. The MCR steelhead will only be considered experimental when they are above Round Butte Dam (the last dam, moving upstream, in the three-dam complex). All MCR steelhead that are above the dams will be in the NEP geographic area, and will be part of the NEP. MCR steelhead below the dams will not be part of the NEP because they are not in the geographic area. This is a clear geographic boundary. It also recognizes the life cycle of MCR steelhead—that they spawn in streams, travel into the ocean to grow to maturity, and return to their natal streams to spawn. In this case, the MCR steelhead designated as an NEP will be geographically separated from the larger DPS of MCR steelhead while above Round Butte Dam, but will intermingle with more steelhead as they travel downstream of the Pelton Round Butte Project, while in the ocean, and on part of their journey upstream.

Background

The Deschutes River basin above the Pelton Round Butte Project was once home to native runs of summer steelhead, Chinook salmon, sockeye salmon, and Pacific lamprey. Before hydroelectric and irrigation development, steelhead used the Deschutes River up to Big Falls,

Whychus Creek (a Deschutes River tributary above the Pelton Round Butte Project), and the Crooked River watershed. Within the Crooked River watershed, steelhead were documented in McKay, Ochoco, Horseheaven, Newsome, Drake, Twelvemile, and Beaver Creeks, and the North Fork Crooked River (Nehlsen, 1995). The completion of Ochoco Dam east of Prineville in 1920 blocked steelhead access into most of the Ochoco Creek watershed, and the completion of Bowman Dam on the Crooked River in 1961 stopped fish passage into the upper Crooked River watershed. On the Deschutes River, the Pelton and Reregulating Dams were completed in 1958. Even though these dams had fish passage, steelhead numbers in the upper Deschutes River basin, though still significant, had declined by that time (Nehlsen, 1995). Available information suggests peak annual escapements in the 1950s were at least 1,600 adult summer steelhead and 800–900 (Montgomery, 1955) adult spring Chinook salmon (with perhaps twice this number harvested downstream). After completion of Round Butte Dam (the most upstream dam) in 1964, fish passage decreased dramatically, and, by 1968, was abandoned in favor of a hatchery program to mitigate lost passage and habitat. The runs could not be sustained primarily because reverse surface currents (surface currents moving upstream in the Metolious arm of Lake Billy Chinook) confused smolts attempting to migrate seaward through Lake Billy Chinook, the reservoir behind Round Butte Dam. Most of the smolts failed to find their way from the head of the reservoir downstream to a fish collector installed at Round Butte Dam (Korn et al., 1967). As a result of this decline and other factors, and following a comprehensive study of west coast steelhead, we subsequently listed the MCR steelhead as a threatened DPS under the ESA (64 FR 14517; March 25, 1999).

There has long been an interest in reestablishing anadromous fish runs in the upper Deschutes River subbasin. This interest strengthened in recent years as technological

innovations advanced and hydrodynamic modeling suggested that surface currents could be altered to favor the downstream passage of smolts. The relicensing of the Pelton Round Butte Project provided the opportunity to implement these innovations in order to attempt to reestablish anadromous fish runs upstream.

The Federal Energy Regulatory Commission issued a new license for the Pelton Round Butte Project (Project No. P–2030) on June 21, 2005, to Portland General Electric Company (PGE) and the Confederated Tribes of the Warm Springs Reservation of Oregon (CTWS), who are joint licensees (Licensees). The Warm Springs Power and Water Enterprises manages hydropower for the CTWS. The license requires fish passage around the Pelton Round Butte Project, and incorporates the terms of a Settlement Agreement (which includes agreement on license articles for fish passage in support of reintroduction) entered into by the Licensees and 20 other parties, including all levels of government, CTWS, and environmental groups. The license establishes a Fish Committee, which is made up of the PGE, CTWS' Natural Resource Management Services, NMFS, Oregon Department of Fish and Wildlife (ODFW), the FWS, and other agencies and entities. Details regarding the responsibilities of the Licensees with respect to fish passage and reintroduction are in the Fish Passage Plan, included as Exhibit D to the Settlement Agreement. These responsibilities include fish passage at the Pelton Round Butte Project, a wide variety of test and verification studies, and longer term monitoring efforts. The license includes a schedule for meeting those obligations.

Steelhead reintroduction has commenced consistent with the Fish Passage Plan, and the donor steelhead are from a captive bred population. This population is propagated to mitigate lost fisheries due to failed fish passage after the Pelton Round Butte Project was originally

constructed. The hatchery fish being used for the ongoing reintroduction are excess stock, and therefore are not needed to help recovery.

Because the Pelton Round Butte Project does not provide volitional passage, the license requires construction and operation of a Selective Water Withdrawal structure that is now in place and operating at Round Butte Dam. The structure has already begun to help guide smolts to an associated fish screening and collection facility, and provide downstream passage for juveniles. This structure and its operation are also central elements of the Fish Passage Plan, as well as additional measures supporting reintroduction. Returning adult steelhead are being collected in traps below the Reregulating Dam and transported for release above Round Butte Dam. These released adults will have NEP status once transported above the dams and in the NEP geographic area (but do not have that status when they are below the dam).

The juvenile fish are marked as they leave the NEP area and thus can be identified by trap operators when they return as adults. For the time period of this rule, marked adult fish (i.e. fish that originated in the NEP) are likely to be the predominant if not only category of fish released above Round Butte Dam. The Fish Passage Plan (developed during the FERC relicensing process) is primarily focused on the release of adult marked fish and, although it provides for the future possibility of wild adult fish releases, that potential will depend on availability of wild spawners and the successful performance of the fish passage program at the Pelton Round Butte Project.

Statutory and Regulatory Framework

Congress made significant changes to the ESA in 1982, including the addition of section 10(j), which provides authority to reintroduce populations of listed species as ‘‘experimental populations.’’ Previously, we had authority to reintroduce populations into unoccupied portions

of a listed species' historical range. However, local citizens often opposed these reintroductions because they were concerned about potential liability for harming these animals, and the placement of restrictions and prohibitions on Federal and private activities. Section 10(j) was designed to address this by providing greater flexibility in the application of ESA protections to experimental populations. H.R. Rep. No. 567, 97th Cong. 2d Sess. 34 (1982). Under section 10(j) of the ESA, the Secretary can authorize the release of an ''experimental'' population outside the species' current range, where: (1) the experimental population is geographically separate from the nonexperimental population; and (2) release of the experimental population will further the conservation of the listed species. The determination of whether experimental populations are ''essential'' or ''nonessential'' to the continued existence of the species must be based on the best scientific and commercial data available.

The ESA provides that species listed as endangered or threatened are afforded protection primarily through the prohibitions of section 9 and the consultation requirements of section 7. Section 9 of the ESA prohibits the take of an endangered species. The term ''take'' is defined by the ESA as ''to harass, harm, pursue, hunt, shoot, wound, trap, capture, or collect, or attempt to engage in any such conduct.'' 15 U.S.C. 1532(19). Section 7 of the ESA provides procedures for Federal interagency cooperation and consultation to conserve federally listed species, ensure their survival, help in recovery of these species, and to protect designated critical habitat necessary for the listed species' survival. It also mandates that all Federal agencies determine how to use their existing authorities to further the purposes of the ESA to aid in recovering listed species. In addition, ESA section 7 requires that Federal agencies will, in consultation with NMFS, ensure that 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 of the ESA does not apply to activities undertaken on private land unless they are authorized, funded, or carried out by a Federal agency.

For the purposes of section 7 of the ESA, section 10(j) requires that we treat NEPs as a species proposed to be listed, unless they are located within a National Wildlife Refuge or National Park, in which case they are treated as threatened, and section 7 consultation requirements apply. When NEPs are located outside a National Wildlife Refuge or National Park, only two provisions of section 7 apply—section 7(a)(1) and section 7(a)(4). In these instances, NEP designations provide additional flexibility in developing conservation and management measures, because they allow NMFS to work with the action agency early to develop conservation measures, instead of analyzing an already well-developed proposed action provided by the agency in the framework of a section 7(a)(2) consultation. Additionally, for populations of listed species that are designated as nonessential, section 7(a)(4) of the ESA only requires that Federal agencies confer (rather than consult) with NMFS on actions that are likely to jeopardize the continued existence of a species proposed to be listed. These conferences are advisory in nature, and their findings do not restrict agencies from carrying out, funding, or authorizing activities.

