

have recently been separated (10 U.S.C. Chapter 58).

(kkk) Carry out the functions and responsibilities and exercise the authorities vested in the Secretary by 14 U.S.C. 670 pertaining to procurement authority for Coast Guard family housing and by 14 U.S.C. 672 pertaining to long-term lease authority for navigation and communications systems sites.

(lll) Carry out the functions and responsibilities and exercise the authorities vested in the Secretary by 33 U.S.C. 1908(b), that pertain to payments of civil penalties assessed for violations of the MARPOL Protocol, Annex IV to the Antarctic Protocol, or regulations issued thereunder, to persons who provide information leading to the assessment of such penalties.

Issued at Washington, DC, this 8th day of July, 1997.

**Rodney E. Slater,**

*Secretary of Transportation.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 227

[Docket No. 970424096-7155-02; I.D. 042597A]

RIN 0648-AG56

#### Endangered and Threatened Species; Interim Rule Governing Take of the Threatened Southern Oregon/Northern California Coast Evolutionarily Significant Unit (ESU) of Coho Salmon

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

**ACTION:** Interim rule; request for comments.

**SUMMARY:** By a rule published on May 6, 1997, NMFS, on behalf of the Secretary of Commerce (Secretary), determined to list as threatened the Southern Oregon/Northern California Coast (SONCC) ESU of coho salmon (*Oncorhynchus kisutch*). Under section 4(d) of the Endangered Species Act (ESA), the Secretary is required to adopt such regulations as he deems necessary and advisable for the conservation of species listed as threatened. Such regulations may include application of the prohibitions contained in section 9(a) of the ESA, which apply to endangered species. In this interim rule,

NMFS imposes the section 9(a) prohibitions for endangered species, except with respect to certain benign and beneficial actions in Oregon and California, and specified actions taken consistent with the Oregon Coastal Salmon Restoration Initiative (OCSRI) and implemented consistent with the April 1997 Memorandum of Agreement (MOA) between NMFS and the Governor of Oregon. The **Federal Register** document containing the final listing determination describes the relevant details of the OCSRI and the implementing MOA.

**DATES:** Comments on this rule must be received by September 16, 1997.

This interim rule is effective August 18, 1997.

**ADDRESSES:** Comments should be sent to Protected Species Program, Environmental and Technical Services Division, NMFS, Northwest Region, 525 NE Oregon Street, Suite 500, Portland, OR 97232-2737.

**FOR FURTHER INFORMATION CONTACT:**

Garth Griffin at 503-231-2005; Craig Wingert at 310-980-4021; or Joe Blum at 301-713-1401.

**SUPPLEMENTARY INFORMATION:**

#### Background

The final rule determining to list the SONCC coho salmon ESU as threatened, published on May 6, 1997 (62 FR 24588), describes the current range and status of this ESU, previous Federal actions on this species, a summary of the comments and recommendations received in response to NMFS' proposal to list the ESU, descriptions of the factors affecting its continued existence, the reasons why critical habitat is not being proposed, and the conservation measures recommended by NMFS or otherwise available to this ESU.

Section 4(d) of the ESA provides that, whenever a species is listed as a threatened species, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of the species, including any or all of the prohibitions applicable to endangered species under section 9(a). Those section 9(a) prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect; or to attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any wildlife species listed as endangered. It is also illegal to possess, sell, deliver, carry, transport, or ship

any such wildlife that has been taken illegally.

When NMFS first proposed the ESU for listing as threatened (60 FR 38011, July 25, 1995), it also proposed to apply the prohibitions of section 9(a) to this species. NMFS continues to find that the prohibitions for endangered species are generally necessary and advisable for conservation of the species. NMFS further finds that take of the SONCC coho salmon should not be prohibited when it results from a specific subset of activities adequately regulated by Federal, state, and local governments. Accordingly, this interim rule revises the earlier proposal by providing certain additional exceptions.

NMFS has chosen to make this rule interim rather than final in order to give the public the opportunity to comment on the additional exceptions that are included in the new § 227.22. NMFS will consider all comments submitted during the comment period before issuing a final rule.

#### Interim Take Exceptions in Oregon

Following NMFS' proposal to list Oregon Coast and SONCC coho salmon, the State of Oregon initiated a major effort to address the factors for decline of these at-risk stocks. That effort culminated in the adoption by Oregon of the OCSRI. The OCSRI contains significant improvements in hatchery management and in harvest management. Previous harvest rate reductions on Oregon coastal coho, as refined and incorporated in the OCSRI, are expected to result in an increase in the near-term stability of the populations. The OCSRI also includes a broad array of state agency and other measures affecting habitat.

NMFS sought to ensure that the adaptive management program contained in the OCSRI would rapidly lead to the ultimate implementation of measures and rules that NMFS would consider adequate in these areas. Accordingly, NMFS entered into an MOA with the Governor of Oregon in April 1997 to clarify how NMFS and Oregon will work together toward implementation, necessary adjustments, and adaptive changes to the OCSRI. (Copies of the MOA are available from NMFS; see ADDRESSES.)

