



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 121210693-2693-01]

RIN 0648-BC68

Endangered and Threatened Species: Designation of a Nonessential Experimental Population of Central Valley Spring-run Chinook Salmon below Friant Dam in the San Joaquin River, CA.

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

ACTION: Proposed rule; notice of availability.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose a rule to designate a nonessential experimental population of Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) under section 10(j) of the Endangered Species Act (ESA) in portions of the San Joaquin River, and to establish take exemptions for the proposed nonessential experimental population for particular activities inside the experimental population's geographic range and outside of the current evolutionarily significant unit (ESU) designated boundary of the species in the San Joaquin River tributaries and in the Delta.

A draft environmental assessment (EA) has been prepared on this proposed action and is available for comment (see ADDRESSES and INSTRUCTIONS section below).

DATES: To allow us adequate time to consider your comments on this proposed rule, they must be received no later than [Insert date 45 days after publication in the FEDERAL REGISTER].

Comments on the EA must be received by [Insert date 45 days after publication in the FEDERAL REGISTER]. Three public meetings will be held at which the public can make

comments on the draft EA and proposed rule. The first meeting will be in Chico, CA on February 5, 2013, at the Chico Masonic Family Center, 1110 West East Avenue from 5:30 p.m. to 7:30 p.m. The second meeting will be in Fresno, CA on January 24, 2013, at the Fresno Metropolitan Flood Control District, Board Meeting Room, 5469 E. Olive Avenue from 5:30 p.m. to 7:30 p.m. (The public should park in the front parking area (rear parking area closes at 5:30 p.m. with no exit after that time) and enter the door located on the west side of the front building). The third meeting will be in Los Banos, CA on January 25, 2013 at the Los Banos Community Center, 645 7th Street from 2 p.m. to 4 p.m.

ADDRESSES: You may submit comments on this proposed rule, identified by NOAA-NMFS-2012-0221 by any of the following methods:

- **Electronic submissions:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2012-0221>, click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- **Mail:** Submit written comments to Elif Fehm-Sullivan, Fisheries Biologist, Protected Resources Division, Southwest Region, National Marine Fisheries Service, 650 Capitol Mall, Suite 5-100, Sacramento, California 95814.
- **Fax:** (916) 930-3629
- **E-mail:** SJRspring.salmon@noaa.gov.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are part of the public record and will generally be posted to <http://www.regulations.gov> without change. All personal identifying information (e.g., name, address, etc.), confidential

business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

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

- Visit NMFS’ Reintroduction website at <http://swr.nmfs.noaa.gov/sjrrestorationprogram/salmonreintroduction.htm>
- Call (916) 930-3723 and request to have a CD or hard copy mailed to you.
- Obtain a CD or hard copy by visiting NMFS’ Central Valley office at 650 Capitol Mall, Suite 5-100, Sacramento, CA 95814.

Please see the draft EA for additional information regarding commenting on that document.

FOR FURTHER INFORMATION CONTACT: Elif Fehm-Sullivan, National Marine Fisheries Service, 650 Capitol Mall, Suite 5-100, Sacramento, California 95814 (916-930-3723) or Dwayne Meadows, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 (301-427-8403).

SUPPLEMENTARY INFORMATION:

Background Information Relevant to Experimental Population Designation

In 1988, a coalition of environmental groups, led by the Natural Resources Defense Council (NRDC), filed a lawsuit challenging renewal of long-term water service contracts between the United States and the Central Valley Project (CVP) Friant Division contractors. After more than 18 years of litigation of this lawsuit, known as NRCD, et al., v. Kirk Rodgers, et al., a Settlement was reached (Settlement). On September 13, 2006, the Settling Parties, including NRDC, Friant Water Users Authority (now the Friant Water Authority (FWA)), and

the U.S. Departments of the Interior and Commerce, agreed on the terms and conditions of the Settlement, which was subsequently approved by the U.S. Eastern District Court of California on October 23, 2006. The Settlement establishes two primary goals: (1) Restoration Goal – To restore and maintain fish populations in “good condition” in the mainstem San Joaquin River below Friant Dam to its confluence with the Merced River, including naturally reproducing and self-sustaining populations of salmon and other fish, and (2) Water Management Goal – To reduce or avoid adverse water supply impacts on all of the Friant Division long-term contractors that may result from the interim and restoration flows provided for in the Settlement. Paragraph 14 of the Settlement indicates that the Restoration Goal shall include the reintroduction of Central Valley spring-run Chinook salmon (hereafter, CV spring-run Chinook salmon) to the San Joaquin River between Friant Dam and its confluence with the Merced River.