Experimental population designations must be done through a rulemaking that identifies the population and states whether the population is essential or nonessential to the continued existence of the species. Through section 4(d) of the ESA, a threatened designation allows the NMFS greater discretion in devising management programs and special regulations for such a population, including take prohibitions. Section 4(d) of the ESA allows us to adopt regulations necessary to provide for the conservation of a threatened species. MCR steelhead are currently included in NMFS' 4(d) rule that imposes section 9 take liability for threatened anadromous fish,

at 50 CFR 203. Through this rulemaking, we are using our authority under section 4(d) to create a different set of protective regulations, specific to the experimental steelhead population above Round Butte Dam. In effect, we would be modifying the current 4(d) rule as it applies to MCR steelhead. For this NEP only, we would allow take if the take is incidental to an otherwise lawful activity, such as agricultural activities, and is unintentional and not due to negligent conduct.

The FWS has regulations for experimental population designation, 50 CFR 17 subpart H, that provide definitions, considerations in finding that the designation would further the conservation of the species, and information to be included in the designation. These regulations state that, in making the determination that the designation would further the conservation of the species, the Secretary must consider the effect of taking the eggs or young from another population, the likelihood that the experimental population will become established, the effect the designation would have on the species' overall recovery, and the extent to which the experimental population would be affected by activities in the area. Under the FWS regulations, a regulation designating the experimental population must include: a clear means to identify the experimental population; a finding based on the best available science indicating whether the population is essential to the continued existence of the species; management restrictions, protective measures, or other management concerns; and a periodic review of the success of the release and its effect on the conservation and recovery of the species. The FWS regulations also state that any experimental population shall be treated as threatened for purposes of establishing protective regulations under ESA section 4(d), and the protective regulations for the experimental population will contain applicable prohibitions and exceptions for that population.

While we do not have regulations regarding designation of experimental populations, many of the considerations in FWS's regulation are generally applicable to this designation and consistent with the statutory criteria. Where applicable, we have applied the considerations in our decision regarding designation, and provide the rationale in the preamble.

Biological Information

''Steelhead'' is the name commonly applied to the anadromous (migratory) form of the biological species O. mykiss. The common names of the non-anadromous, or resident, form are rainbow trout and redband trout. The species O. mykiss exhibits perhaps the most complex suite of life history traits of any species of Pacific salmonid. These fish can be anadromous or freshwater residents, and under some circumstances yield offspring of the opposite form. Steelhead can spawn more than once, whereas all other Oncorhynchus except cutthroat trout (O. clarki) spawn once and then die.

When we originally listed the MCR steelhead as threatened on March 25, 1999 (64 FR 14517), it was classified as an evolutionarily significant unit (ESU) of salmonids that included both the anadromous and resident forms, but not hatchery fish. Since then, we revised our species determinations for West Coast steelhead under the ESA, delineating anadromous, steelhead-only distinct population segments (DPS). We listed the MCR steelhead DPS as threatened on January 5, 2006 (71 FR 834). Rainbow trout and redband trout are not listed under the ESA, and are under the jurisdiction of the states unless they are listed, at which time they would come under the jurisdiction of the FWS. We published a final Critical Habitat designation for MCR steelhead on September 2, 2005, with an effective date of January 2, 2006 (70 FR 52630).

As noted previously, the MCR steelhead DPS extends over an area of about 35,000 square miles (90,650 square km) in the Columbia plateau of eastern Washington and eastern Oregon. The DPS includes all naturally spawned populations of steelhead in drainages upstream of the Wind River, Washington, and the Hood River, Oregon (exclusive), up to, and including, the Yakima River, Washington, excluding steelhead from the Snake River Basin (64 FR 14517, March 24, 1999; 71 FR 834, January 5, 2006). Major drainages that support steelhead in this DPS are the Deschutes, John Day, Umatilla, Walla Walla, Yakima, and Klickitat river systems. Most of the region is privately owned (64 percent), with the remaining area under Federal (23 percent), tribal (10 percent), and state (3 percent) ownership. Most of the landscape consists of rangeland and timberland, with significant concentrations of dryland agriculture in parts of the range. Irrigated agriculture and urban development are generally concentrated in valley bottoms. Human populations in these regions are growing. Steelhead produced in seven artificial propagation programs are considered part of the DPS, and are therefore also listed as threatened (71 FR 834, January 5, 2006). These programs are the Touchet River Endemic Summer Steelhead Program, the Yakima River Kelt Reconditioning Program (in Satus Creek, Toppenish Creek, Naches River, and Upper Yakima River), and the Umatilla River and Deschutes River steelhead hatchery programs.

Within the range of West Coast steelhead, spawning migrations occur throughout the year, with seasonal peaks of activity. The runs are usually named for the season in which the peak occurs. Most steelhead can be categorized as one of two run types, based on their sexual maturity when they re-enter freshwater and how far they go to spawn. In the Pacific Northwest, summer steelhead enter freshwater between May and October, and require several months to mature before spawning; winter steelhead enter freshwater between November and April with

well-developed gonads and spawn shortly thereafter. Summer steelhead usually spawn farther upstream than winter steelhead (Withler, 1966; Roelofs, 1983; Behnke, 1992).

The steelhead that occur in the Deschutes Basin are summer run. Spawning occurs from late winter through spring, and juveniles typically rear in freshwater for 2 years (may range 1–4 years) before migrating to the Pacific Ocean. About half of the adults return after 1 year in the ocean and the other half returns after 2 years.

Throughout much of its historical range, the decline of steelhead has been attributed to habitat degradation and fragmentation, the blockage of migratory corridors, poor water quality, angler harvest, entrainment (the incidental withdrawal of fish and other aquatic organisms in water diverted out-of-stream for various purposes) into diversion channels and dams, and introduced nonnative species. Specific land and water management activities that may negatively impact steelhead populations and habitat, if not implemented in accordance with best management practices, include the operation of dams and other diversion structures, forest management practices, livestock grazing, agriculture, agricultural diversions, road construction and maintenance, mining, and urban and rural development.

Factors Affecting Listing Middle Columbia River Steelhead as Threatened

Section 4(a)(1) of the ESA and NMFS implementing regulations (50 CFR part 424) establish procedures for listing species as threatened or endangered. According to this direction, the Secretary must determine if a species is endangered or threatened based on any one or a combination of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory

mechanisms; or (5) other natural or human-made factors affecting its continued existence (Busby et al., 1996; NMFS, 1999).

In our initial determination to list the MCR steelhead species, we found that all five section 4(a)(1) factors had played a role in the decline of the West Coast salmon and steelhead ESUs. These factors may or may not still be limiting recovery in the future when we reevaluate the status of the species to determine whether the protections of the ESA are no longer warranted and the species may be delisted. Findings leading to the listing of West Coast salmon and steelhead, including MCR steelhead, include:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range: Salmon and steelhead have experienced declines in abundance over the past several decades as a result of loss, damage, or change to their natural environment. Water diversions, forestry, agriculture, mining, and urbanization have eliminated, degraded, simplified, and fragmented habitat. Hydroelectric development on the mainstem Columbia River modified natural flow regimes and impaired fish passage. Tributary obstructions also restrict or block salmon and steelhead access to historical habitats.

(2) Overutilization of the steelhead and salmon for commercial, recreational, scientific, or educational purposes: Overfishing in the early days of European settlement led to the depletion of many salmonid stocks before extensive modifications and degradation of natural habitats, and exploitation rates following the degradation of many aquatic and riparian ecosystems were higher than many populations could sustain. Today, steelhead harvest continues on the Columbia River, tributaries, and Pacific Ocean; however, fishery impacts have declined significantly because of changes in fishery management.