Based on a review and assessment of the OCSRI and MOA, NMFS has determined that it is unnecessary to prohibit certain benign and beneficial actions in Oregon, as well as certain measures provided under the OCSRI and implemented in accordance with the MOA. The actions NMFS believes do not require prohibition are related to harvest carried out in accordance with

the OCSRI, artificial production carried out in accordance with the OCSRI, research and monitoring, and habitat restoration. These exceptions do not exempt actions funded, authorized, or carried out by Federal agencies, which must comply with section 7 and other applicable provisions of the ESA.

With respect to harvest, the OCSRI provides a comprehensive package of measures that reduce harvest rates to an average harvest rate of less than 15 percent. Harvest rates would be permitted to increase only under carefully specified conditions characterized by significant increases in escapement and productivity and in no case would exceed 35 percent.

With respect to artificial production, Oregon production is reduced from a high of 6.4 million smolts in 1990 to 2.3 million by 1998. The OCSRI also specifies that hatchery strays may not exceed 10 percent of natural spawning. In addition, the take of naturally produced broodstock for hatchery production will be counted against the total allocation of fish for harvest and is only allowed if it is not deemed detrimental to the recovery of the species. Incorporation of naturally produced coho into the hatchery broodstock will minimize genetic divergence between the two populations, and will also preserve hatchery populations as a "safety net" for assisting the natural population in the event of a serious decline.

With respect to the research and monitoring activities consistent with the OCSRI, NMFS finds that these activities are vital to improving understanding of risks facing salmon in this ESU and to judge the effectiveness of conservation measures. They also provide critical information to the adaptive management approach of the OCSRI, allowing revision of habitat-related actions to ensure best management in the future.

With respect to habitat measures, NMFS finds that certain habitat restoration activities are likely to assist in conserving coho. NMFS is aware that many projects, particularly those that are part of the Southwest Oregon Salmon Restoration Initiative, already have been developed and, in some cases, funded. NMFS determines it is advisable that incidental take associated with restoration activities that are part of the Southwest Oregon Salmon Restoration Initiative not be prohibited during the 1997 field season.

Projects developed, prioritized, and carried out based on at least a watershed scale assessment and action plan, and, where possible, a sub-basin or basin scale, are likely to be the most beneficial. The interim rule therefore

provides that section 9 take prohibitions will not apply to activities conducted pursuant to watershed action plans or watershed restoration plans that are consistent with NMFS-approved guidelines and are approved by the appropriate state agency and NMFS. To approve a plan, NMFS must concur that the plan is consistent with those guidelines.

Until a watershed action plan for the watershed in which an activity is proposed has been approved, or for 2 years following the effective date of this interim rule (whichever comes first), an individual habitat restoration activity that is consistent with state guidelines that meet the standards of 50 CFR 222.22 is not prohibited. Guidelines for approving individual activities and plans will be developed by Oregon and NMFS. After a watershed plan has been approved, only activities conducted pursuant to the plan are not subject to the section 9 take prohibitions. If no plan has been approved for a watershed after 2 years following the effective date of this interim rule, the general section 9 take prohibitions of this interim rule would apply to individual restoration activities the same as to all other habitat-affecting activities.

#### **Interim Take Exceptions in California**

NMFS has determined that it is unnecessary to prohibit specific benign and beneficial actions carried out by state, tribal, and local governments in the California portion of the SONCC coho salmon ESU. These include: (1) Certain fishery management activities conducted by the State, (2) fisheries research and monitoring activities permitted or conducted by the State, and (3) certain State, local, tribal, and private habitat restoration activities. These exceptions do not exempt actions funded, authorized, or carried out by Federal agencies, which must comply with section 7 and other applicable provisions of the ESA.

The State of California has jurisdiction over fisheries within 3 miles (approximately 5 km) of its coast. The California Fish and Game Commission (CFG) and the California Department of Fish and Game (CDFG) are responsible for establishing the State's sport and commercial ocean salmon fishing regulations, respectively, within 3 miles (approximately 5 km) of the coast each year. Typically, the CFG and CDFG conform the State's ocean salmon fishing regulations to those adopted by NMFS for the Federal Exclusive Economic Zone (EEZ). NMFS has determined that it is advisable that incidental take of coho salmon associated with these State fisheries

management activities not be prohibited provided the regulations issued by the State are consistent with the ocean salmon fishing regulations implemented by NMFS for the Federal EEZ.

In carrying out its fisheries management responsibilities in California, the CDFG conducts or permits a wide range of research and monitoring studies on various fisheries, including studies on coho salmon which occur in the California portion of the SONCC ESU. NMFS finds that these activities are vital for improving our understanding of the status and risks facing coho salmon and other species in this ESU and will provide critical information for assessing the effectiveness of current and future management practices.