In 2009, as part of the Omnibus Public Land Management Act, Congress enacted the San Joaquin River Restoration Settlement Act (Public Law No. 111-11, 123 Stat. 1349)(SJRRSA), which ratified the terms of the litigation Settlement and provided additional authorities to the Department of the Interior to facilitate successful implementation of the Settlement. The SJRRSA provides that if the Secretary of Commerce (Secretary) concludes that a program to reintroduce CV spring-run Chinook salmon into the San Joaquin River can be implemented consistent with other requirements of the ESA, the reintroduction “shall be [conducted] pursuant to §10(j)” of the ESA.

The proposed experimental population will occur in the San Joaquin River from its confluence with the Merced River upstream to Friant Dam and will include all sloughs, channels, and water ways that allow for CV spring-run Chinook salmon passage along the San Joaquin River and will also include portions of the Kings River, when high water years connect the Kings

River with the San Joaquin River. While this experimental area is part of the species historical range, it is outside the current range of the CV spring-run Chinook salmon ESU.

The CV spring-run Chinook salmon ESU (70 FR 37160; June 28, 2005) is listed as threatened under the ESA, and its threatened status was recently confirmed following completion of a 5-year review (NMFS, 2011). The CV spring-run Chinook salmon ESU includes all naturally spawned populations of spring-run Chinook salmon in the Sacramento River and its tributaries, as well as the Feather River Fish Hatchery (FRFH) spring-run Chinook salmon program. We have issued protective regulations under section 4(d) of the ESA for CV spring-run Chinook salmon that prohibit their “take” unless otherwise authorized (50 CFR 223.203).

Statutory and Regulatory Framework for Experimental Population Designation

Section 10(j) of the ESA (16 U.S.C. 1539(j)) defines an experimental population as a population that has been authorized for release by the Secretary but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species. The ESA allows the Secretary to authorize the release of “experimental” populations of listed species outside their current range if the release would “further the conservation” of the listed species. Section 10(j) also requires that before authorizing the release of an experimental population, the Secretary identify the experimental population by regulation and determine, based on the best available information, whether or not the experimental population is “essential to the continued existence” of the listed species (see section 10(j)(2)(B)).

The U.S. Fish and Wildlife Service (USFWS) promulgated regulations to guide its implementation of section 10(j) (see 50 CFR 17.80 through 17.84). While we do not have regulations governing the designation of experimental populations, we considered their regulations where appropriate in making the required determinations under section 10(j) and in

formulating this proposed rule to designate and release an experimental population of CV spring-run Chinook salmon into the San Joaquin River upstream of the Merced River confluence.

Although the USFWS regulations do not govern our proposal, the record demonstrates that our proposal would be consistent with the criteria of those regulations. We analyzed three key elements required by Section 10(j) in formulating this proposed rule.

Element 1: In determining whether release of an experimental population of spring-run Chinook salmon into the San Joaquin River would further the conservation of the Central Valley spring-run Chinook ESU, we considered the effects of gathering broodstock on the extant populations of the ESU; the potential for the released population to survive in the foreseeable future; and the potential contribution of an experimental population to the recovery of the Central Valley spring-run Chinook ESU.

Element 2: An appropriate means to identify the experimental population, and

Element 3: Whether the experimental population is essential to the continued existence of the species in the wild or not;

In order to comply with Section 10011(c) of the San Joaquin River Restoration Settlement Act, we also considered any additional measures, appropriate to address management concerns under local conditions, and we considered a process for data collection and periodic review of the status of the experimental population.

In applying the above considerations to the proposed designation and release of the experimental population of CV spring-run Chinook salmon into the San Joaquin River, we used the best available information as required by section 10(j). We discuss in more detail below how we considered each of these three elements.

Section 10(j) of the ESA requires that an experimental population be treated as a threatened species under the ESA, with two exceptions that apply if an experimental population is not determined to be essential to the listed species' continued existence (i.e., nonessential): 1) section 7 of the ESA applies in a different manner as described below in this paragraph, and 2) critical habitat shall not be designated for that experimental population. If the experimental population is determined to be nonessential, then section 10(j) requires that we apply the section 7 consultation provisions as if the population is a species proposed for listing. This means that the section 7(a)(2) consultation requirement does not apply to any experimental population of CV spring-run Chinook salmon that we determine is nonessential. The only provisions of section 7 that apply to a nonessential experimental population (NEP) are sections 7(a)(1) and 7(a)(4). Section 7(a)(1) requires that Federal agencies use their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of threatened and endangered species. Section 7(a)(4) requires Federal agencies to confer, rather than consult, with us on actions that are likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory in nature.

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. The associated take exemptions proposed below associated with the experimental population will provide sufficient protections to reduce effects of existing or anticipated Federal or State actions, or private activities within or adjacent to the experimental population area.

Will an Experimental Population Designation Further the Conservation of the Species?