(3) Disease or predation: Introductions of non-native species and habitat modifications have resulted in increased predator populations in numerous rivers. Predators on adult and juvenile steelhead include walleye, California sea lions, and seabirds including Caspian terns.

(4) Inadequacy of existing regulatory mechanisms: Various Federal, state, county, and tribal regulatory mechanisms are in place to reduce habitat loss and degradation caused by human use and development. Many of these mechanisms have been improved over the years to slow habitat degradation and destruction. Protective efforts directed toward addressing the many factors that adversely impact MCR steelhead and habitat—water quality and quantity, safe migration, riparian vegetation, food, predation dynamics and complex stream channels, and floodplain connectivity—will aid in improving these factors.

(5) Other natural or human-made factors affecting its continued existence: Variability in ocean and freshwater conditions can have profound impacts on the productivity of salmonid populations and, at different times, have exacerbated or mitigated the problems associated with degraded and altered riverine and estuarine habitats.

Relationship of the Proposed Experimental Population to Recovery Efforts

The 2009 Middle Columbia River Steelhead Recovery Plan (NMFS 2009) has the overarching aim of removing the MCR steelhead DPS from the threatened and endangered species list. The suite of strategies and actions proposed in the Plan will protect and improve ecosystem functions and restore normative ecological processes to levels that support recovery of MCR steelhead populations. The strategies and actions were developed by planning teams comprised of natural resource specialists for the Fifteenmile, Deschutes, John Day, Umatilla, and Walla Walla watersheds. The actions reflect direction identified in regional and local plans, recent modeling and research findings, and local expert input provided by the planning team

members. Together, these strategies and actions call for maintaining high quality habitats and their productive capacity, improving ecosystem processes and habitats that are impaired but are currently important to productive capacity, and restoring habitat through passive and active measures.

Recovery criteria specific to the Deschutes include eight kinds of tributary habitat conservation measures that could mitigate adverse impacts. We organized the habitat actions and associated information for each population by the conservation measures, or habitat strategies:

(1) Protect and conserve natural ecological functions that support the viability of populations and their primary life history strategies throughout their life cycle;

(2) Restore passage and connectivity to habitats blocked or impaired by artificial barriers and maintain properly functioning passage and connectivity;

(3) Maintain and restore floodplain connectivity and function;

(4) Restore degraded and maintain properly functioning channel structure and complexity;

(5) Restore riparian condition and large woody debris recruitment and maintain properly functioning conditions;

(6) Restore natural hydrograph to provide sufficient flow during critical periods;

(7) Improve degraded water quality and maintain unimpaired water quality; and

(8) Restore degraded and maintain properly functioning upland processes to minimize unnatural rates of erosion and runoff.

The recovery scenario described in the MCR steelhead recovery plan states that the Deschutes Eastside and Westside populations should reach a viable status. The

Westside population existed historically in Whychus Creek and the upper Deschutes River below Big Falls. The Eastside population, as determined by the Interior Columbia Technical Recovery Team, did not extend above Pelton Round Butte historically. The Plan recognizes that successful reintroduction of MCR steelhead and their natural production above the Pelton Round Butte Project could contribute substantially to recovery in two ways, by: (1) restoring production from the Whychus Creek drainage, part of the historical Westside Deschutes population that currently is limited to major tributaries below the Pelton Round Butte Project; and (2) reestablishing production in the Crooked River drainage, identified by the Interior Columbia Technical Recovery Team as a separate extirpated historical population. If successful, these reintroductions and restoration of natural production could contribute substantially to population status and therefore to the viability of the MCR steelhead DPS.

The MCR steelhead recovery plan also includes an ambitious restoration and protection program for currently accessible habitats in tributaries below the Pelton Round Butte Project. As a result, it is possible that the Westside Deschutes population could reach minimum viability levels without access to habitat above the Pelton Round Butte Project if there is an increase in actions aimed at further improving natural production from accessible habitats below the project. Furthermore, the Mid-Columbia Steelhead Recovery Plan recognizes that a future delisting decision for the DPS should consider not only the specific biological criteria incorporated into the current plan, but also the general principles underlying those criteria, advances in risk assessment, management actions in place to address threats, and considerations for the status of all of the components in the DPS. Therefore, while the reintroduction program furthers recovery, it is one of many measures to assist achieving this goal.

Does the Designation Further the Conservation of the Species?

Under ESA section 10(j), the Secretary may designate listed species as experimental if doing so furthers the conservation of the species. The underlying premise of section 10(j) is to allow local communities to support, and work with NMFS and FWS, on reintroducing listed species into historical habitat. The designation is consistent with the statutory purpose because it provides regulatory flexibility that will allow local communities to focus on work to support the reintroduction in a productive way. Reintroducing MCR steelhead above the Pelton Round Butte Project supports recovery of the DPS. This rule supports the reintroduction effort by allaying landowners' fear of potential ESA take liability, and allows them to work to support the reintroduction by encouraging them to develop conservation measures in a set time period. Therefore, the designation of MCR steelhead that are a part of the ongoing reintroduction program as an experimental population furthers their conservation by encouraging completion of conservation measures well tailored to support the program.

This designation is expected to promote well tailored conservation measures to support reintroduction because during the time period that the 10(j) rule will be in effect, increasing amounts of relevant data will be collected to inform conservation measures. Without the rule, HCPs hurriedly created to avoid take liability would not benefit from this information. On the other hand, without any time limit, there would not be an incentive to complete HCPs. Thus a balance has to be struck. Twelve years, or three generations, of data is designed to account for some variable environmental conditions the NEP will experience, and give a solid basis for knowing what kinds of conservation measures will provide strong support for the reintroduction effort. For example, once we know the main spawning areas after collecting this information from three generations of spawning adults, we can craft conservation measures to protect those areas. Conservation measures typically include adaptive management components, and those

measures that are completed before the expiration date likely would include an adaptive management component that would allow us to modify these measures based on this information. In addition, the expiration date adds another conservation aspect to the designation by encouraging development and completion of the conservation measures before expiration of the NEP designation.

We weighed these benefits against any potential harm caused by this rule. With respect to the HCP, the designation may create a disincentive for completing the HCP on its current trajectory, which is less than 12 years; however, the HCP does not cover all activities and geographies and so the rule allows non-HCP entities the opportunity and timeframe to also develop and implement conservation measures. Additionally, there is potential harm associated with the reduced ESA section 7 and section 9 protections during the time period of the designation. Yet, while the ESA regime applicable to above-dam entities will temporarily change, past experience suggests that they are likely to continue to take actions that promote steelhead conservation. Even before the steelhead for the reintroduction program were listed under the ESA (i.e., before there was ESA liability), local landowners began implementing certain conservation measures to support the reintroduction, and there is no reason to expect this to change when the landowners are again not subject to ESA liability. Furthermore, the fixed timeframe for the rule provides an incentive for landowners to continue their trend toward fish conservation measures, and thus also provides a counterbalance to any incentive in the opposite direction. It is also worth noting that the MCR steelhead that have been reintroduced to date appear to be doing reasonably well in their historic habitat despite ongoing activities in the area.

Finally, the premise of 10(j) is to provide flexibility in ESA protections to facilitate the greater benefit of promoting reintroduction. Thus, even if there is some potential harm to the

nonessential reintroduced fish as a result of the reduced ESA protections, it does not inherently undermine the conservation benefit to the species. In this case, we have weighed the benefits of developing sound conservation measures in a time certain fashion versus the potential for some harm and determined that, on balance, the designation of the population as experimental, together with reductions in certain ESA protections, would further the conservation of the species. This conclusion is informed by the same considerations that we evaluated in determining that the NEP population is "nonessential", as set out below.

Is the Experimental Population Essential or Nonessential?