There are numerous ongoing local habitat restoration and watershed planning efforts that are expected to contribute to the conservation of coho salmon in the California portion of the SONCC coho salmon ESU. These include, but are not limited to, restoration efforts in the Scott River watershed, the Shasta River watershed, the South Fork Trinity Watershed, and the Mattole River. In addition, there are county-based Resource Conservation Districts throughout the range of coho in the California portion of this ESU that are providing a focus for agricultural interests and local conservation groups to develop and prioritize habitat restoration plans. NMFS believes that certain activities in California are likely to assist in conserving coho salmon, provided that California puts in place a program that assures technically supported watershed assessments and coordinated long-term monitoring strategies for watershed protection plans and activities. This interim rule, therefore, does not apply section 9 prohibitions to activities conducted in accordance with such a program and an approved watershed plan or guidelines, under similar conditions as described in the section "Interim Take Exceptions in Oregon," above.

Coho salmon in the SONCC ESU are currently harvested by the Yurok and Hoopa Indian tribes, incidental to larger subsistence fisheries for chinook salmon in the Klamath and Trinity Rivers. These fisheries are conducted in accordance with the tribes' existing federally reserved fishing rights. Harvest management practiced by both tribes is conservative, focuses on the harvest of chinook salmon stocks, and has had limited impacts on coho salmon in the SONCC ESU. In recognition of the tribes' federally reserved fishing rights, special status, and other tribal conservation programs, NMFS intends

to work with the tribal governments in California to identify an appropriate mechanism for authorizing the incidental take of coho salmon in these chinook fisheries. NMFS may consider promulgation of a separate 4(d) regulation, consistent with the conservation of SONCC coho salmon, to achieve this objective.

The prohibitions of section 9 will not apply to activities specified in an application for a permit for scientific purposes or to enhance the propagation or survival of the species, provided that an application has been received by the Assistant Administrator for Fisheries, NOAA (AA), by September 16, 1997. This exception will cease upon the AA's rejection of the application as insufficient, upon issuance or denial of a permit, or on January 20, 1998, whichever occurs earliest.

### Take Guidance

NMFS and the U.S. Fish and Wildlife Service published in the **Federal Register** on July 1, 1994 (59 FR 34272), a policy that NMFS shall identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. The intent of this policy is to increase public awareness of the effect of a listing on proposed and on-going activities within the species' range. NMFS believes that, based on the best available information, the following actions will not result in a violation of this interim rule:

1. Possession of coho salmon from the Southern Oregon/Northern California Coast ESU acquired lawfully by permit issued by NMFS pursuant to section 10 of the ESA, or by the terms of an incidental take statement pursuant to section 7 of the ESA.

2. Federally funded or approved projects that involve activities such as silviculture, grazing, mining, road construction, dam construction and operation, discharge of fill material, stream channelization or diversion for which section 7 consultation has been completed, and when such activity is conducted in accordance with any terms and conditions provided by NMFS in an incidental take statement accompanied by a biological opinion pursuant to section 7 of the ESA.

Activities that NMFS believes could potentially harm, injure or kill coho salmon in the Southern Oregon/Northern California Coast ESU and result in a violation of this rule include, but are not limited to:

1. Land-use activities that adversely affect coho salmon habitat in this ESU (e.g., logging, grazing, farming, road construction in riparian areas, and areas

susceptible to mass wasting and surface erosion);

2. Except for the habitat alteration activities that are excepted from take prohibitions in this rule, destruction or alteration of coho salmon habitat in this ESU, such as removal of large woody debris and "sinker logs" or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, or altering stream channels or surface or ground water flow;

3. Discharges or dumping of toxic chemicals or other pollutants (e.g., sewage, oil, gasoline) into waters or riparian areas supporting the listed coho salmon;

4. Violation of discharge permits;

5. Pesticide applications;

6. Interstate and foreign commerce of coho salmon from the SONCC coho ESU and import/export of coho salmon from this ESU without an ESA permit, unless the fish were harvested pursuant to this rule;

7. Except as provided in this interim rule, collecting or handling of coho salmon from this ESU. Permits to conduct these activities are available for purposes of scientific research or to enhance the propagation or survival of the species;

8. Introduction of non-native species likely to prey on coho salmon in this ESU or displace them from their habitat.

These lists are not exhaustive. They are intended to provide some examples of the types of activities that might or might not be considered by NMFS as constituting a take of SONCC coho salmon under the ESA and its regulations. Questions regarding whether specific activities will constitute a violation of this rule, and general inquiries regarding prohibitions and permits, should be directed to NMFS (see ADDRESSES).

### Classification

For the following reasons, the Assistant General Counsel for Legislation and Regulation of the U.S. Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that this rule will not have a significant economic impact on a substantial number of small entities.

NMFS canvassed business activity by economic sector (SIC codes) in Curry, Jackson, and Josephine counties in Oregon, and Del Norte, Humboldt, Siskiyou, and Mendocino counties in California. NMFS identified fishing, agriculture, sand and gravel mining, construction, and timber harvest as the economic sectors likely to be affected by

the prohibitions of this interim 4(d) rule. These sectors are all relatively heavily regulated at Federal and/or state levels independent of this action.