The ESA defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the

measures provide pursuant to this [Act] are no longer necessary.” We discuss in more detail below each of the factors we considered in determining if release of an experimental population would “further the conservation” of CV spring-run Chinook: We first considered the most appropriate source of fish to establish an experimental population. Reintroduction efforts have the best chance for success when the donor population has life history characteristics compatible with the anticipated environmental conditions of the habitat into which fish will be reintroduced. Populations found in watersheds closest to the reintroduction area are most likely to have adaptive traits that will lead to a successful reintroduction, and therefore, only spring-run Chinook salmon populations found in the Central Valley will be used in establishing the experimental population in the San Joaquin River.

Functionally independent populations of CV spring-run Chinook salmon occur in Deer, Mill, and Butte creeks. The Feather River CV spring-run Chinook salmon population is also supplemented by operation of the FRFH. The Deer and Mill creek population levels are at a high risk of extinction and special care and consideration will be used when considering these fish as a donor source for reintroduction into the San Joaquin River. The Butte Creek CV spring-run Chinook salmon population is considered to be at a low risk of extinction and has the largest run size of the three major CV spring-run Chinook salmon populations in the Central Valley, thus it may be possible to remove fish from this population in years with high adult returns (NMFS, 2011).

Fish produced from the FRFH specifically for the reintroduction are proposed to be the initial source of individuals to establish an experimental population of CV spring-run Chinook salmon in the San Joaquin River. We would later consider diversifying the donor stock with fish from the naturally spawning population in other streams like Butte Creek if and when those

populations can sustain the removal of fish. Such diversification would be subject to ESA review.

In determining whether release of the proposed experimental population would further the conservation of CV spring-run Chinook, we also considered the potential for the released population to survive in the foreseeable future. The Central Valley drainage as a whole is estimated to have supported spring-run Chinook salmon returns as large as 600,000 fish between the late 1880s and 1940s (CDFG, 1998). However, the CV spring-run Chinook salmon runs in the San Joaquin River were extirpated as a direct result of the completion of Friant Dam and the associated operation of the Friant-Kern and Madera irrigation canals which caused the river to run dry in many locations. As a result of these impacts, the last substantial CV spring-run Chinook salmon spawning cohort (numbering >1,900) returned in 1948 (Yoshiyama et al., 1996). Central Valley spring-run Chinook salmon were originally most abundant in the San Joaquin River basin where the run ascended to high-elevation streams fed by snow-melt where they over-summered until the fall spawning season (Yoshiyama et al., 1996). Construction of other low elevation dams in the foothills of the Sierra Nevada on the American, Mokelumne, Stanislaus, Tuolumne, and Merced rivers extirpated CV spring-run Chinook salmon in these watersheds as well (CDFG, 1998).

NMFS' Public Draft Recovery Plan for Central Valley salmonids characterizes the San Joaquin River basin below Friant Dam as having a high potential to support a spawning population of reintroduced CV spring-run Chinook salmon with implementation of the San

Joaquin River Restoration Program (SJRRP). The Settlement establishes a framework for accomplishing the Restoration Goal which includes channel and structural modifications along the San Joaquin River below Friant Dam and releases of water from Friant Dam downstream to the river's confluence with the Merced River. Based on the available information, we believe that implementation of these actions will create habitat conditions in the San Joaquin River from Friant Dam to its confluence with the Merced River sufficient to support the establishment of CV spring-run Chinook salmon populations.

In addition to actions undertaken by the SJRRP, there are many Federal and State laws and regulations that will also help ensure the establishment and survival of the experimental population by protecting aquatic and riparian habitat. Section 404 of the Clean Water Act (CWA)(40 CFR parts 100 through 149) requires avoidance, minimization, and mitigation for the potential adverse effects of dredge and fill activities within the nation's waterways. Section 404(b) of the CWA requires that section 404 permits are granted only in the absence of practicable alternatives to the proposed project, which would have a less adverse impact on the aquatic ecosystem. CWA section 401 provides protection against adverse water quality conditions. In addition, construction and operational storm water runoff is subject to restrictions under CWA Section 402 and state water quality laws. Also the Magnuson-Stevens Fishery Conservation and Management Act, as amended (16 U.S.C. 1801 et seq.), requires that Essential Fish Habitat (EFH) be identified and Federal action agencies must consult with NMFS on any activity which they fund, permit, or carry out that may adversely affect EFH. Freshwater EFH

for Pacific salmon in the California Central Valley includes waters currently or historically accessible to salmon within the Central Valley ecosystem as described in Myers et al. (1998), which includes the area where this NEP is being proposed.

