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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 223

[Docket No. 221219-0278]

RIN 0648-BK00

Endangered and Threatened Species: Designation of a Nonessential Experimental Population of Central Valley Spring-run Chinook Salmon in the Upper Yuba River Upstream of Englebright Dam, Authorization for Release, and Adoption of Limited Protective Regulations under the Endangered Species Act

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

ACTION: Final rule; notification of availability of a final environmental assessment.

SUMMARY: We, NMFS, designate and authorize the release of a nonessential experimental population (NEP or experimental population) of Central Valley (CV) spring-run Chinook salmon (*Oncorhynchus tshawytscha*) in the upper Yuba River and its tributaries upstream of Englebright Dam, California, and under the Endangered Species Act (ESA), establish a limited set of take exceptions for the experimental population. Successful reintroduction of a population within the species' historical range would contribute to its viability and further its conservation. The issuance of limited protective regulations for the conservation of the species would provide assurances to the people of the upper Yuba River watershed. This document also announces the availability of a final environmental assessment (EA) that analyzed the environmental impacts of promulgating the experimental population rule and associated take exceptions.

DATES: The final rule is effective [*insert date 30 days after date of publication in the Federal Register*].

ADDRESSES: The Final EA and other reference materials regarding this final rule can be obtained at NMFS's National Environmental Policy Act (NEPA) website at: *https://www.westcoast.fisheries.noaa.gov/publications/nepa/nepa_documents.html.* or by submitting a request to the Assistant Regional Administrator, California Central Valley Office, West Coast Region, NMFS, 650 Capitol Mall, Suite 5-100, Sacramento, CA 95814.

FOR FURTHER INFORMATION CONTACT: Steve Edmonson, NMFS, 650 Capitol Mall, Suite 5-100, Sacramento, CA 95814, 916-930-3600, or Adrienne Lohe, NMFS Office of Protected Resources, 301-427-8442.

SUPPLEMENTARY INFORMATION:

Background Information Relevant to Experimental Population Designation

On December 11, 2020, NMFS published a proposed rule in the **Federal Register** (85 FR 79980) for the designation of a NEP and authorization for release under ESA section 10(j) and the adoption of limited protective regulations under ESA section 4(d). The proposed rule also announced the availability of a final EA for the proposed rule.

NMFS listed the CV spring-run Chinook salmon Evolutionarily Significant Unit (ESU)[1] as threatened under the ESA, 16 U.S.C. 1531 *et seq*., on September 16, 1999 (64 FR 50394), and reaffirmed this status in a final rule on June 28, 2005 (70 FR 37160), and 5-year reviews announced on August 15, 2011 (76 FR 50447), and May 26, 2016 (81 FR 33468). The listed ESU of CV spring-run Chinook salmon currently includes all naturally spawned populations of spring-run Chinook salmon in the Sacramento River and its tributaries, as well as the Feather River Hatchery (FRH) spring-run Chinook salmon

[1] The ESA defines "species" to include "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature" (16 U.S.C. 1532(16); see also 50 CFR 424.02). For Pacific salmon, NMFS determined that an ESU will be considered a distinct population segment and thus a species (56 FR 58612, November 20, 1991). A group of Pacific salmon is considered an ESU if it is substantially reproductively isolated from other nonspecific population units, and represents an important component in the evolutionary legacy of the species.

program. On January 9, 2002 (67 FR 1116), NMFS issued protective regulations under section 4(d) of the ESA for CV spring-run Chinook salmon that apply the take prohibitions of section 9(a)(1) of the ESA except for listed exceptions (see 50 CFR 223.203). Critical habitat has been designated for CV spring-run Chinook salmon (70 FR 52488, September 2, 2005), and includes most of the occupied riverine habitat within their extant range. CV spring-run Chinook salmon are also listed as a threatened species by the State of California under the California Endangered Species Act (CESA), California Fish and Game Code, Division 3, Chapter 1.5.

In 2014, we adopted a final recovery plan for the CV spring-run Chinook salmon ESU (79 FR 42504, July 22, 2014). The Central Valley recovery plan identifies re-establishing populations of CV spring-run Chinook salmon above impassable barriers to unoccupied historical habitats as an important recovery action (NMFS 2014). More specifically, the Central Valley recovery plan explains that re-establishing populations above impassable barriers, such as Englebright Dam on the Yuba River (Yuba and Nevada Counties, California), would aid in recovery of the ESU by increasing abundance, spatial structure and diversity and by reducing the risk of extinction to the ESU as a whole.

NMFS is issuing a rule to (a) designate and authorize the release of an experimental population of CV spring-run Chinook salmon pursuant to ESA section 10(j) in the upper Yuba River watershed upstream of Englebright Dam, and (b) establish take prohibitions for the experimental population and exceptions for particular activities.

Supplemental Information

This is a final rule stemming from a proposed rule that was published December 11, 2020 (85 FR 79980). The nonessential experimental population (NEP) Area includes the entire upper Yuba River watershed, which extends from the crest of the Sierra-Nevada Mountains down to Englebright Dam. It is located north of the cities of Grass Valley and Nevada City, and east of the cities of Marysville and Yuba City, California. The NEP

Area is part of the species' historical range. The upper Yuba River experimental population is all CV spring-run Chinook salmon, including fish released or propagated, naturally or artificially, within the NEP Area.

Statutory and Regulatory Framework for Experimental Population Designation

Section 10(j) of the ESA (16 U.S.C. 1539(j)) allows the Secretary of Commerce to authorize the release of any population of a listed species outside their current range if the release "furthers their conservation." An experimental population is a population that is geographically separate from nonexperimental populations of the same species.

Before authorizing the release of an experimental population, section 10(j)(2)(B) requires that the Secretary must "by regulation identify the population and determine, on the basis of the best available information, whether or not the population is essential to the continued existence of the listed species.

An experimental population is treated as a threatened species, except that non-essential populations do not receive the benefit of certain protections normally applicable to threatened species (ESA section 10(j)(2)(C)). Below we discuss the impact of treating experimental populations as threatened species and of exceptions that apply to experimental populations.