Under ESA section 10(j)(2)(B), the Secretary must ''identify the [proposed] population and determine, on the basis of the best available information, whether or not such population is essential to the continued existence of an endangered species or a threatened species.'' 15 U.S.C. 1539(j)(2)(B). First, we considered the importance of the experimental population to recovery of MCR steelhead generally. While the reintroduction effort is a significant recovery effort, it is not the only one and not the key to whether recovery can be achieved for this steelhead DPS. Successful implementation of restoration efforts across all major population groups in the DPS could reduce risks and improve viability even absent reintroduction above the Pelton Round Butte Project.

Another factor we considered is that the juvenile steelhead used for this reintroduction effort at the outplant stage are surplus hatchery stock. The hatchery program exists to mitigate lost MCR steelhead upstream habitat, but the steelhead used in the reintroduction program are excess hatchery fish and are beyond what is needed for the mitigation. In addition, returning adults will primarily, if not solely, be the marked adults associated with those hatchery outplants. Even in the unlikely event that adult wild fish would be placed upstream, it would only occur

consistent with species conservation objectives as set out in the Fish Passage Plan, and means that the NEP is doing very well. Thus, the potential loss of some of the NEP fish will not appreciably reduce the likelihood of survival and recovery for this DPS. Therefore, this experimental population will be designated as nonessential because this population is not essential to the continued existence of the DPS.

Location of Proposed NEP

ESA section 10(j) 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. The NEP geographic area includes all waters that could support steelhead above Round Butte Dam. It includes portions of the Deschutes River basin above Round Butte Dam, which is the most upstream development of the three-dam Pelton Round Butte Project. Specifically, the NEP area 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 downstream (including the Ochoco and McKay Creek watersheds) to its point of confluence with the Deschutes River.

This NEP area is distinct from the areas where MCR steelhead are otherwise found. The nearest steelhead population to the NEP area is found in the Deschutes River below the Pelton Round Butte Project. Other steelhead populations near the NEP area include fish in the following tributaries of the lower Columbia River: the Lewis River, entering the lower Columbia at RM 84, (rkm 135), the Willamette River at RM 101 (rkm 163), and the Hood River at RM 165 (rkm 366).

The Round Butte Dam serves as the line of demarcation between the experimental population and the rest of the steelhead population. This geographic boundary is clearly defined

by the presence of Round Butte Dam, with all steelhead above the dam being part of the experimental population and all steelhead below the dam not part of the experimental population. This approach to providing a clear geographic separation recognizes that anadromous fish migrate and mingle during the migration. Because anadromous populations of steelhead migrate to the Pacific Ocean and return to their natal streams to spawn, fish that originally were part of the experimental population will commingle with other fish in the lower Deschutes and Columbia Rivers, and may stray into any of the lower Columbia River tributaries or into Deschutes River tributaries below the Pelton Round Butte Project and spawn. Nevertheless, the steelhead will be experimental when, and at such times as, they are above Round Butte Dam, and not experimental when they are downstream of the dam, even if they were originally part of the reintroduced stock.

The Round Butte Dam provides a clear geographic boundary in large part because of the passage barrier it represents, both upstream and downstream. All juvenile steelhead smolts leaving the NEP boundary are collected for passage in a fish collection facility at Round Butte Dam. Likewise, when steelhead return to spawn, they must be trapped and manually relocated into the NEP area. As indicated above, marked adult steelhead from the experimental population are likely to be the predominant if not the only category of fish released above Round Butte Dam within the time period of this rule, though any fish released above the dam will have NEP status while in that area.

The NEP area is outside the current range of MCR steelhead because there is currently no self-sustaining population in the NEP geographic area; and if the releases stopped at this point, MCR steelhead would disappear from the NEP area. In summary, the section 10(j) requirement that the experimental population be wholly separate geographically from the nonexperimental

populations of the same species is met here because the NEP area is outside the range of the currently existing DPS, and is clearly defined by Round Butte Dam, which is impassable to steelhead. The NEP area includes all streams above Round Butte Dam capable of supporting steelhead. All steelhead above the dam are in the experimental population, and all steelhead below the dam are not part of the experimental population.

Time Frame for NEP Designation

We are establishing an expiration date for the NEP designation because we want to provide an incentive for private landowners and local government entities to complete conservation measures in a certain time frame, while providing time to gather useful information on the reintroduction effort. Information gathered during the 12-year timeframe will be progressively incorporated into the development of the conservation measures so they will best support the reintroduction program. This set time frame for the NEP designation furthers the conservation of the species because it is expected to provide strong encouragement to complete conservation measures that support the reintroduction by a date certain. The NEP designation period will expire 12 years from the effective date of this final rule.

We are using a timeframe of 12 years because this approximately represents three generations of returns to the NEP area. On average, one generation of steelhead is about 4 years (2 years freshwater rearing, 1 year in the ocean, and roughly 9–11 months for adult migration, holding, and spawning), so three generations will be 12 years. We recognize that variations in freshwater rearing and ocean growth will occur.

The proposed timeframe reflects our view that it will be useful to have information on three generations of steelhead to understand how well the reintroduction program is working and how best to craft conservation measures to support the program. As we discussed in the Does

the Designation Further the Conservation of the Species section, the timeframe of three generations allows an adequate amount of data to be collected on the reintroduction program. It is enough time to account for the kind of environmental variability mentioned above, such as variations in stream and ocean conditions. The time frame also allows time for this information to be used as the basis of conservation measures tailored toward supporting this reintroduction. This amount of information will allow all parties, private and governmental, to work together to develop conservation measures that are specifically focused on addressing needs of steelhead in the Upper Deschutes River basin. For conservation measures completed before expiration of the designation, such as potentially the HCP currently being developed, an adaptive management component could be used to address the need to modify the measures based on this information. This component will maximize the benefit of the conservation measures and strengthen the reintroduction program, and will result in a strong program for this recovery measure.

Without an expiration date, development and completion of conservation measures may continue for a longer time. In general, 12 years is a reasonable amount of time to complete development of conservation measures because there is still a lot of information needed, and the issues are complex and involve many parties. That said, the HCP could be completed before the NEP designation expires. We would like to strongly encourage development and implementation of conservation measures that will support the reintroduction, and this expiration date is meant to provide that encouragement while also ensuring that the measures are based on good information.

Management Considerations and Protective Measures

The aquatic resources in the NEP area are managed by the USFS, BLM, Bureau of Reclamation (BOR), the State of Oregon, municipalities, and private landowners. Multiple-use

management of these waters would continue under the NEP designation. We do not expect that continuing these agricultural, recreational, municipal, and other activities by private landowners within and near the NEP area will cause significant harm to the NEP. The main factors we took into account in considering appropriate protective measures are: (1) A significant number of upstream irrigators are developing or already implementing certain conservation measures; (2) Federal agencies have already consulted under section 7 of the ESA on various actions in the area and are implementing actions that do not cause jeopardy and minimize incidental take; (3) fish used for the reintroduction will be excess hatchery fish, and loss of some of them will not harm survival and recovery of the steelhead; and (4) enough steelhead are already surviving to provide information necessary for the initial stages of the reintroduction program. These factors all lead to the conclusion that, for a 12-year period, the reintroduction effort can continue successfully while allowing some take of the steelhead in the experimental population because enough fish will survive to support successful reintroduction. Therefore, for the time period of the designation, incidental take, as provided in the next paragraph, will not harm the recovery program.

Incidental Take: Although MCR steelhead are already covered by a NMFS 4(d) rule at 50 CFR 203, this action would modify that protection. In this final rule, under the authority of ESA section 4(d), incidental take of steelhead within the experimental population area would be allowed, provided that the take is incidental to an otherwise lawful activity, such as agricultural activities, unintentional, and not due to negligent conduct. One example is recreational fishing that is consistent with State fishing regulations that have been coordinated with NMFS. As recreational fishing for species other than steelhead is popular within the NEP area, we expect some incidental take of steelhead from this activity, but as long as it is incidental to the

recreational fishery, and in compliance with ODFW fishing regulations and Tribal regulations on land managed by the CTWS, such take will not be a violation of the ESA.