At the state level, the California Fish and Game Code section 1600, et seq. and the California Environmental Quality Act (Pub. Resources Code sections 21000 et seq.) (CEQA) set forth criteria for the incorporation of avoidance, minimization, and feasible mitigation measures for on-going activities as well as for individual projects. Section 1600 et seq. was enacted to provide conservation for the state's fish and wildlife resources and includes requirements to protect riparian habitat resources on the bed, channel, or bank of streams and other waterways. Section 1600 et seq. requires a person to notify the California Department of Fish and Wildlife (CDFW) (previously called California Department of Fish and Game until Dec 31, 2012) before substantially diverting or obstructing the natural flow of a river or stream. The CDFW then has the opportunity to determine whether the activity may substantially adversely affect an existing fish or wildlife resource and issue a final agreement that includes reasonable measures necessary to protect the resource (California Fish and Game Code Section 1602). Under CEQA, no public agency shall approve or carry out a project without identifying all feasible mitigation measures necessary to reduce impacts to a less than significant level, and shall incorporate such measures absent overriding considerations. In addition, protective measures, including programs for strategic screening and participation in habitat conservation programs, will be implemented in conjunction with SJRRP activities and are intended to provide a net benefit to the reintroduction.

The SJRRP restoration actions, in combination with the protective measures proposed in this rule, as well as compliance with existing Federal, State and local laws, statutes, and

regulations, including those mentioned above, are expected to ensure the survivability of the experimental population in the San Joaquin River into the foreseeable future.

In addition, we considered the potential contribution of an experimental population toward recovery of the CV spring-run Chinook ESU. NMFS' draft recovery plan for Central Valley salmon and steelhead contains specific management strategies for recovering CV spring-run Chinook salmon that include securing existing populations and reintroducing populations into historically occupied habitats, including the San Joaquin River. Establishing an experimental population of CV spring-run Chinook salmon in the San Joaquin River that persist into the foreseeable future is expected to reduce the species' overall extinction risk from natural and anthropogenic factors by increasing its abundance, productivity, spatial structure, and diversity within the Central Valley. These expected improvements in the overall viability of CV spring-run Chinook salmon, in addition to other actions being implemented throughout the Central Valley, will contribute to the species recovery.

In light of the foregoing, we conclude that release of the proposed experimental population would further the conservation of CV spring-run Chinook salmon.

Identification of the Experimental Population

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. We are proposing to designate the experimental population area for experimental CV spring-run Chinook salmon population as the San Joaquin River from its confluence with the Merced River upstream to Friant Dam, including all, sloughs, channels, and water ways that connect the San Joaquin River and provide passage for the species. In addition, the experimental area includes portions of the Kings River in high water years that provide connectivity between

the Kings River with the San Joaquin River. The proposed experimental population area is within the species historical range, but it is presently unoccupied by CV spring-run Chinook salmon and is outside the currently defined freshwater and estuarine boundary of the CV spring-run Chinook salmon ESU.

False pathways (water ways that salmon follow that do not lead to spawning habitat) that fish may use as a result of restored flows have not yet been identified; however, the SJRRP includes actions to prevent or reduce straying to false pathways, and this proposed experimental population designation assumes that the SJRRP will take appropriate action to reduce losses of the experimental population caused by undesirable straying. In addition, we will be using other means of identifying fish that are part of the experimental population such as marking fish with specific fin clips or other methods (e.g., coded wire tags, genetic testing).

Is the Experimental Population Essential to the Continued Existence of the Species?

Since we do not have regulations implementing section 10(j), we considered the USFWS regulations (50 CFR 17.80(b)), which define an essential experimental population as “an experimental population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild.” All other experimental populations are classified as nonessential. While we are not bound by the definition of “essential” in the USFWS regulations, we have determined it is appropriate for use in this proposed rule.

In making the determination whether the proposed experimental population of CV spring-run Chinook salmon is essential, we used the the best available information as required by ESA section 10(j)(2)(B). Furthermore, we considered the geographic location of the proposed experimental population in relation to other populations of CV spring-run Chinook salmon, the source of fish that will be used to establish the experimental population (e.g., naturally spawning

populations or FRFH stocks), and whether the removal of individuals from any donor population would appreciably reduce the likelihood of the existing listed species survival and recovery in the wild.

Through our section 10 permitting authority and the section 7 consultation process, we will also ensure that the use of CV spring-run Chinook salmon from any donor populations for release into the San Joaquin River is not likely to jeopardize the continued existence of the species in the wild. Currently NMFS has issued a 10(a)(1)(A) permit along with a section 7 Biological Opinion (2012) that reached a non-jeopardy conclusion on the first five years of broodstock collection from FRFH.

As noted above, there are several choices for source populations for this experimental population. Initially we will be using FRFH fish in excess to what is needed for Feather River operations. If we consider using CV spring-run Chinook salmon from naturally spawning populations, we will remove only small numbers of fish from natural populations that we consider to be viable and at a low risk of extinction. In addition, a captive broodstock program is being established as part of the SJRRP to augment and supplement the establishment of experimental populations in the San Joaquin River. Over time, we expect the captive broodstock at the San Joaquin River conservation hatchery will produce sufficient numbers of eggs and juveniles to support reintroduction actions, and will reduce the need for fish to be taken from existing hatchery or natural populations in the Sacramento River basin.