For endangered species, section 9 of the ESA prohibits take of those species. For a threatened species, ESA section 9 does not specifically prohibit take of those species, but the ESA instead authorizes NMFS to adopt regulations under section 4(d) that it deems necessary and advisable for species conservation, including prohibiting take. The experimental population of CV spring-run Chinook salmon must generally be treated as a threatened species. Therefore, we issue tailored protective regulations under ESA section 4(d) for the experimental population of CV spring-run Chinook salmon to identify take prohibitions necessary and advisable to provide for the conservation of the species with exceptions for particular activities.

Section 7 of the ESA provides for Federal interagency cooperation and consultation on Federal agency actions. Section 7(a)(1) directs all Federal agencies, in consultation with NMFS as applicable depending on the species, to use their authorities to further the purposes of the ESA by carrying out programs for the conservation of listed species. Section 7(a)(2) requires all Federal agencies, in consultation with NMFS as applicable depending on the species, to ensure any action they authorize, fund or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Section 7 applies equally to endangered and threatened species.

Although ESA section 10(j) provides that an experimental population must generally be treated as a threatened species, for the purposes of ESA section 7, if the experimental population is determined to be a NEP, section 10(j)(C)(i) requires that we treat the experimental population as a species proposed to be listed, rather than a species that is listed (except when it occurs within a National Wildlife Refuge or National Park, in which case it is treated as listed). Section 7(a)(4) of the ESA requires Federal agencies to confer (rather than consult under ESA section 7(a)(2)) with NMFS on actions likely to jeopardize the continued existence of a species proposed to be listed. The results of a conference are advisory recommendations, if any, on ways to minimize or avoid adverse effects rather than mandatory terms and conditions under ESA section 7(a)(2) consultations (compare 50 CFR 402.10(c) with 50 CFR 402.14(i)(1)(iv)).

NMFS has designated three experimental populations (78 FR 2893, January 15, 2013; 78 FR 79622, December 31, 2013; 79 FR 40004, July 11, 2014) and promulgated regulations, codified at 50 CFR part 222, subpart E, to implement section 10(j) of the ESA (81 FR 33416, May 26, 2016). NMFS' implementing regulations include the following provisions:

The provision at 50 CFR 222.501(b) defines an "essential experimental

population" as an experimental population that if lost, the survival of the species in the wild would likely be substantially reduced. All other experimental populations are classified as nonessential.

The provision at 50 CFR 222.502(b) provides, before authorizing the release of an experimental population, the Secretary must find by regulation that such release will further the conservation of the species. In addition, 50 CFR 222.502(b) provides that in making such a finding, the Secretary shall utilize the best scientific and commercial data available to consider:

- Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;
- The likelihood that any such experimental population will become established and survive in the foreseeable future;
- The effects that establishment of an experimental population will have on the recovery of the species; and
- The extent to which the introduced population may be affected by existing or anticipated Federal or state actions or private activities within or adjacent to the experimental population area.

The provision 50 CFR 222.502(c) describes 4 components that must be provided in any NMFS regulations designating an experimental population under ESA section 10(j):

- Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location; actual or anticipated migration; number of specimens released or to be released; and other criteria appropriate to identify the experimental population(s);
- A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild;

- Management restrictions, protective measures, or other special management concerns of that population, as appropriate, which may include, but are not limited to, measures to isolate and/or to contain the experimental population designated in the regulation from nonexperimental populations and protective regulations established pursuant to section 4(d) of the ESA; and
- A process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

In addition, as described above, ESA section 10(j)(1) defines an "experimental population" as any population authorized for release but only when, and at such times as, the population is wholly separate geographically from the non-experimental populations of the same species. Accordingly, we must establish that there are such times and places when the experimental population is wholly geographically separate. Similarly, the statute requires that we identify the experimental population; the legislative history indicates that the purpose of this requirement is to provide notice as to which populations of listed species are experimental (see Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep No. 97–835, at 34 (1982)).

We discuss in more detail below how we considered each of these elements.

Status of the Species

Life history and the historical population trend of CV spring-run Chinook salmon are summarized by Healy (1991), United States Fish and Wildlife Service (USFWS) (1995), Yoshiyama *et al*. (1998), Yoshiyama *et al*. (2001), and Moyle (2002). Section 4(f) of the ESA requires the Secretary of Commerce to develop recovery plans for all listed species unless the Secretary determines that such a plan will not promote the conservation of a listed species. Prior to developing the Central Valley recovery plan (NMFS 2014), we assembled a team of scientists from Federal and state agencies, consulting firms, non-

profit organizations and academia. This group, known as the Central Valley Technical Recovery Team (CVTRT), was tasked with identifying population structure and recommending recovery criteria (also known as delisting criteria) for ESA-listed salmon and steelhead (*O. mykiss*) in the Sacramento River and San Joaquin Rivers and their tributaries. The CVTRT recommended biological viability criteria at the ESU level and population level (Lindley *et al*., 2007) for recovery planning consideration. The CVTRT identified the current risk level of each population based on the gap between recent abundance and productivity and the desired recovery goals. The CVTRT concluded that the greatest risk facing the ESUs resulted from the loss of historical diversity following the construction of major dams that blocked access to historical spawning and rearing habitat (Lindley *et al*., 2007).

The CVTRT also recommended spatial structure and diversity metrics for each population (Lindley *et al*., 2004). Spatial structure refers to the geographic distribution of a population and the processes that affect the distribution. Populations with restricted distribution and few spawning areas are at a higher risk of extinction from catastrophic environmental events (*e.g*., wildfire, volcanic eruption, et cetera) than are populations with more widespread and complex spatial structure. A population with complex spatial structure typically has multiple spawning areas, which allows the expression of diverse life history characteristics. Diversity is the combination of genetic and phenotypic characteristics within and between populations (McElhany *et al*., 2000). Phenotypic diversity allows more diverse populations to use a wider array of environments and protects populations against short-term temporal and spatial environmental changes. Genotypic diversity, on the other hand, provides populations with the ability to survive long-term changes in the environment by providing genetic variations that may prove successful under different situations. The combination of phenotypic and genotypic diversity, expressed in a natural setting, provides populations with the ability to utilize the

full range of habitat and environmental conditions and to have the resiliency to survive and adapt to long-term changes in the environment.