For each sector, NMFS estimated the number of small businesses within the geographic range of this ESU, the approximate number of employees in that sector, and the annual revenues of those businesses. NMFS then used available data to identify what, if any, incremental economic impacts the 4(d) prohibitions might create over and above impacts attributable to other state or Federal controls, including ESA § 7 consultations. In the Commercial and Recreational Fishing sector, existing ocean salmon fishing regulations that control harvest of SONCC coho salmon prohibit retention of coho and limit any incidental take of coho resulting from other fisheries to between 10 and 13 percent. Because NMFS has determined that these restrictions are sufficient to avoid jeopardizing coho in the SONCC ESU, the interim 4(d) rule excepts ocean fishing activities conducted under these regulations from take prohibitions. Similarly, the interim rule excepts ocean, bay, and freshwater fisheries under Oregon's jurisdiction from take prohibitions, so long as the activity complies with agreed-upon Oregon regulations. Hence the rule will not impose any additional burdens on small entities associated with commercial or recreational ocean harvest or upon inland recreational fishing in Oregon.

Existing California regulations for bay and freshwater coho fisheries are not as stringent and do not warrant an exception. However, California estimates the contribution of coho salmon to in-river sport catch in the California portion of the ESU to be small. The impacts of the rule will be associated with ensuring that coho salmon are not targeted in any fishing efforts and that any coho salmon that are incidentally hooked are released. NMFS does not expect the take prohibitions to result in any fishery closures in California's inland waters or a decrease in fishing effort. Consequently, the interim 4(d) rule will cause very little, if any, loss of revenue for small entities involved in inland recreational fishing activities in the California range of the SONCC coho salmon ESU.

NMFS has determined there are approximately 5,000 agriculture businesses within the geographic area of the ESU, with a combined annual revenue of approximately \$275 million. All entities are assumed for this analysis to be small. The majority of agricultural activities that might result in take of SONCC coho are those affecting water

quality, such as sediment from cultivation or livestock movements on the banks or in the beds of streams, temperature increases from clearing vegetation, confined animal feeding operations, overgrazing, and the like. Unscreened water diversions and reduction of flows through irrigation could also result in take. To the extent an agricultural activity causes water quality impairments, that activity is subject to the water pollution control requirements of the Clean Water Act (CWA), as administered by the states. For example, in Oregon, Agricultural Water Quality Management plans are being developed under State law for all water quality impaired stream segments and will result in agricultural practices that do not "take" through impairing water quality. Similar regulation of agricultural activities in California fall under the Regional Water Quality Control Board and other entities associated with the State's Non-point Source Management Plan. Therefore, any additional costs over and above those imposed by existing law with respect to water quality related activities are likely to be quite small.

However, it is unlikely that these water quality plans will completely protect all important physical habitat conditions from further degradation, particularly with respect to reductions in remaining riparian vegetation. Therefore, NMFS expects some loss of productivity where an agricultural operation ceases to cultivate or remove vegetation in a riparian area because of this interim rule. Even assuming that all riparian agricultural activity were to be halted within 50 ft of coho streams and that none of that restriction were attributed to water quality requirements (unrealistically conservative assumptions), this would take less than 1 percent of the agricultural land within the ESUs out of production.

To avoid taking juvenile coho, farmers who irrigate will have to have proper screening of irrigation pumps or diversions. A relatively high proportion of diversions in Oregon are already properly screened in accord with existing state requirements. The average cost of screening is about \$1,000 per screen, and the one-time total cost would be in the range of 2 percent of an estimated "low end" of annual farm income. Oregon has a screening program that defrays much of the cost of screen installation and, in any case, this capital cost does not represent a significant portion of capital available to agricultural operations, considering external financing capabilities and cost share opportunities.

Thus, the two major areas in which agricultural activity may need adjustment to comply with the 4(d) prohibitions will result in economic impact in the 3-percent range of annual revenue, calculated on the most conservative of assumptions. Even if there are some additional circumstances where farm practices need adjustment (such as irrigation alterations or exclusion of livestock from a redd area not already dealt with for water quality reasons), the incremental costs and revenue loss attributable to the interim 4(d) rule would be well below 5 percent of annual gross revenues for the most affected entities.