Special Handling: NMFS, ODFW, and CTWS employees and authorized agents acting on their behalf may handle MCR steelhead for: scientific purposes, to relocate steelhead within the NEP area, to aid sick or injured steelhead, and to salvage dead steelhead. PGE and CTWS employees and authorized agents acting on their behalf for the purpose of monitoring and evaluating the ongoing reintroduction under the FERC license for the Pelton Round Butte Project may handle MCR steelhead in the NEP area. 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) may handle steelhead. However, non-authorized personnel will need to acquire permits from NMFS and ODFW for these activities.

Monitoring and Evaluation

As a requirement under its Federal license to operate the Pelton Round Butte Project, the Licensees will monitor over the 50-year term of the license. Some of this monitoring relates directly to the MCR steelhead reintroduction program. The licensees will collect data to gauge long-term progress of the reintroduction program and to provide information for decision-making and adaptive management for directing the reintroduction program. Fish passage, fish biology, aquatic habitat, and hatchery operations will be the primary focus of the monitoring (PGE and CTWSRO, 2004; ODFW and CTWSRO, 2008).

Fish passage monitoring will focus on addressing a variety of issues important to successful reintroduction. These issues consist of measuring fish passage efficiency, including smolt reservoir passage, collection efficiency at the fish collection facility, smolt injury and mortality rates, adult collection, and adult reservoir 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 (e.g., habitat availability, habitat effectiveness, riparian condition) and natural production (the number, size, productivity, and life history diversity) of steelhead in the NEP area above Round Butte Dam.

Monitoring at the fish hatchery will focus on multiple issues important to the quality of fish collected and produced for use in the reintroduction program. ODFW and CTWS' Natural Resource Services are primarily responsible for monitoring hatchery operations. This will consist mainly of broodstock selection; disease history and treatment; pre-release performance such as survival, growth, and fish health by life stage; the numerical production advantage provided by the hatchery program relative to natural production; and success of the hatchery program in meeting conservation program objectives.

While this monitoring is being conducted for purposes of making the reintroduction effort successful, we will use the information to also determine if the experimental population designation is causing any harm to MCR steelhead and their habitat, and then, based on this and other available information, determine if the designation needs to be removed before the expiration date. There is no need for additional monitoring because this effort will provide all the information necessary.

Unrelated to the monitoring and evaluation for the ongoing reintroduction, NMFS conducts status reviews of listed anadromous fish populations roughly every 5 years to determine whether any species should be removed from the list or have its listing status changed. We

anticipate the next status review of the MCR steelhead DPS to occur in or about 2015. We further anticipate that the status of the ongoing reintroduction program would be a consideration of NMFS' analysis of the Cascades Eastern Slope Tributaries major population group and DPS as a whole. While we cannot reasonably determine at this time what effect the new status review would have on this experimental population designation, we do not anticipate any changes to the designation.

Summary of Comments and Responses

We requested written comments from the public on the proposed rule and draft EA published on May 18, 2011 (76 FR 28715), on all issues of concern to the public. We also requested comments on five specific questions regarding (1) the use of a specific expiration date; (2) the efficacy of a 12-year designation; (3) the effects of current and future actions on the NEP within the NEP area; (4) current programs within the NEP area that protect fish or aquatic habitats; and (5) additional management measures that we have not considered. We also contacted other Federal agencies and tribes and invited them to comment on the proposed rule. The comment period was open from May 18, 2011, until July 18, 2011.

A number of parties combined their respective comments into one submittal; thus, we received eight separate filings of comments from a total of 18 parties. For clarity, we treat each filing as one commenter in our summary and response to comments below. Commenters included natural resource agencies, non-governmental organizations, and private entities. All of the parties supported the reintroduction program, but had varying comments on the proposed rule. Two commenters responded directly to the five questions we asked in the proposed rule, while others provided comments on different issues. The comments generally addressed issues regarding whether an expiration date is appropriate; the choice of a 12-year time frame is the

correct amount of time; if hatchery or wild fish should be used; and whether a 4(d) rule would be more appropriate. Some commenters questioned the need for the expiration date, suggesting that 12 years was not necessary to achieve the purpose and need for the NEP designation; one party also questioned whether the designation was too broad to address a narrow set of concerns. Others suggested eliminating the expiration date and to keep the rule in place until the MCR steelhead DPS is delisted. Some parties suggested the promulgation of a new 4(d) rule, or limit (we use the term "limit" in connection with 4(d) rules because our 4(d) rules limit the take liability for threatened species, if the entity covered by the limit meets the proper criteria included in the specific limit), would be more appropriate.

We reviewed all comments received, and provide our response to all the substantive issues regarding the proposed rule and draft EA. Our responses to the substantive comments on the proposed rule are provided below, and where appropriate, we made changes in this final rule in response to the comments. Substantive comments we received on the EA were addressed in Appendix A1 of the Final EA, and where appropriate, we made changes to the EA in response to comments.

Public Comments

The first five sets of comments are in response to the five questions we asked in our proposed rule. The rest of the comments are additional ones raised by the commenters.

(1) Use of a specific expiration date.

Comment 1: Two commenters disagreed with the concept of having an expiration date on the designation. While both commenters recommended against use of an expiration date, both did provide suggestions to help alleviate their concerns without eliminating the expiration date concept completely. One commenter suggested that the designation either be left in place until

the MCR steelhead DPS is delisted, or be tied biologically to development of a self-sustaining run of MCR steelhead above the Project. This commenter also suggested that if we decide to keep the expiration date, then we should promulgate a 4(d) rule to become effective when the designation expires, to address potential ESA liability. The other commenter suggested setting a time to reevaluate the status of the reintroduced population and determine at that time whether the designation should be terminated. A third commenter stated that, if we go forward with the rule, a limited time frame for the NEP was absolutely necessary. This commenter went on to say that the time frame should be shortened. We respond to the use of a time frame in this response, and provide our rationale for our choice of the number of years, in our response to the second question.

Response: Section 10(j) of the ESA specifically states that the experimental population designation must further the conservation of the species. In this case, use of an expiration date promotes this objective by setting an end date after which ESA take prohibitions will again be in effect. Local landowners and municipalities have a very clear time frame, which they are encouraged to put to good use to develop focused conservation measures that support the reintroduction effort. Without such a time limit, there would be little incentive to develop and implement conservation measures because there would be no potential take liability. The rationale for our choice of 12 years for the expiration date is provided in detail in our response to the second comment.

While we recognize that FWS has not included an expiration date in its designations, in this case, it is appropriate to further the conservation of the species. This expiration date furthers the stated intent of Congress in the ESA, 16 USC 1531(a)(5), to encourage interested parties to develop and maintain conservation programs. This expiration date also furthers the specific

intent of Congress when amending the ESA to add section 10(j) to provide broad discretion and flexibility to the Secretaries of Commerce and Interior in managing populations so as to reduce opposition to release of listed species outside their current range. The expiration date associated with this NEP designation of the reintroduced MCR steelhead satisfies the intent of Congress by providing local entities temporary relief of certain potential ESA section 9 take liabilities to allow time to build support for the reintroduction program among local landowners and municipalities, and to provide an incentive to complete and implement conservation plans and other conservation measures in a time certain. The designation will allow local entities adequate time and flexibility to assess and mitigate impacts, if any, to the reintroduced population of MCR steelhead, and do these without the concern of certain ESA section 9 take liabilities. It will also allow time for the reintroduction monitoring and evaluation programs to develop information on the status of the reintroduction while under the NEP designation. The expiration is designed to encourage entities to complete, in a time certain, necessary conservation measures to support the reintroduced population.

After considering the suggested alternatives to removing the expiration date, we did not accept any of them because they are not appropriate means to achieve the goal of acting as an incentive to local landowners and municipalities to complete and implement conservation measures in a time certain:

(1) Keeping the designation in place until the species improves to the point of delisting removes incentives to complete conservation measures within a time certain. Delisting depends on many more factors than supporting the reintroduction in the upper Deschutes River, and would not provide any certainty for an expiration date.