The San Joaquin River is substantially geographically separated from the watersheds that support extant populations of CV spring-run Chinook salmon in the Sacramento River basin. We expect that any CV spring-run Chinook salmon reintroduced to the San Joaquin River will imprint on this river and would therefore be unlikely to stray into the Sacramento River basin

and interact with extant populations found in that watershed. Thus it is expected that the proposed experimental population will exist as a population independent from those in the Sacramento River basin and will not contribute to their survival.

Based on these considerations, we conclude that the loss of the proposed experimental San Joaquin River population of CV spring-run Chinook salmon is not likely to appreciably reduce the likelihood of the survival of the species in the wild. Accordingly, this population will be considered nonessential under this designation.

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

The ESA defines “take” to mean: harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. For threatened species such as the proposed NEP of CV spring-run Chinook salmon, the ESA does not specifically prohibit take, but ESA section 4(d) (16 U.S.C. 1533(d)) provides that the Secretary shall issue protective regulations he or she deems necessary and advisable for species conservation. Such protective regulations may, if appropriate, include the take prohibitions of section 9 of the ESA.

Therefore, in conjunction with our proposal to designate and authorize the release of a CV spring-run Chinook salmon NEP in the San Joaquin River, we also propose to promulgate protective regulations under section 4(d) of the ESA that would apply to the NEP. To ensure that the NEP has protections from activities that are not lawful under Federal, State or local laws and regulations, we propose to apply all take prohibitions listed under ESA sections 9(a)(1)(A) through 9(a)(1)(G), except for section 9(a)(1)(C) which involves the irrelevant issue of take upon the high seas, to the experimental population when it is within the experimental population area. Such activities include those resulting in direct intentional take or harm or illegal activities that

result in incidental take or harm. These prohibitions would apply to all CV spring-run Chinook salmon in the experimental population area that have intact adipose fins as well as those that are adipose fin-clipped.

In addition, we are proposing that the unintentional take of CV spring-run Chinook salmon in the experimental population area that is caused by otherwise lawful activities will be exempted from the take prohibitions under section 9. Similarly, this proposed rule proposes to exempt handling of fish in the experimental population for salvage/rescue and scientific research subject to specific requirements. We are proposing to provide an exemption from the section 9 take prohibitions for specified scientific research activities conducted by the State of California that is consistent with the existing state 4(d) research programs established for listed salmon, making use of the system already in place. Federal, State, and private-sponsored research activities for scientific research or enhancement purposes that are not covered under the exceptions, criteria for exceptions, and reporting requirements or exemptions provided by NMFS-approved 4(d) programs above, may take CV spring-run Chinook salmon in the NEP pursuant to the specifications of an ESA section 10 permit. Section 9(a)(1)(B) take prohibitions would not apply to ongoing research activities if an application for an ESA section 10 (a)(1)(A) permit is received by NMFS, preferably through the NMFS online application Web site.

Questions regarding whether specific activities will constitute a violation of the section 9 take prohibition, and general inquiries regarding prohibitions and permits, should be directed to NMFS (see ADDRESSES).

As noted above, we propose to prohibit the intentional take of CV spring-run Chinook salmon in the experimental population area by angling. We intend to work with CDFW to review fishing regulations in the geographic area in order to minimize the impact of this

prohibition on current angling on other species. In the future, if the experimental population becomes established, we may consider allowing limited harvest of CV spring-run Chinook salmon in the experimental population through a Fishery Management and Evaluation Plan developed by CDFW and approved by NMFS.

Special Take Exemptions Outside of the Experimental Population Area

Under the SJRRSA, the reintroduction of an experimental CV spring-run Chinook salmon population to the San Joaquin River must not impose more than de minimus water supply reductions, additional storage releases, or bypass flows on unwilling third parties. The SJRRSA defines “third party” to mean persons or entities diverting or receiving water pursuant to applicable State and Federal laws which includes CVP contractors outside of the Friant Division of the CVP and the State Water Project (SWP) contractors. Because the proposed reintroduction under the SJRRSA cannot impose any more than de minimus effects onto third parties and some of these third parties operate outside of the proposed experimental population area, this proposed rule also extends special take exemptions to third parties outside of the experimental population area geographic location. These proposed special take exemptions will apply to fish that originate from the San Joaquin River, including the experimental area above the confluence with the Merced River. Spring-run Chinook salmon that are part of the threatened CV spring-run Chinook salmon ESU (50 CFR 223.102), and are known to occur in the area, will be exempt from take prohibitions for activities related to diverting or receiving water pursuant to applicable State and Federal laws, but otherwise would continue to be covered by the take prohibitions applicable to the non-experimental part of the ESU. The proposed special take exemptions for CV spring-run Chinook salmon that originate from the San Joaquin River would address areas

downstream from the confluence of the Merced and San Joaquin rivers, including all tributaries to the San Joaquin River and in the south Delta.