A total of eight businesses within the ESU were identified as mining sand and gravel, some or all of which likely involve in-water work and hence potentially affecting listed coho. These businesses employ substantially fewer than 200 people in total, with an estimated gross production value in the range of \$10 million, and most are small entities. Gravel, sand, or other removal activities in navigable waters are regulated by the U.S. Army Corps of Engineers (Corps) under section 10 of the Rivers and Harbors Act. NMFS' consultations with the Corps triggered by the listing of the SONCC ESU will set the baseline for impacts of most in-water mining activities in the lower reaches of stream systems at a level that will not result in take, and this rule will not result in any additional lost revenue in those locations. Those few entities that may be operating in the upper reaches of a river system may sustain economic impacts, but the extent of those impacts cannot be known until assessments of annual gravel recruitment and patterns of deposition is completed for each river system so that limits of permissible removal may be set for any particular site. That information dictates reduction in volume removed or changes in timing or methods, and the rule could cause loss of revenue or increased cost to small business (for instance in locating new sources of gravel) for one or more of the eight small entities engaged in gravel removal, but the extent of that impact cannot be projected at this time. NMFS seeks comments and/or data that can assist in making projections.

Specific construction categories that might be affected by the interim 4(d) regulation were examined, including highway and street construction, heavy construction, concrete work, and excavation work. Approximately 200 businesses within the ESU were primarily engaged in these categories, although only some of them would be affected by the rule. These businesses

employ just over 1,000 people, with annual revenues under \$140 million. Over 90 percent of these construction businesses within the ESU were found to be small entities.

Construction activities likely to be affected include construction of irrigation withdrawal structures, construction of docks and piers, fill in wetlands for roads, private residences or commercial development, and installation of industrial and municipal wastewater outfalls. The Corps regulates in-water fill activities under § 404 of the Clean Water Act (regardless of amount) and impacts to navigation (docks, etc.) under § 10 of the Rivers and Harbors Act. Any of the above actions likely to affect coho in the SONCC ESU will be examined during Corps consultation with NMFS under ESA § 7, through which any changes in the activity necessary to avoid jeopardizing the coho will be required. Hence, the rule is unlikely to additionally affect businesses engaged in any of these in-water activities.

Within the ESU, between four and five hundred businesses are engaged in either forestry or logging. These firms employ 3,000 to 4,000 people, with total revenue estimated at approximately \$700 million. Approximately 80 percent of the forestry businesses and 100 percent of the logging businesses are considered small entities under SBA classification guidelines. The interim 4(d) rule could affect logging operations and timber revenues by limiting the extent of harvest activity in riparian areas in order to protect water quality, protect sources of large woody debris, etc. All forest activity on Federal lands, which comprise 53 percent of the land in this ESU, is conducted under the Northwest Forest Plan, which has already been determined adequate to protect coho salmon habitat. Therefore, logging on, or timber availability from, Federal forests will not be affected by the rule.

Approximately 1.9 million acres in this ESU are private non-industrial forest lands, which can be equated generally with small businesses. Harvest on these lands is subject to state regulation of forest practices, which require some degree of buffer protection. The Oregon Forest Practice rules set riparian management areas (RMA) ranging up to 100 ft in width, prohibit removal of any trees in the first 20 ft of the riparian area on large and medium size streams, and require retention of varying additional amounts of timber in the remaining RMA. The California Forest Practice Rules set protective zones ranging up to 150 ft in width, with a similarly complex set of timber

retention requirements depending on stream size, slope, etc. NMFS does not consider either of these state regulatory schemes fully adequate to protect coho, and, therefore, would expect the 4(d) rule to result in some curtailment of harvest on lands owned by small entities over and above the impacts of state regulation.

For purposes of estimating a maximum impact small entity timber harvest operations might experience from the rule, this analysis assumes a uniform, entirely unmanaged and unharvested (e.g. "no touch") buffer of 150 ft (the maximum *managed* width under existing California regulation). Based on the ratio of stream miles (8,500) to total forest acres (11 million) in this ESU, that buffer would constitute an average of 2.4 percent of the total forest acreage.

Obviously, not all forest lands will be adjacent to streams that contribute to coho habitat, and also some landholdings will be affected above the average amount. There also could be some incremental impacts related to non fish-bearing streams over and above what would result from water quality requirements and the Northwest Forest Plan, but these are speculative and cannot be quantified. Absent any data to identify these ratios or other impacts, NMFS assumes that the land owners most affected have double the average riparian frontage. The maximum reduction in timber harvest with that assumption would be below 5 percent, with the impacts of existing state regulation subtracted out. That incremental impact may be further lessened because of tightened harvest regulations needed to meet Clean Water Act concerns.

Logging companies would presumably be affected to an even lesser extent, since they operate on Federal as well as private lands, and would not be limited to harvest operations on the most affected private lands. Thus, the interim rule may have an incremental economic impact ranging from zero to 5 percent on small timber owning entities and logging companies.

To sum up, impacts of this interim 4(d) rule fall below NMFS' threshold criteria for determining that a rule will cause significant economic impact on a substantial number of small entities. These standards include: (a) Five percent loss of revenue for twenty percent of the small entities; (b) ten percent increase in compliance costs for twenty percent of the small entities; (c) two percent of the small entities cease operations; or (d) capital costs of compliance are a significant portion of capital available considering internal

cash flow and external financing capabilities.

