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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 190130032-9324-01]

RIN 0648-XG758

Endangered and Threatened Wildlife; 90-day Finding on a Petition to List Summer-run Steelhead in Northern California as Threatened or Endangered Under the Endangered Species Act

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

ACTION: 90-day petition finding, request for information, and initiation of status review.

SUMMARY: We, NMFS, announce a 90-day finding on a petition to list Northern California (NC) summer-run steelhead (*Oncorhynchus mykiss*) as an Endangered distinct population segment (DPS) under the Endangered Species Act (ESA). We find that the petition presents substantial scientific information indicating the petitioned action may be warranted. We will conduct a status review of NC summer-run steelhead to determine if the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information pertaining to this species from any interested party.

DATES: Scientific and commercial information pertinent to the petitioned action must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments on this document, identified by “Northern California summer-run steelhead Petition (NOAA-NMFS-2019-0003),” by either of the following methods:

- *Federal eRulemaking Portal:* Go to www.regulations.gov#!/docketDetail;D=NOAA-NMFS-2019-0003, click the “Comment Now” icon, complete the required fields, and enter or attach your comments.
- *Mail or hand-delivery:* Protected Resources Division, West Coast Region, NMFS, 1201 NE Lloyd Blvd., Suite #1100, Portland, OR 97232. Attn: Gary Rule.

Instructions:

Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on <http://www.regulations.gov> without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

Electronic copies of the petition and other materials are available on the NMFS West Coast Region website at www.westcoast.fisheries.noaa.gov.

FOR FURTHER INFORMATION CONTACT: Gary Rule, NMFS West Coast Region, at gary.rule@noaa.gov, (503) 230-5424; or Heather Austin, NMFS Office of Protected Resources, at heather.austin@noaa.gov, (301) 427-8422.

SUPPLEMENTARY INFORMATION:

Background

On November 15, 2018, the Secretary of Commerce received a petition from the Friends of the Eel River (hereafter, the Petitioner) to list NC summer-run steelhead as an endangered DPS under the ESA. Currently, NC summer-run steelhead are part of the NC steelhead DPS that combines winter-run and summer-run steelhead and is listed as threatened under the ESA (71 FR 833; January 5, 2006). The Petitioner is requesting that NC summer-run steelhead be considered as a separate DPS and listed as endangered. Copies of the petition are available as described above (see **FOR FURTHER INFORMATION CONTACT**).

ESA Statutory, Regulatory, Policy Provisions, and Evaluation Framework

Section 4(b)(3)(A) of the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), requires, to the maximum extent practicable, that within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When it is found that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted (a “positive 90-day finding”), we are required to promptly commence a review of the status of the species concerned during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, we conclude the review with a finding as to whether, in fact, the petitioned action is warranted within 12 months of receipt of the petition. Because the finding at the 12-month stage is based on a more thorough review of the available information, as compared to the narrow scope of review at the 90-day stage, a positive 90-day finding does not prejudge the outcome of the status review.

Under the ESA, a listing determination may address a species, which is defined to also include subspecies and, for any vertebrate species, any DPS that interbreeds when mature (16 U.S.C. 1532(16)). A joint NMFS–U.S. Fish and Wildlife Service (USFWS) (jointly, “the Services”) policy clarifies the Services’ interpretation of the phrase “distinct population segment” for the purposes of listing, delisting, and reclassifying a species under the ESA (DPS Policy; 61 FR 4722; February 7, 1996). A species, subspecies, or DPS is “endangered” if it is in danger of extinction throughout all or a significant portion of its range, and “threatened” if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether species are threatened or endangered based on any one or a combination of the following five ESA section 4(a)(1) factors: the present or threatened destruction, modification, or curtailment of the species’ habitat or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting the species’ continued existence (16 U.S.C. 1533(a)(1)(A)-(E), 50 CFR 424.11(c)(1)-(5)).

ESA-implementing regulations issued jointly by NMFS and USFWS (50 CFR 424.14(h)(1)(i)) define “substantial scientific or commercial information” in the context of reviewing a petition to list, delist, or reclassify a species as “credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted.” Conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered “substantial information.” In reaching the initial

90-day finding on the petition, we consider the information described in sections 50 CFR 424.14(c), (d), and (g) (if applicable).