For take at the CVP and SWP facilities in the Delta, NMFS will annually calculate and document the proportionate contribution of CV spring-run Chinook salmon originating from the reintroduction to the San Joaquin River. NMFS will document this calculation by January 15 each year and will describe the method for calculating and deducting this share of CV spring-run Chinook salmon take from the operational triggers and incidental take statements associated with the June 2009 Biological Opinion on the Long-term Operations of the CVP and SWP or subsequent future Biological Opinions. The intent of this proposed exemption is to ensure that the proposed experimental reintroduction will not impose more than a de minimus impact on water supply, storage releases and bypass flows for unwilling third parties due to the reintroduction.

Process for Periodic Review

Monitoring and analysis is necessary to gauge the progress of the proposed reintroduction program and to provide information for decision-making and adaptive management. Fish passage, fish biology, aquatic habitat, and conservation hatchery facility operations will be the primary focus of the monitoring (FMP, 2009).

Fish passage monitoring will focus on addressing a variety of issues important to successful reintroduction. These issues consist of measuring fish passage efficiency, smolt injury and mortality rates, and adult river 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 (i.e., habitat availability, habitat effectiveness, riparian condition) and natural production (the number, size, productivity, and life history diversity) of CV spring-run Chinook salmon in the experimental population area.

Monitoring at the conservation hatchery facility will focus on multiple issues important to the quality of fish collected and produced for use in the reintroduction program. CDFW will be primarily responsible for monitoring conservation hatchery facility operations. Monitoring activities will consist mainly of tracking broodstock sources; disease history and treatment; pre-release performance such as survival, growth, and fish health by life stage; the numerical production advantage provided by the conservation hatchery facility program relative to natural production; and success of the conservation hatchery facility program in meeting the programs 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 CV spring-run Chinook salmon that are part of the threatened ESU and their habitat, and then, based on this and other available information, determine if any changes to the experimental population designation may be warranted. Any contribution that an experimental population might make to the overall viability of CV spring-run Chinook salmon would be considered in future status assessments required under the ESA.

Experimental Population Findings

Based on the best available scientific information, we have determined that the designation and release of a NEP of CV spring-run Chinook salmon in the San Joaquin River basin below Friant Dam will further the conservation of CV spring-run Chinook salmon. Fish

used for the reintroduction will rely on FRFH hatchery production or fish produced from a conservation hatchery facility from limited collection of wild fish, and loss of some fish will not reduce the survival and recovery of CV spring-run Chinook salmon. The collection of wild fish will be permitted only after issuance of permits under section 10(a)(1)(A) of the ESA that ensure that any such collections will not jeopardize the survival and recovery of the species. We have determined that this experimental population is nonessential because it is not necessary for the continued survival of the CV spring-run Chinook salmon; however, the population is expected to contribute to the recovery of CV spring-run Chinook salmon if the reintroduction is successful. This experimental population designation and release is being implemented in association with the reintroduction efforts called for in the SJRRP and the Stipulation of Settlement. Actions of the SJRRP are intended to provide habitat conditions that will be sufficient to establish a CV spring-run Chinook salmon population in the San Joaquin River while at the same time ensuring that no further protections will be needed and that the reintroduction will not impact landowners and third parties as defined by the SJRRSA.

The success of the reintroduction of CV spring-run Chinook salmon in the experimental population area will be monitored as part of the SJRRP. We will assess the contribution of the NEP to the status of the species during the required five year status review of the CV spring-run Chinook salmon ESU. This information will be used by NMFS to determine if changes to the NEP designation may be warranted.

As previously noted, we considered the Fish and Wildlife Service's regulations and applied them only where appropriate in this proposed rule. We believe that our identification of the proposed experimental population, our finding that release of the proposed experimental population would further the conservation of CV spring-run Chinook, and our finding that the proposed experimental population is not essential to the continued existence of the listed species would be identical had we strictly applied all of the Fish and Wildlife Service's 10(j) regulations.

Public Comment

We want the final rule to be as effective and accurate as possible, and the final EA to evaluate the potential issues and reasonable range of alternatives. Therefore, we invite the public, State, Tribal, and government agencies, the scientific community, environmental groups, industry, local landowners, and all interested parties to provide comments on the proposed rule and EA. We request that submitted comments be relevant to the reintroduction and experimental population designation and not include comments on the SJRRP as a whole, which is beyond the scope of the action described in this proposed rule. Comments should be as specific as possible, provide relevant information or suggested changes, the basis for the suggested changes, and any additional supporting information where appropriate. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Prior to issuing a final rule, we will take into consideration the comments and supporting materials received. The final rule may differ from the proposed rule based on this information and other considerations. We are interested in all public comments, but are specifically interested in obtaining feedback on:

- (1) The geographical boundary of the designated experimental population.