(2) Tying the expiration date of the designation to completion of a self-sustaining run of MCR steelhead also removes incentives to complete conservation measures in a time certain. This idea would work against successful development of a self-sustaining run because the conservation measures are needed to support the reintroduction program. Without the conservation measures, it would likely take much longer to achieve the goal of a self-sustaining run.

(3) Completion of an ESA 4(d) rule, or limit, at the end of the expiration date would considerably weaken the incentive to complete the conservation measures by the expiration date of the designation because it would perpetuate most of the limits on ESA take liability for local entities.

(4) Including an option to reevaluate the NEP designation before it expires does not provide the private or public sector certainty for planning and operating their facilities and lands, and also removes the incentive to complete the conservation measures in a time certain. A reevaluation option also could be a disincentive to complete the conservation measures in 12 years because of the possibility of an extension of time.

We agree with the commenter who stated that the time limit is necessary here because it provides an incentive to complete conservation measures that support the reintroduction program in a time certain. As stated above in this response, a time limit in this case serves an important conservation function because it lifts certain ESA take liabilities for the local community for a set period of time, during which the community is strongly encouraged to develop and implement conservation measures that support reintroduction.

(2) 12-Year Time Frame.

Comment 2: We received one comment that the 12-year time frame is too short, and another that 12 years is too long. One commenter stated that the 12-year period is the minimum time needed to identify whether the establishment of a self-sustaining population is possible, and also that 12 years is insufficient to include variability in ocean conditions, and to assess the effectiveness of the reintroduction program and conservation measures. The commenter stated that we should wait until supplementation has stopped and upstream passage is completed at Opal Springs Dam. This commenter also requested that NMFS promulgate a 4(d) rule to be effective when the NEP designation expires. The other commenter strongly urged NMFS to limit the designation to no more than 7 years because this shorter time frame would be more of an incentive to complete conservation measures sooner. This commenter also stated that they did not understand the connection between the 12-year time frame and data needed for development of conservation measures.

Response: We agree with the first commenter that 12 years of monitoring and evaluation is too short to take into account decadal and interdecadal variations in the ocean environment. However, we disagree that this information on decadal ocean conditions is necessary for conservation measures supporting the reintroduction program in the Upper Deschutes River basin. The conservation measures will assist the reintroduction effort by supporting the part of the MCR steelhead's life that is spent in rivers, not the ocean. While ocean conditions play a role in the numbers of MCR steelhead that return to the NEP area, this designation and the conservation measures to support the reintroduction are focused on the part of MCR steelhead life that is spent in fresh water. However, we anticipate that information resulting from these conservation measures will be instructive regarding the effectiveness of the NEP designation in terms of conserving MCR steelhead in the NEP area.

We disagree with the commenter that we need to wait to gather information on the reintroduction program after supplementation has stopped and passage is completed at Opal Springs Dam. We need the completion of conservation measures to help achieve a self-sustaining run of MCR steelhead in the NEP area, and waiting to develop conservation measures until the population is self-sustaining would reduce the likelihood of ever reaching that goal. The data gathered in the next 12 years will be sufficient to inform supportive conservation measures in the Upper Deschutes River basin that are needed to increase the likelihood of success for the reintroduction because the data will focus the conservation measures on areas that are needed most by the MCR steelhead. Information gathered after that time, and also toward the end of the 12 years, will be used to modify the conservation measures through adaptive management, as well as to form the basis of additional conservation measures. Additionally, because this commenter misunderstood the draft EA's purpose and need statement, we clarified the language in the EA.

The monitoring and evaluation programs for the reintroduction are being conducted by the joint licensees for the Pelton Project. These programs include, to name a few, habitat use and productivity, fish passage efficiency and survival, smolt to adult return ratios, adult migration and spawning effectiveness, spawning locations, and water quality changes in Lake Billy Chinook and the lower Deschutes Rivers. This monitoring effort will be most concentrated during the NEP period but may continue at a reduced effort for many years after the NEP expires. The reintroduction program will continue for the life of the Pelton Round Butte Project's license.

As stated in our first response to comments, we disagree with the concept of implementing an ESA 4(d) rule at the end of the designation because it would be a disincentive to complete conservation measures in a time certain.

We partly disagree with the one commenter who stated that a shorter time frame or 7 years for the designation would be a better incentive for timely completion of conservation measures, and would also be sufficient time to complete the local irrigation district's and City of Prineville's HCP, as well as other conservation measures.

We agree that a NEP period of 7 years would be an incentive to complete the HCP in a shorter period of time. However, there are other considerations that support our choice of 12 years instead of 7 years. For local entities who are not participating in the HCP development effort, and who believe their operations may have impacts on MCR steelhead that are being reintroduced, a shorter timeframe may not allow adequate time for identifying their effects, determining conservation measures to address those effects, and finding funds, if needed, to complete the necessary measures. Furthermore, a 7-year timeframe would not allow sufficient time for the monitoring and evaluation programs to develop information on the reintroduction to support development of conservation measures tailored to support the reintroduction. After considering the reasons provided by both commenters for choosing at least 12 years or shortening the expiration date to 7 years, we consider the 12-year expiration date to be appropriate, for the following reasons. Our choice of 12 years is based on the biology of the MCR steelhead, time needed to incorporate data into the conservation measures, and time needed to develop and implement conservation measures that support the reintroduction program. First, the biological basis for the 12 years is that it will allow for monitoring of three generations of MCR steelhead in their historical habitat above the Project. This is enough time to determine

where they chose to spawn and rear, and also enough time to account for year-to-year variability in stream and other environmental conditions. These data should be used to develop conservation measures focused on supporting the reintroduction by mitigating specific effects in areas that are important to the MCR steelhead. Conservation measures typically have an adaptive management component, so they could be completed before the 12 years are up and can be modified through adaptive management if needed, based on new information.

(3) The effect of current and future actions on the NEP in the NEP area.

Comment 3: One commenter noted that we did not provide information about future ESA section 7 consultations (consultation with Federal agencies) and expressed concern with the NEP's effects on those future actions as well as existing section 7 consultations. The commenter also provided a list of actions that would require ESA section 7 consultations. This commenter specifically called out NMFS' existing section 7 consultation with the BOR on the Deschutes Basin Projects, and questioned how the status of this consultation would be affected by the NEP designation. Another commenter noted that it has undertaken an assessment of its activities and their effects on MCR steelhead for the purpose of developing an HCP. This commenter also noted that many conservation measures have already been completed or are being implemented in the NEP area.

Response: We asked Federal agencies that have previously conducted ESA section 7 consultations in the NEP area about ongoing or potential future actions, and we reviewed agency websites. These agencies include the Forest Service, BLM, BOR, Army Corps of Engineers and the Federal Highway Administration.

Three ESA section 7 consultations in particular were underway while this final rule was being developed, and they should be completed before this final rule's effective date. These

consultations are commonly referred to as "programmatic consultations" because they apply to programs implemented by various Federal agencies in Oregon, Washington, and Idaho, including the NEP area. Many individual actions are typically carried out under the auspices of these programs. Programmatic consultations are designed to streamline ESA compliance and accelerate actions carried out under each program. Consultation and implementation of the individual actions is accelerated because actions carried out under these programs must include all appropriate minimization measures required by the Federal agency as part of its program, and must satisfy the terms and conditions in the incidental take statement issued by NMFS for the various programs. Some actions may still need to undergo an individual ESA section 7 consultation. The three relevant ongoing section 7 consultations are:

- Reinitiation on the Aquatic Restoration Biological Opinion (ARBO): This is a consultation on a number of individual actions which, when grouped together, represent programs that may occur at many sites across lands managed by the Forest Service and BLM in Washington and Oregon, and the Coquille Indian Tribe in Oregon (the Bureau of Indian Affairs is the consulting agency). All proposed activity categories comply with the Record of Decision and Standards and Guidelines of the Northwest Forest Plan, INFISH and PACFISH (USFS and BLM aquatic and riparian area management strategy to protect habitat for Pacific anadromous salmonids and resident fish species), and respective National Forest Land and Resource Management Plans and BLM Resource Management Plans.
- Reinitiation on the Bonneville Power Administration's Habitat Improvement Program in Oregon, Washington, and Idaho: This is a consultation on the effects of the Bonneville Power Administration's Habitat Improvement Program (HIP) in the

Columbia River basin. The HIP is designed to mitigate the effects of the Federal Columbia River Power System on fish, wildlife, and their habitat. Consultation on this program is designed to streamline the process for ESA compliance for a number of the most common salmon and steelhead habitat improvement projects (e.g., fish passage at manmade barriers, screening water diversions, placement of large woody debris, riparian fencing, and spawning gravel augmentation).