In 2016, NMFS completed a periodic review as required by the ESA section 4(c)(2)(A), and concluded that the CV spring-run Chinook salmon ESU should remain listed as threatened (81 FR 33468, May 26, 2016). An analysis conducted by NMFS' Southwest Fisheries Science Center (Johnson and Lindley, 2016) indicated that the extant independent populations of the CV spring-run Chinook salmon ESU remained at a moderate to low extinction risk since the last status review (Williams *et al*., 2011). The analysis noted some improvements in the viability of the ESU, particularly with respect to the increased spatial diversity of the dependent Battle Creek and Clear Creek populations. The analysis identified as key threats the recent catastrophic declines of many of the extant populations, high pre-spawn mortality during the 2012-2015 drought in California, uncertain juvenile survival due to drought and ocean conditions, as well as straying of CV spring-run Chinook salmon from the Feather River Hatchery (FRH) (Johnson and Lindley, 2016).

Analysis of the Statutory Requirements

1. Will authorizing release of an experimental population further the conservation of the species?

Section 3(3) of the ESA, 16 U.S.C. 1532(3), defines "conservation" as the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. We discuss in more detail below each of the factors considered in determining if authorizing release of an experimental population in the NEP Area would further the conservation of CV spring-run Chinook salmon.

Under 50 CFR 222.502(b), NMFS must consider several factors in finding whether authorizing release of an experimental population will further the conservation of the

species, including any possible adverse effects on extant populations of the species as a result of removal of individuals for introduction elsewhere; the likelihood that the experimental population will become established and survive in the foreseeable future; the effects that establishment of the experimental population will have on the recovery of the species; and the extent to which the experimental populations may be affected by existing or anticipated Federal or state actions or private activities within or adjacent to the experimental population area.

Regarding the likelihood that reintroduction efforts will be successful in the foreseeable future, an important question is: what are the most appropriate sources of broodstock to establish the experimental population, and are the sources available? 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 (Araki *et al*., 2008). Populations found in watersheds closest to the NEP Area are most likely to have adaptive traits that will lead to a successful reintroduction. Therefore, only CV spring-run Chinook salmon populations found in the Central Valley will be used in establishing the experimental populations in the NEP Area.

We have preliminarily identified a donor source for reintroduction into the upper Yuba River as CV spring-run Chinook salmon produced from the FRH. The Yuba River is a tributary to the Feather River and CV spring-run Chinook salmon from the FRH are the geographically closest donor source that could be used with minimal impact to the wild population for reintroduction into the upper Yuba River. The donor stock raised at the FRH may include CV spring-run Chinook salmon from either the Feather or Yuba River. NMFS, in consultation with the California Department of Fish and Wildlife (CDFW), may later consider diversifying the donor stock with CV spring-run Chinook salmon from other nearby streams if those populations can sustain removal of fish without adverse population

level effects.

Use of donor stock from the FRH for the initial phases of a reintroduction program will minimize the number of individuals needed from existing wild populations. Donor stock supplementation, if necessary, would be dependent upon genetic diversity needs and the extent of adverse effects to other populations. Although donor stocks have not been determined, fish produced from the FRH are expected to be the initial source of individuals to establish an experimental population of CV spring-run Chinook salmon in the NEP Area. Any collection of CV spring-run Chinook salmon would be subject to NMFS's approval of a permit under ESA section 10(a)(1)(A), which potentially includes a Hatchery Genetic Management Plan (HGMP) in relation to a hatchery stock and will include additional analysis under NEPA and ESA section 7. Once a self-sustaining population is established, it is anticipated that the FRH contribution (and contributions from other locations) of CV spring-run Chinook salmon would be phased out.

We also consider the suitability of habitat available to the experimental population. NMFS initiated a habitat assessment of the upper Yuba River and determined conditions were suitable for Chinook salmon spawning, adult holding, and juvenile rearing (Stillwater Sciences 2013). The relative abundance of habitat types, habitat quality and environmental conditions vary between the North, Middle, and South Yuba Rivers. Under current conditions when compared to one another, habitat conditions are most suitable in the North Yuba River. The Middle Yuba River maintains significant quantities of suitable habitat and habitat conditions are currently less suitable in the South Yuba River. Habitat conditions in the Middle and South Yuba Rivers will likely improve with additional instream flow releases from dams in the upper watersheds as part of the Federal Energy Regulatory Commission's (FERC) relicensing process pursuant to the Federal Power Act (FPA).

In addition, there are Federal and state laws and regulations that will help ensure

the establishment and survival of the experimental population by protecting aquatic and riparian habitat in the NEP Area. Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344, establishes a program to regulate the discharge of dredged or fill material into waters of the United States, which generally requires avoidance, minimization, and mitigation for potential adverse effects of dredge and fill activities within the nation's waterways. Under CWA section 401, 33 U.S.C. 1341, a Federal agency may not issue a permit or license to conduct any activity that may result in discharge into waters of the United States unless a state or authorized tribe, where the discharge would originate, issues a section 401 water quality certification verifying compliance with existing water quality requirements or waives the certification requirement. In addition, construction and operational storm water runoff is subject to restrictions under CWA section 402, 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System permit program, and state water quality laws.

FERC, pursuant to the FPA and the U.S. Department of Energy Organization Act, is authorized to issue licenses for up to 50 years for the construction and operation of non-Federal hydroelectric developments subject to its jurisdiction. The FPA authorizes NMFS to issue mandatory prescriptions for fish passage and recommend other measures to protect salmon, steelhead, and other anadromous fish.

The Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801 *et seq*.) is the principal law governing marine fisheries conservation and management in the United States. Chinook salmon Essential Fish Habitat (EFH) is identified and described to include all water bodies currently or historically occupied by Chinook salmon in California, and Chinook salmon EFH was identified for the upper Yuba River upstream of Englebright Dam (50 CFR 660.412(a) and part 660, subpart H, table 1). Under the MSA, Federal agencies are required to determine whether a Federal action they authorize, fund, or undertake may adversely affect EFH (16 U.S.C. 1855(b)).