- (2) The extent to which the experimental population would be affected by current or future Federal, State, or private actions within or adjacent to the experimental population area.
- (3) Any necessary management restrictions, protective measures, or other management measures that we may have not considered.
- (4) The extent to which we have has provided protections for third parties as required by the SJRRSA.
- (5) Whether we should propose the experimental population as nonessential.
- (6) Whether the proposed designation furthers the conservation of the species and we have used the best available science in making this determination.

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) in the Federal Register on January 14, 2005 (70 FR 2664). The Bulletin established minimum peer review standards, a transparent process for public disclosure of peer review planning, and opportunities for public participation with regard to certain types of information disseminated by the Federal Government. The peer review requirements of the OMB Bulletin apply to influential or highly influential scientific information disseminated on or after June 16, 2005. There are no documents supporting this proposed rule that meet this criteria.

Classification

Executive Order 12866:

This rule has been determined to be not significant under E.O. 12866.

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

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 801 et seq.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

We are certifying that this rule would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale. The effect of the proposal would be to avoid the need for affected entities, including small entities, to obtain ESA permits or authorization to conduct otherwise lawful activities as a result of reintroduction of CV spring-run Chinook salmon to the San Joaquin River. We do not collect the data to be able to quantify the number or type of small entities within the area affected by this proposed rule. If this proposal is adopted, the area affected by this rule includes the San Joaquin River from Friant Dam to Mossdale County Park, San Joaquin County, California and associated water ways accessible to anadromous fish. The NEP area would include the San Joaquin River from Friant Dam downstream to the confluence with the Merced River. Private land ownership is significant in the NEP area. Land uses are primarily agriculture, recreation, and tourism.

This proposed rule authorizes incidental take of CV spring-run Chinook salmon within the NEP area. The regulations implementing the ESA define “incidental take” as take that is

incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Intentional take for negligent, or as a result of unlawful, activities would not be permitted. Intentional take other than for conservation purposes as described in the special rule are not authorized unless for research or educational purposes, which would require a section 10 permit under the ESA.

Because of the substantial regulatory relief provided by NEP designations, we do not expect this rule to have any significant effect on recreational, agricultural, or development activities within the NEP area.

Additionally, the proposal would provide specific regulatory relief to persons or entities diverting or receiving water pursuant to applicable State and Federal laws, such that the reintroduction of CV spring-run Chinook salmon would not impose more than de minimus: water supply reductions, additional storage releases, or bypass flows on these persons or entities, if unwilling. These exemptions include Central Valley Project contractors outside of the Friant Division of the Central Valley Project and the State Water Project. Because this proposal would require no additional regulatory requirements on small entities and would provide regulatory relief for activities within the affected area, the Chief Council for Regulation certified that this proposed rule would not have a significant economic effect on a substantial number of small entities.

Executive Order 12630:

In accordance with E.O. 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required because this proposed rule: (1) would not effectively compel a property owner to have the government physically invade their property, and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule would substantially advance a legitimate government

interest (conservation and recovery of a listed fish species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Executive Order 13132:

In accordance with E.O. 13132, we have determined that this proposed rule does not have federalism implications as that term is defined in E.O. 13132.

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

OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.), require that Federal agencies obtain approval from OMB before collecting information from the public. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. This proposed rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

National Environmental Policy Act:

In compliance with all provisions of the National Environmental Policy Act of 1969 (NEPA), we have analyzed the impact on the human environment and considered a reasonable range of alternatives for this proposed rule. We have prepared a draft EA on this proposed action and have made it available for public inspection (see ADDRESSES section). All appropriate NEPA documents will be finalized before this rule is finalized.

Government-to-Government Relationship with Tribes (E.O. 13175):

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.

There are no tribally owned or managed lands included in the experimental population area. We have invited all possibly impacted tribes (letter dated November, 15, 2010, from Maria Rea, Central Valley Office Supervisor, NMFS) to discuss the proposed rule at their convenience should they choose to have a government-to-government consultation.

References Cited

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

Dated: January 9, 2013.

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.

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports.

For the reasons set out in the preamble, we propose to amend part 223, subpart B of chapter 1, title 50 of the Code of Federal Regulations, as set forth below.

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).

2. Add § 223.301 paragraph (b) to read as follows:

§ 223.301 Special rules—marine and anadromous fishes.

(b) San Joaquin River CV spring-run Chinook Salmon Experimental Population (Oncorhynchus tshawytscha).