Of the several thousand small entities operating in sectors that may be impacted by the interim 4(d) rule, estimates of revenue reduction on the entities most seriously impacted by the rule range from zero (construction and fishing businesses) to under 5 percent (forestry). In the sand and gravel mining sector, it is not possible to project the range of impact, but fewer than eight entities would potentially be affected. Hence, of all small entities potentially substantially impacted by the interim 4(d) rule prohibitions, far fewer than 20 percent have any potential for a revenue reduction exceeding 5 percent. Any impacts on small governments will likely fall within the impacts in one or more of these same categories (e.g., road construction).

The interim 4(d) rule places no reporting or recordkeeping compliance costs on small entities. The capital cost of potential irrigation screening should not represent a significant portion of capital available, especially recognizing existing state programs to defray some of those costs. NMFS has identified no entities likely to be forced to cease business operations as a result of this rule.

This interim rule has been determined to be not significant for purposes of Executive Order 12866.

This interim rule contains a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act which has been approved by the Office of Management and Budget under control Number 0648-0230. Public reporting burden for the approval of Watershed Plans under exceptions 227.22(e) and (f) is estimated to average less than 30 hours per response, including the time for formatting, copying, preparing transmittal letter, and responding to any inquiries.

Comments are invited on: (a) Whether the proposed collection of information to provide these exceptions (without which restoration actions would require a section 10 permit) is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other

aspects of the collection of information to NMFS (see **ADDRESSES**) and to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC. 20503 (Attention: NOAA Desk Officer).

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

#### **National Environmental Policy Act**

NMFS will comply with the National Environmental Policy Act (NEPA) of 1969 in implementing the provisions of this interim rule, completing NEPA requirements before the final rule is issued.

#### **List of Subjects in 50 CFR Part 227**

Endangered and threatened species, Exports, Imports, Marine mammals, Transportation.

Dated: July 9, 1997.

**David L. Evans,**

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 227 is amended as follows:

#### **PART 227—THREATENED FISH AND WILDLIFE**

1. The authority citation for part 227 continues to read as follows:

**Authority:** 16 U.S.C. 1531–1543; subpart B, § 227.12 also issued under 16 U.S.C. 1361 *et seq.*

2. In subpart C, § 227.21 is revised to read as follows:

##### **§ 227.21 Threatened salmon.**

(a) *Prohibitions.* The prohibitions of section 9 of the ESA (16 U.S.C. 1538) relating to endangered species apply to the threatened species of salmon listed in § 227.4 (f), (g), (h), and (i), except as provided in paragraph (b) of this section. These prohibitions shall become effective for the threatened species of salmon listed in § 227.4(i) on August 18, 1997.

(b) *Exceptions.* (1) The exceptions of section 10 of the ESA (16 U.S.C. 1539) and other exceptions under the Act relating to endangered species, including regulations implementing such exceptions, also apply to the threatened species of salmon listed in § 227.4 (f), (g), (h), and (i). This section supersedes other restrictions on the applicability of parts 217 and 222 of this chapter, including, but not limited to,

the restrictions specified in §§ 217.2 through 222.22(a) of this chapter with respect to the species identified in § 227.21(a).

(2) The prohibitions of paragraph (a) of this section relating to threatened species of salmon listed in § 227.4(i) do not apply to activities specified in an application for a permit for scientific purposes or to enhance the propagation or survival of the species, provided that the application has been received by the Assistant Administrator for Fisheries, NOAA (AA), by September 16, 1997. This exception ceases upon the AA's rejection of the application as insufficient, upon issuance or denial of a permit, or on January 20, 1998 whichever occurs earliest.

(3) The prohibitions of paragraph (a) of this section relating to threatened species of salmon listed in § 227.4(i) do not apply to any employee or agent of the NMFS, any other Federal land management agency, or the Oregon Department of Fish and Wildlife (ODFW) or the California Department of Fish and Game (CDFG), who is designated by his/her agency for such purposes, when that employee or agent, acting in the course of his/her official duties, takes a coho salmon in California or Oregon without a permit if such action is necessary to: (1) Aid a sick, injured, or stranded individual, (2) dispose of a dead individual, or (3) salvage a dead individual, which may be useful for scientific study.

3. In subpart C, section 227.22 is added to read as follows:

**§ 227.22 Southern Oregon/Northern California Coast (SONCC) coho salmon.**

The following exceptions to the prohibitions of section 227.21(a) apply to SONCC coho salmon:

(a) Take of SONCC coho salmon within three miles (approximately 5 km) of the coast, and in bay, estuarine or freshwater fisheries regulated under the sole authority of the State of Oregon is not prohibited, if the take results from a fisheries harvest program conducted in accordance with the Oregon Coastal Salmon Restoration Initiative of March 1997 (OCSRI), provided that NMFS has issued written concurrence that the fisheries regulations are consistent with the OCSRI using information provided through the April 1997 Memorandum of Agreement (MOA) between the State of Oregon and NMFS.