- Reinitiation on the Farm Services Agency's Conservation Reserve Enhancement Program: This consultation addresses the effects of the Department of Agriculture's Farm Services Agency Conservation Reserve Enhancement Program (CREP). In Oregon, CREP is designed to address agriculture-related impacts by establishing conservation practices on agricultural lands using funding from Federal, state, and tribal governments as well as non-government sources. It is a voluntary program with the goal of enhancing riparian habitat on agricultural lands along streams within the boundaries of water quality management area plans and along streams that support listed fish species under the ESA, as well as addressing stream water quality issues (primarily temperature).

We do not expect this final rule to have material implications for these consultations because the proposed actions and associated conservation measures are very broad in geographic scope and species covered and not focused only on MCR steelhead in the upper Deschutes. Thus, we do not expect that the Federal agencies implementing these programs would make specific changes to their actions or implementation thereof with respect to only the NEP population and area. This logic also applies to programmatic ESA section 7 consultations in the NEP area that have already been completed. For example, section 7 consultations on Federal

land management plans will often result in terms and conditions on activities affecting water quality and fish habitats to conserve listed species, and other Federal and state water quality laws and fish habitat requirements apply to these plans, too.

Furthermore, to the extent that a completed consultation is determined to no longer apply to the NEP population, or activities in the NEP area are treated differently by an action agency after consultation is completed, the conservation benefit of this final rule is not inherently undermined. As explained above with respect to section 9 take liability, the underlying premise of ESA section 10(j) is to provide flexibility in ESA protections to facilitate reintroductions and associated benefits to the species. Thus, even if there is some potential harm to the reintroduced fish as a result of the reduced ESA protections, this must be weighed against the benefits of developing sound conservation measures in a time certain fashion. We have undertaken that weighing exercise and determined that, on balance, the designation of the population as experimental, together with reductions in certain ESA protections, would further the conservation of the species. This conclusion is informed by the same considerations that we evaluated in determining that the NEP population is "nonessential", as set out above.

Concerning the existing ESA section 7 consultation between NMFS and the BOR on the BOR's Deschutes Basin Projects, the commenter noted language in the biological opinion stating that consultation must be reinitiated if fish passage were established at the Pelton Round Butte Project, and asked what the NEP designation means for reinitiation. There is now a need to evaluate how reinitiation requirements apply to the Deschutes Basin Projects consultation. That is an analysis and determination that will be undertaken in the context of the specific consultation and in coordination with the action agency.

NMFS is aware of certain future Federal actions in the NEP area. The Deschutes National Forest is proposing a flood plain restoration action on Whychus Creek, a tributary to the Deschutes River and part of the NEP area. Additionally, the Federal Highway Administration is planning an action in the Metolius River basin for 2014. However, while this river basin is included in the NEP area, steelhead are not being reintroduced here. Also, the BLM is planning to remove Stearns Dam on the Crooked River. This is the last fish passage barrier remaining on the Crooked River and once removed, volitional migration by both adult and juvenile steelhead will be allowed up to Bowman Dam. Even though this is a beneficial action, construction activity in the water during dam removal could impact fish in the area. Finally, the installation of new fish passage facilities is proposed at Opal Springs Dam on the lower Crooked River; this action would be authorized by the Federal Energy Regulatory Commission.

Under the terms of 10(j), there is no section 7 consultation obligation for non-essential experimental populations. Thus, such actions in the NEP area will not be subject to section 7 consultation obligations during the NEP period if only MCR steelhead would be affected. However, because the NEP is treated as a species proposed for listing, Federal agencies are required to confer with NMFS when the Federal action is likely to jeopardize the proposed species, pursuant to section 7(a)(4) of the ESA. As set out in section 402.10 of the consultation regulations, the conference may be conducted in accordance with formal consultation procedures if requested by the action agency and deemed appropriate by NMFS. During such a conference, NMFS is required to make advisory recommendations on ways to minimize or avoid adverse effects. As outlined above, any resulting impact on the NEP population is factored into the overall analysis as to whether the designation benefits the MCR steelhead species. Upon

expiration of the NEP, section 7 consultation obligations will once again apply to Federal actions that may affect NEP.

Lastly, we acknowledge the importance of the other commenter's statements about private conservation programs that have already begun. We recognize the efforts by the irrigation districts and municipalities to evaluate their activities that may affect MCR steelhead, and the significant work that has been accomplished (e.g., piping and lining irrigation canals to conserve water, screening water diversions) and is ongoing (e.g., habitat conservation planning).

(4) Current programs within the NEP area that protect fish or aquatic habitats.

Comment 4: One commenter noted that it has already implemented numerous conservation programs to conserve water and improve fish habitat. This commenter also provided a list of these existing programs implemented by some of the irrigation districts in the NEP area. Another commenter merged its response to questions 3 and 4 and we addressed their concerns in our response to their comments in question 3.

Response: We recognize and support the effort by local irrigation districts to conserve water, both the completed conservation projects and ones still under development. We appreciate these early conservation actions that support the reintroduction program, and plan to continue working with these entities and others to support the reintroduction of salmon and steelhead. Regarding the second commenter's concerns about the effect of the NEP designation on the section 7 consultation requirement, we provided a lengthy response in our response to question 3.

(5) Additional management measures that we have not considered.

Comment 5: One commenter raised concerns about the potential to pass wild fish during the NEP designation time frame, and cautioned against putting them into the NEP area with fewer ESA protections.

Response: As set out above, the Fish Passage Plan (developed during the FERC relicensing process) is primarily focused on the release of adult marked fish that are the progeny of the excess hatchery fish, and, although it provides for the future possibility of wild adult fish releases, that potential will depend on availability of wild spawners and the successful performance of the fish passage program at the Pelton Round Butte Project. Thus, for the time period of this rule, marked adult fish are likely to be the only category of fish released above Round Butte Dam, and the possibility of any wild adults being returned would only occur consistent with species conservation objectives as set out in the Fish Passage Plan.

(6) Use of ESA 4(d) instead of 10(j), rationale for 10(j), and use of 4(d) when the designation expires.

Comment 6: Two commenters acknowledged that allaying community concerns by providing relief from ESA section 9 take prohibitions, and supporting the reintroduction program are legitimate goals. They suggest a different way to meet those goals, to use only the authority under ESA section 4(d) to address local landowner and municipality concerns about potential ESA take liability. One of these commenters states that we can achieve the same goals with a 4(d) limit, and still would provide more protections for the MCR steelhead because we could still designate critical habitat and section 7 consultations for Federal agencies would still apply. One other commenter suggested that we prepare a 4(d) rule or limit to be effective when the 10(j) designation expires.

Response: Before issuing the proposed rule, we considered the proper tool to address local concerns about potential ESA liability resulting from the ongoing reintroduction of threatened MCR steelhead above the Project into historical habitat. The two options that we considered were: (1) use of a new ESA 4(d) rule, or limit; and (2) authorization of the continued release of the MCR steelhead as an experimental population under section 10(j) of the ESA with tailored limits on take. Both options are discretionary, and the ESA provides for both. Each option has slightly different effects, as noted by the commenter. We have exercised our discretion to use the regulatory tool of 10(j) combined with a modified take prohibition because it seems best suited to the situation at hand. As evidenced in the legislative history, this is exactly the type of situation that Congress had in mind when it provided the regulatory flexibilities of 10(j) to promote local landowner support for reintroductions of listed species. Here, the broad effect of the NEP designation will give more relief, flexibility and time to the local landowners and communities in the NEP area to work with NMFS, ODFW, CTWS, local watershed councils, or other conservation entities in assessing and correcting impacts, if any, they may have on MCR steelhead, by developing conservation measures; and the time limit would reinstate full protection under the ESA for a threatened species within a reasonable amount of time.