At the state level, the California Fish and Game Code (CFGC) Fish and Wildlife Protection and Conservation provisions (CFGC section 1600, *et seq*.), the CESA (CFGC section 2050, *et seq*.), and the California Environmental Quality Act (CEQA) (Public Resources Code section 21000, *et seq*.) set forth criteria for the incorporation of avoidance, minimization, and feasible mitigation measures for on-going activities as well as for individual projects. The CFGC Fish and Wildlife Protection and Conservation provisions were enacted to provide conservation for the state's fish and wildlife resources and include requirements to protect riparian habitat resources on the bed, channel, or bank of streams and other waterways. CESA prohibits the taking of listed species except as otherwise provided in state law. Under the 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 public agencies shall incorporate such measures absent overriding consideration.

Regarding the effects that establishment of the experimental population will have on the recovery of the species, the Central Valley recovery plan (NMFS 2014) characterizes the NEP Area as having the potential to support a viable population of Chinook salmon. The Central Valley recovery plan establishes a framework for reintroduction of Chinook salmon and steelhead to historical habitats upstream of dams. The framework recommends that a reintroduction program should include feasibility studies, habitat evaluations, fish passage design studies, and a pilot reintroduction phase prior to implementation of the long-term reintroduction program. In addition, the Central Valley recovery plan contains specific management strategies for recovering CV spring-run Chinook salmon that include securing existing populations and reintroducing this species into historically occupied habitats upstream of rim dams in the Central Valley of California (NMFS 2014). The Central Valley recovery plan concludes, and we continue to agree, that establishing an experimental population in the NEP Area that persists into the

foreseeable future is expected to reduce extinction risk from natural and anthropogenic factors by increasing abundance, productivity, spatial structure, and diversity within California's 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, which are described next, will contribute to this species' near-term viability and recovery.

Across the Central Valley, a number of actions are being undertaken to improve habitat quality and quantity for CV spring-run Chinook salmon. Collectively, implementation of the San Joaquin River Restoration Program (*https://www.restoresjr.net/*), Battle Creek Salmon and Steelhead Restoration Project (*https://www.usbr.gov/mp/battlecreek/*), and the Central Valley Flood Protection Plan (Department of Water Resources - DWR 2011) will result in many projects that will improve habitat conditions. The San Joaquin River Restoration Program will improve passage survival and spatial distribution for CV spring-run Chinook salmon in the San Joaquin River corridor. The Battle Creek Salmon and Steelhead Restoration Project will improve passage and rearing survival, spawning opportunities and spatial distribution in Battle Creek. The Central Valley Flood Protection Plan (DWR 2011) will improve juvenile rearing conditions during outmigration by creating and improving access to high quality floodplain habitats.

Climate change is expected to exacerbate existing habitat stressors in California's Central Valley and increase threats to Chinook salmon and steelhead by reducing the quantity and quality of freshwater habitat (Lindley *et al*., 2007). Significant contraction of thermally suitable habitat is predicted, and as cold-water sources contract, access to cooler headwater streams is expected to become increasingly important for CV spring-run Chinook salmon in the Central Valley (Crozier *et al*., 2018). For this reason and other reasons described above, we anticipate reintroduction of CV spring-run Chinook salmon

into the NEP Area will contribute to their conservation and recovery.

Existing or anticipated Federal or state actions or private activities within or adjacent to the NEP Area may affect the experimental population. The NEP Area is sparsely populated and ongoing state, Federal and local activities include forest management, limited mining, road maintenance, limited residential development, grazing, and tourism and recreation. These activities will likely continue into the future and are anticipated to have minor impacts to CV spring-run Chinook salmon in the NEP Area and adjacent areas. Potential impacts from these and other activities are further minimized through application of the aforementioned state and Federal regulations. Dams and water diversions in the NEP Area currently limit fish populations in some parts of the NEP Area. NMFS anticipates releases of CV spring-run Chinook salmon will be specifically targeted into riverine reaches with abundant high-quality habitats that are not blocked by barriers to fish passage, impaired by high water temperatures or inadequate flows. The habitat improvement actions called for in the Central Valley recovery plan, as well as compliance with existing Federal, state, and local laws, statutes, and regulations, including those mentioned above, are expected to contribute to the establishment and survival of the experimental population in the upper Yuba River in the foreseeable future. Although the donor source for this reintroduction effort is anticipated to include hatchery-origin individuals from the FRH, based on the factors discussed above, we conclude it is probable that a self-sustaining experimental population of CV spring-run Chinook salmon will become established and survive in the upper Yuba River. Furthermore, we conclude that such a self-sustaining experimental population of genetically compatible individuals is likely to further the conservation of the species, as discussed above.

2. Identification of the Experimental Population and Geographic Separation from the Nonexperimental Populations of the same Species

Section 10(j)(2)(B) of the ESA requires we identify experimental populations by

regulation. ESA section 10(j)(1) also provides that a population is considered an experimental population only when, and at such times as, it is wholly separate geographically from the nonexperimental population of the same species. The NEP Area would extend upstream from Englebright Dam and include the North, Middle, and South Yuba Rivers and their tributaries up to the ridgeline. The experimental population will be geographically separated from the extant ESU of CV spring-run Chinook salmon while in the NEP Area, but will intermingle with other Chinook salmon populations as they migrate downstream of the NEP Area, while in the ocean, and on part of their upstream spawning migration. The "experimental" population designation is geographically based and does not travel with the fish outside the NEP Area.

The NEP Area provides the requisite level of geographic separation because the extant population of CV spring-run Chinook salmon are currently extirpated from this area due to the presence of Englebright Dam, which blocks their upstream migration. Straying of fish from other spring-run Chinook populations into the NEP Area is currently not possible due to the presence of this dam. As a result, the geographic description of the extant CV spring-run Chinook ESU does not include the NEP Area.