(b) Incidental take of SONCC coho salmon in ocean fisheries within 3 miles (approximately 5 km) of the coast that are regulated under the sole authority of the State of California is not prohibited, provided that the ocean salmon fishing regulations adopted by the California

Fish and Game Commission and CDFG for recreational and commercial fisheries within 3 miles (approximately 5 km) of the coast are consistent with the Pacific Fishery Management Council's Fishery Management Plan for Ocean Salmon Fisheries and the annual ocean salmon fishing regulations issued by the Secretary of Commerce for the Federal EEZ.

(c) Take of SONCC coho salmon in a hatchery program regulated under the sole authority of the State of Oregon is not prohibited, if the take results from a hatchery program conducted in accordance with the OCSRI, and the take is counted against the total allocation of harvest-related mortality as specified in the OCSRI, provided that NMFS has issued written concurrence that the hatchery program is consistent with the OCSRI including the hatchery and genetic management plan adopted pursuant to the OCSRI, using information provided through the MOA.

(d) Take of SONCC coho salmon in fisheries research and monitoring activities conducted in California and Oregon is not prohibited *provided that*:

(1) Research and monitoring involving directed take of coho salmon is conducted by CDFG personnel (in California) and ODFW personnel (in Oregon).

(2) The CDFG and ODFW, respectively, provide NMFS with a list of all research and monitoring activities involving coho salmon directed take planned for the coming year for NMFS' review and approval, including an estimate of the total directed take that is anticipated, a description of the study design including a justification for taking the species and a description of the techniques to be used, and a point of contact.

(3) The CDFG and ODFW, respectively, annually provide NMFS with the results of research and monitoring studies directed at SONCC coho salmon, including a report of the directed take resulting from the studies.

(4) The CDFG and ODFW, respectively, provide NMFS annually with a list of all research and monitoring studies each permits that may incidentally take listed coho salmon during the coming year and report the level of incidental take of listed coho salmon from the previous year's research and monitoring activities, for NMFS' review and approval.

(5) The research and monitoring activities do not include the use of electrofishing in any body of water known or suspected to contain coho salmon.

(e) Incidental take of the SONCC coho salmon in Oregon that results from a habitat restoration activity, as defined in paragraph (4), is not prohibited, *provided that*:

(1) The activity is conducted pursuant to a watershed action or restoration plan that the state has affirmed in writing is consistent with state watershed plan guidelines that NMFS has found meet the standards set forth in 50 CFR 222.22(c), and NMFS concurs in writing that the plan is consistent with those guidelines; or

(2) Until a watershed action or restoration plan is approved by both Oregon and NMFS as described in paragraph (e)(1) of this section, or until August 18, 1999, whichever occurs first, the ODFW has made a written finding that the activity is consistent with state restoration activity guidelines that NMFS has agreed in writing meet the standards set forth in 50 CFR 222.22(c); or January 19, 1998.

(3) Until January 20, 1998, the activity is any restoration action listed in the Southwest Oregon Salmon Restoration Initiative (OCSRI ch. 17F), provided that any action involving in-water work receives written approval from ODFW as to timing, scope, and methods.

(4) "Habitat restoration activity" is defined as an activity that has the sole objective of restoring natural aquatic or riparian habitat conditions or processes.

(f) Incidental take of the SONCC coho salmon in California that results from a habitat restoration activity, as defined in paragraph (3) of this section, is not prohibited, provided that California has a program in effect that NMFS finds will assure technically supported watershed assessments and coordinated long-term monitoring strategies for watershed protection plans and activities and:

(1) The activity is conducted pursuant to a watershed protection plan that CDFG has affirmed in writing is consistent with state watershed plan guidelines for California's Watershed Protection Program that NMFS has found meet the standards set forth in 50 CFR 222.22(c), and NMFS concurs in writing that the plan is consistent with those guidelines; or

(2) Until a watershed protection or restoration plan is certified by the State of California and NMFS as described in paragraph (f)(1) of this section, or until August 18, 1999, whichever occurs first, NMFS has made a written finding that the activity is consistent with State of California conservation guidelines that NMFS has previously found meet the standards set forth in 50 CFR 222.22(c).

(3) "Habitat restoration activity" is defined as an activity that has the sole

objective of restoring natural aquatic or riparian habitat conditions or processes.  
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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 285

[Docket No. 960816226-7172-05; I.D. 061897C]

RIN 0648-AJ04

#### Atlantic Tuna Fisheries; Regulatory Adjustments

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues this final rule to amend the regulations governing the Atlantic tuna fisheries to prohibit the use of aircraft to assist fishing vessel operators in the location and capture of Atlantic bluefin tuna (ABT), with the exception of vessels permitted in the Purse Seine and Harpoon categories, and to establish a deadline for permit category changes for 1997 only. These regulatory amendments are necessary to achieve the domestic management objectives for the Atlantic tuna fisheries. **DATES:** Effective July 14, 1997.