Additionally, we have previously elected to craft our 4(d) limits for threatened Pacific salmon so that they apply to activities across large geographic scales, and potentially many entities. As a matter of policy, this approach is considered desirable for Pacific salmon and, by contrast, it is considered undesirable to signal a different approach whereby 4(d) rules are applied to discrete areas and situations such as the reintroduction of fish in the upper Deschutes.

In summary, we have decided to use our authority under section 10(j) to provide regulatory relief to landowners and other entities in the area of the reintroduced MCR steelhead; and we will not use 4(d) at the time the designation expires because it would remove the incentive to complete the conservation measures in a time certain, as explained in our response to comments 1 and 2.

(7) Use of hatchery or wild stock.

Comment 7: One commenter urged us to use only hatchery stock for the reintroduction, and another commenter stated that only wild fish should be used to reestablish a self-sustaining population of MCR steelhead above the Pelton Round Butte Project.

Response: The commenters' remarks are more appropriately directed at the reintroduction program and associated Fish Passage Plan, and not the NEP designation because the reintroduction is being conducted under a separate authority and process, and will continue regardless of this designation. The NEP designation is being applied to the ongoing reintroduction, which began in 2007, and will continue according to the fish passage plan that is part of the Federal Energy Regulatory Commission license for the Pelton Round Butte Project. This designation only changes the ESA status of MCR steelhead in the NEP area for a period of 12 years and does not influence which stock is used. We address above the implications of using hatchery stock in the context of the 10(j) statutory criteria, and address the remote possibility of passing wild fish above the dams in our response to comment 5.

(8) Passage needed at Opal Springs Dam.

Comment 8: One commenter suggested that passage at Opal Springs Dam, located in the Crooked River Gorge, was necessary for the reintroduction of MCR steelhead to be successful.

Thus, the 12-year NEP period should be extended or done away with altogether, because it was unknown when passage could be achieved at Opal Springs Dam.

Response: A portion of the Crooked River makes up part of the NEP area and we agree that access to the Crooked River is very important for the reintroduction. The details of the reintroduction program are separate from the designation, and the designation is meant to help the reintroduction succeed by encouraging local support for the program and completion of conservation measures in a time certain. The designation, with its 12-year expiration date, is not tied to completion of a successful program. The Opal Springs Hydroelectric Project currently blocks adult steelhead, and other species, from volitionally accessing most of the Crooked River. A settlement agreement on fish passage was completed in August 2011. The owners of this hydropower project are seeking funds to complete construction of an adult fish passage facility, and are currently developing an interim passage program so that returning adult steelhead can be collected and released above the project.

(9) General support for the designation.

Comment 9: Three commenters stated general support for the rule. Two of them provided an explanation that it will foster local cooperation to recover listed species, and will encourage completion of the HCP and other conservation measures.

Response: We agree that the rule will foster local support for the reintroduction program that will aid in recovery of the MCR steelhead. This support includes completion of the HCP and other conservation measures supporting the reintroduction.

Conclusion

After review of the comments and further consideration, we have decided to adopt the proposed rule that was published in the Federal Register (76 FR 28715) on

May 18, 2011, with only non-substantive editorial changes. Minor modifications were made to remove unnecessary regulatory language and provide clarity. The modifications make no change to the substance of the rule.

Findings

The statutory criteria for designating an experimental population under ESA section 10(j) are met for this designation.

(1) Further the conservation of the species. Based on the best available scientific information, we find that the continued release of MCR steelhead above the Pelton Round Butte Project as an NEP will further the conservation of the species for the following reasons. We expect that this will encourage private landowners, as well as local, state and Federal entities, to continue to develop and expand implementation of effective conservation actions throughout the geographic NEP range and in areas affecting environmental conditions in the geographic NEP range. Our expectation that this will occur is an important factor in finding that this rule furthers the conservation of the species.

Providing a 12-year term for the NEP designation will further the conservation of the species because conservation actions can be based on site-specific biological and environmental information gathered during that 12-year term. Conservation measures, any completed HCPs, and other permits, authorizations, or approvals developed during the 12-year term that are based on the best available scientific information and include measures designed to protect or conserve MCR steelhead in the geographic NEP range should include appropriate adaptive management components that may require modification, expansion, or adjustment of their conservation and mitigation actions to take new site specific biological and environmental information into account.

(2) Geographically separate from non-experimental populations. The NEP will be geographically separated from nonexperimental populations by Round Butte Dam (the most upstream dam of the three-dam hydropower complex), which does not allow volitional passage. The MCR steelhead will only be considered experimental when they are above Round Butte Dam.

(3) Non-essential designation. This experimental population is nonessential because it is not key to whether recovery can be achieved for this steelhead DPS. In addition, juvenile outplants are made up solely of excess hatchery stock that are not necessary for the survival and recovery of the species, and returning adults passed in the NEP area will be predominantly, if not solely, from the same stock.

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 106–554). The Bulletin 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 final rule that meet this criteria.

Classification

Regulatory Planning and Review (Executive Order (E.O.) 12866)

In accordance with the criteria in E.O. 12866, OMB has determined this final rule is not a significant rulemaking action.

This final rule will not create inconsistencies with other agencies' actions or otherwise interfere with an action taken or planned by another agency. Federal agencies most interested in this rulemaking are the USFS, BLM, and BOR. Because of the substantial regulatory relief provided by the NEP designation, we believe the reestablishment of steelhead in the areas described would not conflict with existing human activities or hinder public utilization of the area.

This final rule also would not materially affect entitlements, grants, user fees, or loan programs, or the rights and obligations of their recipients.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic effect on a substantial number of small entities. None of the public comments submitted to NMFS addressed this certification, and no new information has become available that would change this determination. As a result, no final regulatory flexibility analysis is required and none has been prepared.

Takings (E.O. 12630)

In accordance with E.O. 12630, this final 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 final 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.

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

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 final 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 final rule. We made the draft EA available for public comment along with the proposed rule, received one set of comments, and responded to those comments in an Appendix to the EA. We have prepared a final EA on this proposed action and have made it available for public inspection (see ADDRESSES section).

Government-to-Government Relationship With Tribes

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. Accordingly, we engaged in a technical consultation with the CTWS on December 7, 2012, and discussed the rule and their recommendations. The CTWS' recommendations were incorporated into this final rule.

Furthermore, Secretarial Order 3206 acknowledges the trust responsibility and treaty obligations of the United States toward recognized tribes and tribal members, as well as its government-to-government relationship with tribes. The order requires NMFS to carry out its ESA responsibilities in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Department of Commerce, and that strives to ensure that tribes do not bear a disproportionate burden for the conservation of listed species to avoid or minimize the potential for conflict and confrontation.

The CTWS are co-managers of natural resources and share management responsibilities and rights for fisheries in the Columbia Basin. In the Deschutes River basin, MCR steelhead have important cultural, religious, tribal subsistence, ceremonial, and commercial value for the CTWS. The CTWS is engaged in the ongoing reintroduction as one of the Licensees, through the Warm Springs Power and Water Enterprises, and as a member of the Pelton Fish Committee, through the Natural Resources Management Services. Moreover, the CTWS own about 28 percent of the land included in the NEP.

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 a 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 final rule is available upon request from National Marine Fisheries Service (see FOR FURTHER INFORMATION CONTACT).

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports.

Dated: January 9, 2013.

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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, 50 CFR part 223 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).

**§ 223.211 [Removed and Reserved]**

2. Section 223.211 is removed and reserved.

**§§ 223.212 through 223.300 [Reserved]**

3. Add reserved §§ 223.212 through 223.300.

4. Add § 223.301 to read as follows:

**§ 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 paragraph (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 nonessential 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 downstream (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 nonessential 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) [Reserved]

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