NMFS anticipates that CV spring-run Chinook salmon used for the initial stages of a reintroduction program would be marked, for example, with specific fin clips and/or coded-wire tags to evaluate stray rates and allow for broodstock collection of returning adults that originated from the experimental population. Any marking of individuals of the experimental population, such as clips or tags, would be for the purpose of evaluating the effectiveness of a near-term and long-term fish passage program, and would not be for the purpose of identifying fish from the NEP Area other than for broodstock collection of returning adults. As discussed above, the experimental population is identified based on the geographic location of the fish. Indeed, if the reintroduction is successful as expected, and fish begin reproducing naturally, their offspring would not be distinguishable from

fish from other Chinook salmon populations. Outside of the NEP Area, *e.g.*, downstream of Englebright Dam in the lower Yuba, lower Feather and Sacramento Rivers, or in the ocean, any such unmarked fish (juveniles and adults alike) would not be considered members of an experimental population. They would be considered part of the CV spring-run Chinook salmon ESU currently listed under the ESA. Likewise, any fish that were marked for release into the NEP Area would not be considered part of the experimental population once they left the NEP Area; rather, they would be considered part of the ESU currently listed under the ESA.

3. Is the experimental population essential to the continued existence of the species?

As discussed above, ESA section 10(j)(2)(B) requires the Secretary to determine whether experimental populations would be "essential to the continued existence" of the listed species. The statute does not elaborate on how this determination is to be made. However, as noted above, Congress gave some further attention to the term when it described an essential experimental population as one whose loss "would be likely to appreciably reduce the likelihood of survival of that species in the wild" (Joint Explanatory statement, supra*,* at 34). NMFS regulations incorporated this concept into its definition of an essential experimental population at 50 CFR 222.501(b), which provides an experimental population that if lost, the survival of the species in the wild would likely be substantially reduced.

In determining whether the experimental population of CV spring-run Chinook salmon is essential, we used the best available information as required by ESA section 10(j)(2)(B). Furthermore, we considered the geographic location of the experimental population in relation to other populations of CV spring-run Chinook salmon, and the likelihood of survival of these populations without the existence of the experimental population.

The CV spring-run Chinook salmon ESU includes four independent populations and several dependent or establishing populations. Given current protections and restoration efforts, these populations are persisting without the presence of a population in the NEP Area. It is expected that the experimental population will exist as a separate population from those in the Sacramento River basin and will not be essential to the survival of those populations. Based on these considerations, we conclude the loss of the experimental population of CV spring-run Chinook in the NEP Area is not likely to appreciably reduce the likelihood of the survival of the species in the wild. Accordingly, NMFS is designating this experimental population as nonessential. Under section 10(j)(2)(C)(ii) of the ESA we cannot designate critical habitat for a nonessential experimental population.

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

As indicated above, ESA section 10(j)(2)(C) requires that experimental populations be treated as threatened species, except, for nonessential experimental populations, certain portions of ESA section 7 do not apply and critical habitat cannot be designated. Congress intended that the Secretary would issue regulations deemed necessary and advisable to provide for the conservation of experimental populations just as he or she does, under ESA section 4(d), for any threatened species (Joint Explanatory Statement, supra*,* at 34). In addition, when amending the ESA to add section 10(j), Congress specifically intended to provide broad discretion and flexibility to the Secretary in managing experimental populations so as to reduce opposition to releasing listed species outside their current range (H.R. Rep. No. 567, 97th Cong. 2d Sess. 34 (1982)). Therefore, we are exercising the authority to issue protective regulations under ESA section 4(d) for the experimental population of CV spring-run Chinook salmon to identify take prohibitions necessary to provide for the conservation of the species and otherwise

provide assurances to people in the NEP Area.

The ESA defines "take" to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). Concurrent with the ESA section 10(j) experimental population designation, we adopt protective regulations under ESA section 4(d) for the experimental population that would prohibit take of CV spring-run Chinook salmon that are part of the experimental population, except in the following circumstances in the NEP Area:

1. Any take by authorized governmental entity personnel acting in compliance with 50 CFR 223.203(b)(3) 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;

2. Any take that is incidental[2] to an otherwise lawful activity and is unintentional, not due to negligent conduct. Otherwise lawful activities include, but are not limited to, recreation, forestry, water management, agriculture, power production, mining, transportation management, rural development, or livestock grazing, when such activities are in full compliance with all applicable laws and regulations; and

3. Any take that is pursuant to a permit issued by NMFS under section 10 of the ESA (16 U.S.C. 1539) and regulations in 50 CFR part 222 applicable to such a permit.

Process for Periodic Review

Evaluation of the success of an experimental population release will require new monitoring programs developed specifically for this purpose. NMFS anticipates monitoring in the NEP Area, including fish passage efficiency, spawning success, adult and smolt injury and mortality rates, juvenile salmon collection efficiencies, competition with resident species, predation, disease and other types of monitoring will be necessary to gauge the success of the program. We anticipate the status of a reintroduced population of

[2] Incidental take refers to takings that result from, but are not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant. 50 CFR 402.02

CV spring run Chinook salmon in the NEP Area would be evaluated during NMFS' five-year status review process under ESA 4(c)(2). During the 5-year status review, NMFS may evaluate whether the current designation under ESA section 10(j) as a nonessential experimental population is still warranted.

Summary of Comments and Responses

The public comment period for the proposed rule and draft EA was open from December 11, 2020, until March 12, 2021. Public scoping meetings were held February 3 and 11, 2021, to provide background on the project, answer questions and provide details on how to submit written comments. The purpose of the comment period is to help us better understand the concerns of the public on the experimental population designation, take and take exceptions, and associated draft EA. During the comment period, NMFS received 54 written letters with comments, germane to the rulemaking, from entities representing various agencies, nongovernmental organizations, and individuals.

In addition, NMFS engaged in prior public outreach since 2009 including numerous meetings, forums, and discussions regarding reintroduction in the upper Yuba River watershed. Outreach included multi-stakeholder forums, both federally recognized and non-recognized tribes, the Yuba Salmon Forum, the North Yuba Reintroduction Initiative, the Yuba Salmon Partnership and the Yuba Salmon Reintroduction Working Group. These various groups included a diverse array of stakeholders familiar with the Yuba River watershed, including water agencies, tribes, county officials, landowners and managers, and non-governmental organizations.