Our determination as to whether the petition provides substantial scientific or commercial information indicating that the petitioned action may be warranted depends in part on the degree to which the petition includes the following types of information: (1) Information on current population status and trends and estimates of current population sizes and distributions, both in captivity and the wild, if available; (2) identification of the factors under section 4(a)(1) of the ESA that may affect the species and where these factors are acting upon the species; (3) whether and to what extent any or all of the factors alone or in combination identified in section 4(a)(1) of the ESA may cause the species to be an endangered species or threatened species (*i.e.*, the species is currently in danger of extinction or is likely to become so within the foreseeable future), and, if so, how high in magnitude and how imminent the threats to the species and its habitat are; (4) information on the adequacy of regulatory protections and effectiveness of conservation activities by States as well as other parties, that have been initiated or that are ongoing, that may protect the species or its habitat; and (5) a complete, balanced representation of the relevant facts, including information that may contradict claims in the petition. See 50 CFR 424.14(d).

If the petitioner provides supplemental information before the initial finding is made and states that it is part of the petition, the new information, along with the previously submitted information, is treated as a new petition that supersedes the original petition, and the statutory timeframes will begin when such supplemental information is received. See 50 CFR 424.14(g).

We also consider information readily available at the time the determination is made. We are not required to consider any supporting materials cited by the petitioner if the petitioner does

not provide electronic or hard copies, to the extent permitted by U.S. copyright law, or appropriate excerpts or quotations from those materials (*e.g.*, publications, maps, reports, and letters from authorities). See 50 CFR 424.14(h)(1)(ii).

The “substantial scientific or commercial information” standard must be applied in light of any prior reviews or findings we have made on the listing status of the species that is the subject of the petition. Where we have already conducted a finding on, or review of, the listing status of that species (whether in response to a petition or on our own initiative), we will evaluate any petition received thereafter seeking to list, delist, or reclassify that species to determine whether a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous review or finding. Where the prior review resulted in a final agency action – such as a final listing determination, 90-day not-substantial finding, or 12-month not-warranted finding – a petitioned action will generally not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information or analyses not previously considered.

At the 90-day finding stage, we do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioner’s sources and characterizations of the information presented if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition’s information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be dismissed at the 90-day finding stage, so long as it is reliable and a reasonable person conducting an impartial scientific review would

conclude it supports the petitioner's assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding. We will not conclude that a lack of specific information alone necessitates a negative 90-day finding if a reasonable person conducting an impartial scientific review would conclude that the unknown information itself suggests the species may be at risk of extinction presently or within the foreseeable future.

To make a 90-day finding on a petition to list a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the subject species may be either threatened or endangered, as defined by the ESA. First, we evaluate whether the information presented in the petition, in light of the information readily available in our files, indicates that the petitioned entity constitutes a "species" eligible for listing under the ESA. Next, we evaluate whether the information indicates that the species faces an extinction risk such that listing, delisting, or reclassification may be warranted; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species (*e.g.*, population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1) of the ESA.

Information presented on impacts or threats should be specific to the species and should reasonably suggest that one or more of these factors may be operative threats that act or have acted on the species to the point that it may warrant protection under the ESA. Broad statements

about generalized threats to the species, or identification of factors that could negatively impact a species, do not constitute substantial information indicating that listing may be warranted. We look for information indicating that not only is the particular species exposed to a factor, but that the species may be responding in a negative fashion; then we assess the potential significance of that negative response.

Northern California steelhead

Following completion of a comprehensive status review of West Coast steelhead (*O. mykiss*) populations in Washington, Oregon, Idaho, and California, NMFS published a proposed rule to list 10 Evolutionarily Significant Units (ESUs) as threatened or endangered under the ESA on August 9, 1996 (61 FR 41541). One of these steelhead ESUs, the NC ESU, was proposed for listing as a threatened species. Because of scientific disagreements, NMFS deferred its final listing determination for five of these steelhead ESUs, including the NC ESU, on August 18, 1997 (62 FR 43937). After soliciting and reviewing additional information to resolve these disagreements, NMFS published a final determination on March 19, 1998 (63 FR 13347), that the NC ESU did not warrant listing under the ESA because available scientific information and conservation measures indicated the ESU was at a lower risk of extinction than at the time of the proposed rule. Because the State of California did not implement conservation measures that NMFS considered critically important in its decision to not list the NC steelhead ESU, NMFS completed an updated status review for the ESU and reassessed the State and Federal conservation measures that were in place to protect the ESU. Based on this reconsideration, NMFS proposed to list the NC steelhead ESU as a threatened species under the ESA on February 11, 2000 (65 FR 6960). After considering public comments on the proposed determination, NMFS issued a final rule to list the NC ESU of steelhead as a threatened species on June 7, 2000