**ADDRESSES:** Copies of supporting documents, including an Environmental Assessment and Regulatory Impact Review (EA/RIR), are available from, Rebecca Lent, Chief, Highly Migratory Species Management Division, Office of Sustainable Fisheries (F/SF1), NMFS, 1315 East-West Highway, Silver Spring, MD 20910-3282.

**FOR FURTHER INFORMATION CONTACT:** John Kelly, 301-713-2347.

**SUPPLEMENTARY INFORMATION:** The Atlantic tuna fisheries are managed under the authority of the Atlantic Tunas Convention Act (ATCA). The ATCA authorizes the Secretary of Commerce (Secretary) to issue regulations as may be necessary to carry out the recommendations of the International Commission for the Conservation of Atlantic tunas (ICCAT). The authority to issue these regulations has been delegated from the Secretary to the Assistant Administrator for Fisheries, NOAA (AA).

Background information about the need for revisions to the Atlantic tunas fishery regulations was provided in the preamble to the proposed rule (62 FR 9726, March 4, 1997) and is not

repeated here. All measures in the proposed rule, except for the prohibition on the use of aircraft, were addressed in an earlier final rule (62 FR 30741, June 5, 1997). Additionally, NMFS issued an interim final rule that suspended the May 15 deadline for switching permit categories for calendar year 1997 until the remaining regulatory issues which could influence category selection were resolved and a new deadline set. Final quotas were published on June 30, 1997 (62 FR 35107) and the spotter aircraft issue is addressed by this final rule. As there are no remaining regulatory issues to be resolved that would influence category selection, vessel owners now have sufficient information to select an appropriate permit category for 1997. The deadline for switching permit categories for calendar year 1997 is set as July 28, 1997. After 1997, the deadline will revert to May 15.

#### Relation to Proposed Consolidation

The regulatory amendments contained in this final rule, when proposed, were drafted to be consistent with a proposed rule to consolidate all of the regulations for Atlantic highly migratory species (HMS) fisheries, published on November 6, 1996 (61 FR 57361). The proposed consolidation would group all regulations pertaining to Atlantic HMS under 50 CFR part 630. The final consolidated regulations have not yet been issued. Accordingly, the regulatory amendments contained in this final rule were revised to make the appropriate changes to the existing text at 50 CFR part 285. The regulatory amendments contained in this final rule will eventually be incorporated into the final consolidated regulations at 50 CFR part 630. Copies of the proposed consolidation rule may be obtained by writing (see **ADDRESSES**) or calling the contact person (see **FOR FURTHER INFORMATION CONTACT**).

#### Spotter Aircraft Prohibition

Since the mid-1980's, fishery participants have raised concerns that the use of spotter aircraft in the ABT fishery accelerates catch rates and compromises conservation, equal opportunity and safety. In 1996, a voluntary agreement was signed by the majority of active tuna aircraft spotters that would limit their activity in the General category to harpoon vessels. NMFS recognized that the voluntary agreement warranted a trial period but also indicated that the agency would continue to monitor the situation and would take appropriate action if necessary. Fishery management concerns continue to be expressed,

anecdotal information suggests that the number of spotter aircraft has increased, and vessel safety issues continue to be raised. Accordingly, NMFS has reconsidered the need to take action. By this final rule, the use of aircraft to assist fishing vessel operators in the location and capture of ABT, with the exception of vessels operating in the Harpoon and Purse Seine categories, is prohibited. These regulatory changes will improve NMFS' ability to achieve domestic management objectives for the Atlantic tuna fisheries.

#### Comments and Responses

NMFS conducted several public hearings on the proposed rule and received written and oral comments over a 30-day comment period. Nearly two thousand comments (letters and comments) were received regarding the proposed ban on spotter aircraft. Responses to the comments on the spotter aircraft issue are provided below.

**Comment:** Those in favor of the prohibition commented that it would restore equal opportunity for vessels of different categories and lengthen the Harpoon and General category seasons without the use of further effort controls.

**Response:** Although data on the use and effects of spotter aircraft on the ABT fishery are not sufficient for a quantitative analysis of impacts, it is undeniable that there is a decrease in search time when spotter aircraft are used. Data regarding recent closures in the General and Harpoon categories support the conclusion that seasons are shortened. The International Commission for the Conservation of Atlantic Tunas (ICCAT) has recognized the effect of spotter aircraft on catch rates; in 1996, ICCAT adopted a recommendation that the use of spotter aircraft by purse seine vessels in the Mediterranean be prohibited due to the aircrafts' effect of accelerating catch rates. NMFS agrees that the use of spotter aircraft accelerates catch rates. Accelerated catch rates are inconsistent with the regulatory goal of extending the ABT season for the General and Angling categories, and with actions taken this year and in previous years to accomplish that goal. Extending the season for the rod-and-reel fisheries in these two categories helps improve scientific monitoring of the stock by allowing catch-per-unit-effort (CPUE) data collection over a wider geographical area and a longer period of time. Extending the season also provides fishing opportunities over a wider area. Data from the Harpoon and Purse Seine categories have not been