EA Appendix C contains the public comment letters received and EA Appendix D contains detailed responses. A summary of the comments and our responses to those comments is presented here. Please review EA Appendix D for additional comments and responses to comments not included herein.

Comment. Several commenters stated that we needed to be more specific regarding

what actions would be exempted from ESA Section 9 liability by the 4(d) rule, that we should have included more specific examples of the types activities to be exempted, that we needed to consult with affected parties before promulgating a 4(d) rule, and that we should extend the 4(d) rule to include downstream areas.

Response. The limited protective regulations would prohibit take of the experimental population of CV spring-run Chinook salmon located within the NEP Area, except in certain circumstances as described in the EA and proposed rule, which includes any take that is incidental to an otherwise lawful activity and is unintentional, and not due to negligent conduct. We did not adopt the approach of listing all take excepted activities, but we did include some examples of common activities likely to occur in the NEP Area.

Expanding the 4(d) rule to include areas downstream of the NEP Area to the current listed range of the CV spring-run Chinook salmon ESU is not necessary because an existing 4(d) rule is in place for downstream areas. When CV spring-run Chinook salmon that originated from within the NEP Area are downstream of Englebright Dam, they will be covered under the existing 4(d) rule and will have the same protections as individuals in the extant ESU.

Comment. Commenters stated that the EA was not clear or not consistent with the proposed rule with respect to authorization of the release of fish into the NEP Area.

Response. The EA preferred alternative and the proposed rule both describe the proposed action as the designation of a nonessential experimental population under ESA section 10(j) for any CV spring-run Chinook salmon released into the upper Yuba River watershed by a permittee, authorization of the release of a nonessential experimental population of CV spring-run Chinook salmon into the NEP Area, and establishing take prohibitions for CV spring-run Chinook salmon in the NEP Area and exceptions under ESA section 4(d).

NMFS anticipates a reintroduction effort will occur in the upper Yuba River with the goal of furthering the conservation and recovery of CV Chinook salmon. NMFS' rulemaking designates and authorizes release of a nonessential experimental population of CV spring-run Chinook salmon, pursuant to ESA section 10(j), in the upper Yuba River and its tributaries upstream of Englebright Dam, and establishes take prohibitions for the nonessential experimental population and exceptions for particular activities under ESA section 4(d). Release of fish would not occur until after the completion of additional future actions as part of either a pilot reintroduction program and/or a long-term project-specific reintroduction effort. NMFS' rulemaking is an administrative step regarding the NEP designation and authorization for release of CV spring-run Chinook salmon. The rulemaking does not include or authorize specific actions regarding the capture, transport of CV spring-run Chinook salmon individuals or identification of precise release locations. These steps are necessary to implement a future reintroduction effort. NMFS intends to develop a reintroduction plan in cooperation with CDFW and other stakeholders prior to the release of CV spring-run Chinook salmon into the NEP Area. The reintroduction plan will include details regarding the source population, numbers and life stages of fish to be released, methods of fish transport, how fish will be marked and release locations within the NEP Area. Additionally, threatened CV spring-run Chinook salmon individuals from outside the NEP Area will not be captured, transported or released into the NEP Area until the necessary State of California and Federal permits are acquired by the permittee(s) for either a pilot program or long-term project-specific reintroduction effort. For example, future permitting under section 10(a)(1)(A) will be required once a reintroduction plan is submitted for regulatory review. Any collection of CV spring-run Chinook salmon as part of a pilot program or a project-specific reintroduction plan would be subject to NMFS's approval of a permit under ESA section 10(a)(1)(A), which will require additional analyses of the specific plan for capture,

transport, and release of individuals under the National Environmental Policy Act (NEPA) and ESA section 7.

Comment. Some commenters thought NMFS has not worked cooperatively with stakeholders.

Response. NMFS engaged in numerous meetings, forums, and discussions regarding reintroduction in the upper Yuba River watershed since at least 2009 including multi-stakeholder forums, federally recognized and non-federally recognized tribes, the Yuba Salmon Forum, the North Yuba Reintroduction Initiative, the Yuba Salmon Partnership, the Sierra County Fish and Game Commission, and the Yuba Salmon Reintroduction Working Group. These various groups included a diverse array of stakeholders familiar with the Yuba River watershed, including water agencies, tribes, county officials, landowners and managers, and non-governmental organizations.

Comment. We received several comments regarding instream flows that expressed concerns related to changes to instream flows and potential effects to foothill yellow-legged frogs, FERC licenses, water supply and whether baseline flows in the NEP Area would support a reintroduced population of CV spring-run Chinook salmon.

Response. The proposed action does not include changes to instream flows including changes to yellow-legged frog habitat or water supply. NMFS reviewed the best available scientific and commercial information regarding the suitability of habitat in the NEP Area to support key life stages of CV spring-run Chinook salmon including a review by the Yuba Salmon Forum (2013) and Stillwater (2013). Both reports indicate that riverine flows necessary to support the aforementioned life stages present in the upper watershed. NMFS recognizes that other agencies with authorities under the FPA may request FERC implement flow recommendations if anadromous fish are present below FERC regulated facilities. NMFS assumes that other agencies will implement laws, plans, and policies under their regulatory jurisdiction. NMFS cannot predict how other agencies

will implement their regulatory framework if a nonessential population of CV spring-run Chinook salmon is reintroduced into the NEP Area.

Comment. A few commenters stated that we ignored key components of NMFS' recovery plan that provides a framework for reintroduction.

Response. The NEP Area (the upper Yuba River watershed) was identified as a high priority for reintroduction in the NMFS' Central Valley recovery plan (NMFS 2014). The recovery plan (Action ID YUR-1.1) recommends developing and implementing "a program to reintroduce spring-run Chinook salmon and steelhead to historic(al) habitats upstream of Englebright Dam. The program should include feasibility studies, habitat evaluations, fish passage design studies, and a pilot reintroduction phase prior to implementation of the long-term reintroduction program." NMFS rulemaking is an initial regulatory step towards implementing reintroduction into the upper Yuba River as recommended in the recovery plan, by authorizing release of a nonessential experimental population into the NEP Area and providing substantial regulatory relief through a 4(d) rule.