(65 FR 36074). Within the NC ESU, only naturally spawned anadromous populations of steelhead (and their progeny) residing below naturally occurring and man-made impassable barriers (*e.g.*, impassable waterfalls and dams) were listed.

A court ruling in 2001 (*Alesea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154 (D. Or. 2001)) determined that listing only a subset of a species or ESU/DPS, such as the anadromous portion of *O. mykiss*, was not allowed under the ESA. Because of this court ruling, NMFS conducted updated status reviews for all West Coast steelhead ESUs that took into account those non-anadromous populations below dams and other major migration barriers that were considered to be part of the steelhead ESUs (Good *et al.*, 2005). Subsequently, NMFS used the joint USFWS-NMFS DPS Policy to delineate steelhead-only DPSs rather than ESUs that included both steelhead and the related non-anadromous forms. Using this DPS Policy, NMFS redefined the NC steelhead ESU as a steelhead-only DPS and reaffirmed that the NC steelhead DPS was a threatened species under the ESA (71 FR 834; January 5, 2006). The DPS includes both summer-run and winter-run steelhead. Since 2006, NMFS has conducted two status reviews (76 FR 50447; August 15, 2011 and 81 FR 33468; May 26, 2016) to evaluate whether the listing classification of NC steelhead remains accurate or should be changed. In both instances, after reviewing the best available scientific and commercial data, we concluded that no change in ESA-listing status for NC steelhead was warranted.

Section 4(d) of the ESA directs NMFS to issue regulations deemed necessary and advisable to conserve species listed as threatened. Under section 4(d), NMFS may prohibit “take,” which would include any act that kills or injures fish, and could include habitat modification. NMFS originally promulgated 4(d) protective regulations for NC steelhead in 2002 (67 FR 1116) and then subsequently modified those regulations in 2005 (70 FR 37160).

The ESA requires NMFS to designate critical habitat for any species it lists under the ESA. Critical habitat is defined as: (i) the specific areas within the geographical area occupied by the species, at the time it is listed..., on which are found those physical or biological features (I) essential to the conservation of the species, and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed...that...are essential for the conservation of the species. 16 U.S.C. 1532(5)(A)(i)-(ii). NMFS designated critical habitat for NC steelhead DPS in 2005 (70 FR 52488).

Evaluation of Petition and Information Readily Available in NMFS Files

The petition contains information and arguments in support of listing NC summer-run steelhead as an endangered DPS under the ESA. Based on biological, genetic, and ecological information compiled and reviewed as part of previous NC steelhead status reviews (Busby *et al.*, 1996; NMFS 1997; Adams 2000), we included all summer-run and winter-run steelhead populations in river basins from Redwood Creek in Humboldt County, California, south to the Gualala River, inclusive, in the NC steelhead DPS (65 FR 36074; June 7, 2000). Busby *et al.* (1996) found that the few genetic analyses that had considered this issue indicated that summer-run and winter-run steelhead from the same river basin are more genetically similar to each other than to the same run type in another river basin. In our 1997 status review update (NMFS 1997), we examined additional genetic data and reconfirmed that summer-run and winter-run steelhead from the same geographic area typically are more genetically similar to one another compared to populations with similar run timing in different geographic areas.