(1) The San Joaquin River CV spring-run Chinook salmon population identified in paragraph (b)(5) of this section is designated as a nonessential experimental population under section 10(j) of the ESA.

(2) Prohibitions. The prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538 (a)(1)) relating to endangered species apply to fish that are part of the threatened, nonessential experimental population of CV spring-run Chinook salmon identified in paragraph (a)(4) of this section.

(3) Allowable take of CV spring-run Chinook salmon in the Experimental Population Area:

(i) Any taking of CV spring-run Chinook salmon provided that it is unintentional, not due to negligent conduct, and incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Examples of otherwise lawful activities include recreation, agriculture, municipal usage, and other similar activities, which are carried out in accordance with Federal, State, and local laws and regulations.

(ii) Any taking of CV spring-run Chinook salmon by an employee or designee of NMFS, the USFWS, other Federal land management agencies, the California Department of Fish and Wildlife, or any other governmental entity if in the course of their duties it is necessary to: aid a sick, injured or stranded fish; dispose of a dead fish; or salvage a dead fish which may be useful for scientific study. Any agency acting under this provision must report to NMFS (see ADDRESSES section) the numbers of fish handled and their status on an annual basis.

(iii) Any taking of CV spring-run Chinook salmon for scientific research or enhancement purposes by a person or entity with a valid section 10(a)(1)(A) permit issued by NMFS and a valid permit issued by the CDFW.

(iv) Any taking of CV spring-run Chinook salmon for scientific research purposes by the CDFW provided that:

(A) Scientific research activities involving purposeful take are conducted by employees or contractors of CDFW or as a part of a monitoring and research program overseen by or coordinated with CDFW.

(B) CDFW provides for NMFS' review and approval a list of all scientific research activities involving direct take planned for the coming year, including an estimate of the total direct take that is anticipated, a description of the study design, including a justification for taking the species and a description of the techniques to be used, and a point of contact.

(C) CDFW annually provides to NMFS the results of scientific research activities directed at fish in the experimental population, including a report of the direct take resulting from the studies and a summary of the results of such studies.

(D) Scientific research activities that may incidentally take fish in the experimental population are either conducted by CDFW personnel, or are in accord with a permit issued by the CDFW.

(E) CDFW provides NMFS annually, for its review and approval, a report listing all scientific research activities it conducts or permits that may incidentally take fish in the experimental population during the coming year. Such reports shall also contain the amount of incidental take occurring in the previous year's scientific research activities and a summary of the results of such research.

(F) Electro fishing in any body of water known or suspected to contain fish in the experimental population is conducted in accordance with NMFS “Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act” (NMFS, 2000a).

(G) NMFS' approval of a research program shall be a written approval by NMFS Northwest or Southwest Regional Administrator.

(4) Take of CV spring-run Chinook salmon in Experimental Population Area that is not allowed:

(i) Except as expressly allowed in paragraph (3) of this section, the taking of CV spring-run Chinook salmon is prohibited within the experimental population area. This includes the taking of CV spring-run Chinook salmon by all activities that are illegal or not allowed under Federal, State or local laws and regulations.

(ii) No person shall possess, sell, deliver, carry, transport, ship, import, or export, by any means whatsoever, CV spring-run Chinook salmon from the nonessential, experimental population area in violation of this paragraph and paragraph (2) of this section.

(5) San Joaquin River CV Spring-run Chinook Salmon Experimental Population Area.

The geographic boundary defining the experimental population of CV spring-run Chinook salmon includes the San Joaquin River from Friant Dam downstream to its confluence with the Merced River as well as all sloughs, channels, and waterways connected with the San Joaquin River that allow for CV spring-run Chinook salmon passage. Those portions of the Kings River that connect with the San Joaquin River during high water years are also part of the experimental population area. The experimental population area is within the historic range of the species, but is outside of its current range. All CV spring-run Chinook salmon in this defined

experimental population area are considered part of the San Joaquin River experimental population.

(6) Special Take Exemption Outside of the Experimental Population Area:

(i) Any taking of CV spring-run Chinook salmon in those portions of the lower San Joaquin River and its tributaries downstream from its confluence with the Merced River to Mossdale County Park in San Joaquin County, by otherwise lawful activities related to diverting or receiving water pursuant to applicable State and Federal laws.

(ii) Any taking of CV spring-run Chinook salmon at the CVP and SWP projects in the Delta that originates from reintroduction to the San Joaquin River. NMFS will annually determine by January 15 the share of take at the CVP and SWP facilities that originates from the reintroduction to the San Joaquin River. This determination will provide a methodology for deducting San Joaquin River origin spring-run Chinook salmon from the operational triggers and incidental statements associated with any biological opinion that is in effect at the time for operations of the CVP and SWP facilities.

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