Comment. Several commenters stated that we did not comply with 50 CFR 222.502(b), which requires us to consider four factors: 1) the adverse effects on extant populations as a result of removal of individuals, eggs, or propagules for introduction elsewhere; 2) the likelihood that any such experimental population will become established and survive in the foreseeable future; 3) the effects that establishment of an experimental population will have on the recovery of the species; and 4) the extent to which the introduced population may be affected by existing or anticipated Federal or state actions or private activities within or adjacent to the experimental population area.

Response. NMFS evaluated all of the factors in the EA: 1) The EA describes that donor stock will likely come from the FRH. Other potential donor stocks would only be used if those populations could sustain the removal of fish without adverse population

level effects. Any collection of CV spring-run Chinook salmon would be subject to NMFS' approval of a permit under ESA section 10(a)(l)(A), which includes an HGMP and an analysis under NEPA and ESA section 7. Thus, NMFS anticipates that there will be a need for future authorization for the collection of CV spring-run Chinook salmon, an HGMP, subsequent issuance of a 10(a)(1)(A) permit, and a future analysis under the ESA and NEPA when NMFS receives a permit application.

2) Re-establishing populations of CV spring-run Chinook salmon upstream of California's Central Valley rim dams, including the upper Yuba River, would aid in the conservation and recovery of the CV spring-run Chinook salmon ESU by increasing abundance and productivity, improving spatial structure and diversity, and reducing the risk of extinction (see EA section 1.2.5). NMFS' 2014 Central Valley recovery plan emphasizes that reintroduction of all ESA listed Central Valley salmonids into some of their currently blocked but historically accessible habitats is necessary for their conservation and recovery. Reintroduction into the upper Yuba River clearly follows recovery plan recommendations and is anticipated to directly contribute to the conservation of the ESU. In contrast, not moving forward with a reintroduction will ensure that the CV spring-run Chinook salmon remain at high risk of extinction.

3) Included in NMFS 10(j) regulations is the requirement that NMFS have a process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species. The ESA requires that NMFS conduct a status review every five years for all listed species under its regulatory jurisdiction. These requirements would ensure NMFS tracks the status of the experimental population and would develop information to assess the effectiveness of the rule, and if necessary, would trigger revision to the regulation through the rulemaking process. This would ensure that the reintroduction of CV spring-run Chinook to the NEP Area is providing for the conservation of the species as expected. Also, it would ensure the

nonessential designation is reviewed periodically, and updated by regulation, if necessary. The best available information on habitat in the NEP Area indicates suitable habitat exists for CV spring-run Chinook salmon.

4) EA Section 7.4 describes the effects of past, present, and reasonably foreseeable future actions. EA section 7.5 describes incremental impacts when added to other past, present, and reasonably foreseeable future actions. Release locations will occur in reaches with suitable habitat for the experimental population within the NEP Area.

Comment. Several commenters questioned whether the non-essential designation could be changed to an essential designation.

Response. We concluded that it is appropriate to designate the reintroduced population as non-essential after determining that the loss of the reintroduced population would be unlikely to appreciably reduce the likelihood of the survival of the species in the wild. Climate change will likely worsen the status of the extant CV spring-run Chinook salmon ESU absent significant restoration and enhancement actions in both currently accessible and historical but inaccessible habitats. The limited, impaired, and stressed conditions of currently accessible habitat are anticipated to deteriorate further due to climate change, rendering many currently accessible riverine reaches unsuitable for migration, holding, spawning, and rearing. Providing access to high quality, cold water, historical habitat that is blocked by dams will help address and partially offset these impacts. NMFS will review the status of CV spring-run Chinook salmon in the NEP Area as part of our 5-year review process. During the 5-year review NMFS may evaluate whether the current designation under ESA section 10(j) as a nonessential experimental population is still warranted. To date, none of the NMFS nonessential experimental population designations have been changed to an essential experimental population status. Furthermore, to our knowledge, none of the USFWS' more than 60 nonessential experimental population designations have been changed to an essential experimental

population status. Congress envisioned that in most cases, experimental populations would be nonessential.

Comment. Some commenters requested that we use marks or genetic tags to identify the experimental population and to help distinguish them from other fish when outside of the NEP Area.

Response. If and when a permit application for a reintroduction is received by NMFS and tagging is determined necessary, methods to mark experimental population fish will be identified.

Comment. Some commenters stated that the NEP Area described in the proposed rule and draft EA was too broad. A few commenters wanted the NEP Area to be limited to the North Yuba River. Some commenters stated that there were inconsistencies between the proposed rule and the draft EA relative to where fish would be released in the NEP Area.

Response. We determined that limiting the release to the North Yuba River could unduly constrain future opportunities and limit participation from key potential partners with interest in the upper Yuba River. Nonetheless, NMFS also acknowledges the high quality and quantity of available habitat in the North Yuba River relative to the Middle and South Yuba Rivers. A future reintroduction effort in the upper watershed, regardless of location, would need to occur in locations that provide suitable habitat, in sufficient quantity, for establishment of an independent population(s) of CV spring-run Chinook salmon into the foreseeable future.

The NEP Area, as described in the EA and rule, includes the entire upper Yuba River watershed, which extends from the crest of the Sierra-Nevada Mountains down to Englebright Dam. As described in the draft EA and proposed rule, the amount of potentially suitable habitat for anadromous salmonids in the upper Yuba River varies as a function of flow and related environmental conditions such as water temperature. Dams

and water diversions in the NEP Area currently limit suitable habitat in some areas. NMFS anticipates a future reintroduction effort would target stream reaches with suitable habitat. The NEP Area includes more than the actual riverine areas where habitat could support reintroduced fish. The size of the NEP Area was specifically designed to account for possible volitional straying of CV spring-run Chinook salmon from areas targeted for release as part of a future reintroduction effort. The NEP Area also expands beyond riverine areas in order to provide ESA section 4(d) coverage for otherwise legal activities.