The Petitioner presents new genetic evidence to suggest the summer-run steelhead populations may qualify as a separate DPS from the winter-run populations. The Petitioner

contends the findings from recently published articles on the evolutionary basis of premature migration in Pacific salmon (Prince *et al.* 2017; Thompson *et al.* 2018) indicate that summer-run steelhead in the NC steelhead DPS should be considered a separate DPS. Prince *et al.* (2017) reported on a survey of genetic variation between mature- and premature-migrating populations of steelhead and Chinook salmon from California, Oregon, and Washington. Thompson *et al.* (2018) provide additional information about genetic differentiation between mature- and premature-migrating Chinook salmon in the Rogue River, Oregon. The authors of these studies suggest that their results indicate that premature migration (*e.g.* summer-run steelhead) arose from a single evolutionary event within the species and, if lost, are not likely to re-evolve in time frames relevant to conservation planning. The Petitioner also asserts that Moyle *et al.* (2017) provides arguments in support of delineating NC summer-run steelhead as a DPS. Moyle *et al.* (2017) maintains that winter-run and summer-run are genetically discrete and separate units of migrating populations. Moyle *et al.* (2017) further asserts that NC summer-run steelhead are distinctive in their genetic makeup, behavior, and reproductive biology and require different conservation frameworks than winter-run steelhead. Therefore, the Petitioner contends that the new genetic information indicates that summer-run steelhead in the NC steelhead DPS satisfy the criteria for a species to be considered a DPS because it is: (1) discrete in relation to the remainder of the species to which it belongs; and (2) significant to the species to which it belongs.

The Petitioner asserts that all five ESA section 4(a)(1) factors contribute to the need to list the NC summer-run steelhead as an endangered DPS. In support of this assertion, the Petitioner presents information from three sources: 1) the 2016 5-Year Review: Summary & Evaluation of California Coastal Chinook Salmon and Northern California Steelhead (NMFS 2016b); 2) the Coastal Multispecies Recovery Plan (CMP) (NMFS 2016a); and 3) State of

Salmonids: Status of California's Emblematic Fishes (Moyle *et al.* 2017). Our status review and recovery plan describe the current status and threats facing the NC steelhead DPS. Moyle *et al.* (2017) presents additional scientific and technical information about the status of the NC summer-run steelhead populations.

Petition Finding

After reviewing the information contained in the petition, as well as information readily available in our files, we conclude the petition presents substantial scientific information indicating that the petitioned action to delineate a NC summer-run steelhead DPS may be warranted. Therefore, in accordance with section 4(b)(3)(A) of the ESA and NMFS' implementing regulations (50 CFR 424.14(h)(2)), we will commence a status review to determine whether the summer-run populations of steelhead constitute a DPS, and, if so, whether the NC summer-run steelhead DPS is in danger of extinction throughout all or a significant portion of its range, or likely to become so within the foreseeable future throughout all or a significant portion of its range. After the conclusion of the status review, we will make a finding as to whether listing the NC summer-run steelhead DPS as endangered or threatened is warranted as required by section 4(b)(3)(B) of the ESA.

Information Solicited

To ensure that our status review is informed by the best available scientific and commercial information, we are opening a 60-day public comment period to solicit information on summer- and winter-run steelhead in the NC steelhead DPS. We request information from the public, concerned governmental agencies, Native American tribes, the scientific community, agricultural and forestry groups, conservation groups, fishing groups, industry, or any other interested parties concerning the current and/or historical status of summer- and winter-run

steelhead in the NC steelhead DPS. Specifically, we request information regarding: (1) species abundance; (2) species productivity; (3) species distribution or population spatial structure; (4) patterns of phenotypic, genotypic, and life history diversity; (5) habitat conditions and associated limiting factors and threats; (6) ongoing or planned efforts to protect and restore the species and their habitats; (7) information on the adequacy of existing regulatory mechanisms, whether protections are being implemented, and whether they are proving effective in conserving the species; (8) data concerning the status and trends of identified limiting factors or threats; (9) information on targeted harvest (commercial and recreational) and bycatch of the species; (10) other new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes; and (11) information concerning the impacts of environmental variability and climate change on survival, recruitment, distribution, and/or extinction risk.

We request that all information be accompanied by: (1) supporting documentation such as maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

References Cited

The complete citations for the references used in this document can be obtained by contacting NMFS (See **FOR FURTHER INFORMATION CONTACT**) or on our Web page at: www.westcoast.fisheries.noaa.gov.

Authority: The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 17, 2019.

Patricia A. Montanio,
Acting Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

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