After review of the comments and further consideration, we have decided to adopt the proposed rule that was published in the **Federal Register** (85 FR 79980) on December 11, 2020, with only non-substantive editorial changes. Minor modifications were made to remove unnecessary regulatory language and provide clarity. The modifications make no change to the substance of the rule.

Findings

Based on the best available information, we determine that the designation of and release of a nonessential experimental population of CV spring-run Chinook salmon in the upper Yuba River NEP Area will further the conservation of CV spring-run Chinook salmon. CV spring-run Chinook salmon used to initiate the reintroduction are anticipated to come from the FRH using either donor stock from the Feather or Yuba Rivers, which is part of the CV spring-run Chinook salmon ESU. The collection of donor stock from the FRH will require issuance of a permit under section 10(a)(1)(A) of the ESA, which includes analysis under NEPA and ESA section 7. The experimental population fish are expected to remain geographically separate from the extant CV spring-run Chinook salmon ESU during the life stages in which they remain in, or are returned to, the NEP Area. At all times when members of the experimental population are downstream of Englebright Dam, the experimental population designation will not apply. Establishing an experimental population of CV spring-run Chinook salmon in the NEP Area would likely

contribute to the viability of the ESU. Authorization for the experimental population release is consistent with the 2014 Central Valley recovery plan, while at the same time ensuring that a reintroduction will not impose undue regulatory restrictions on landowners and third parties.

We further determine, based on the best available scientific information, that the experimental population would not be essential to the continued existence of the CV spring-run Chinook salmon ESU, because absence of the experimental population would not be likely to appreciably reduce the likelihood of the survival of the ESU in the wild. However, as described above, the experimental population is expected to contribute to the recovery of the CV spring-run Chinook salmon ESU if reintroduction is successful. We therefore designate the population to be released as a nonessential experimental population.

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 rule that meet this criteria.

Classification

Executive Order 12866

This final rule has been determined by the Office of Management and Budget to be not significant under Executive Order 12866.

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

The Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy at the proposed rule stage that this rule will not have a significant effect on external entities, including small businesses, small organizations, or small governments. No comments were received regarding the economic impact of this final rule on small entities. The factual basis for this certification was published with the proposed rule and is not repeated here. Because this rule requires no additional regulatory requirements for activities within the affected area, a final regulatory flexibility analysis is not required and one was not prepared.

Executive Order 12630

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

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

Executive Order 13132

In accordance with Executive Order 13132, we have determined that this final rule does not have federalism implications as that term as defined in Executive Order 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 final rule does not include any new collections of information that require approval by OMB under the Paperwork Reduction Act.

National Environmental Policy Act

In compliance with all provisions of the National Environmental Policy Act of 1969 (NEPA), we have analyzed the impact on the human environment and considered a reasonable range of alternatives for this final rule. We made the draft EA available for public comment along with the rule, received 54 letters with comments germane to the rule, and responded to those comments in an Appendix to the EA. We have prepared a final EA and Finding of No Significant Impact (FONSI) on this action and have made these documents available for public inspection (see ADDRESSES section).

Government-to-Government Relationship with Tribes (Executive Order 13175)

Executive Order 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 in the NEP Area. As part of NMFS's obligations under the National Historic Preservation Act, NMFS inquired with federally recognized and non-federally recognized tribes with potential interest in the NEP Area to inform them of the rule and solicit information on cultural resources eligible for listing on the National Register of Historic Places (letters dated May 23, 2017, from Maria Rea, Central Valley Office Supervisor, NMFS, and letters dated May 26, 2020, from Cathy Marcinkevage, Central Valley Office Supervisor, NMFS). To date responses have been limited and no concerns over the proposed rule have been raised. NMFS invites tribes to meet with us to have detailed discussions that could lead to government-to-government consultation meetings with tribal governments. We will continue to coordinate with the affected tribes.

References Cited

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

List of Subjects in 50 CFR Part 223

Endangered and threatened species, Exports, Imports, Transportation.

Dated: December 20, 2022.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 223 is amended as follows:

PART 223--THREATENED MARINE AND ANADROMOUS SPECIES

1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531-1543; subpart B, § 223.201-202 also issued under 16 U.S.C. 1361 *et seq*.; 16 U.S.C. 5503(d) for § 223.206(d)(9).

2. In § 223.102, amend the table in paragraph (e) by adding an entry for "Salmon, Chinook (Central Valley spring-run ESU-XN Yuba)" under "Fishes" in alphabetical order by common name to read as follows:

§ 223.102 Enumeration of threatened marine and anadromous species.

* * * * *

(e) * * *

Species[1]			Citation(s) for listing determinations(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
* * * * * * *					
Fishes					
* * * * * * *					
Salmon, Chinook (Central Valley spring-run ESU-XN Yuba)	*Oncorhynchus tshawytscha*	Central Valley spring-run Chinook salmon only when, and at such times as, they are found in the upper Yuba River watershed, upstream of Englebright Dam.	[INSERT **FEDERAL REGISTER** CITATION], [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]	NA	223.301

Species[1]			Citation(s) for listing determinations(s)	Critical habitat	ESA rules
Common name	Scientific name	Description of listed entity			
* * * * * * *					

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

* * * * *

3. In § 223.301, add paragraph (d) to read as follows:

§ 223.301 Special rules—marine and anadromous fishes.

* * * * *

(d) *Upper Yuba River Central Valley spring-run Chinook salmon experimental population* (*Oncorhynchus tshawytscha*)—(1) *Status of Upper Yuba River Central Valley spring-run Chinook salmon under the Endangered Species Act*. The Upper Yuba River Central Valley spring-run Chinook salmon population identified in paragraph (d)(2) of this section is designated as a nonessential experimental population under section 10(j) of the Endangered Species Act (ESA) and shall be treated as a "threatened species" pursuant to 16 U.S.C. 1539(j)(2)(C).

(2) *Upper Yuba River Central Valley spring-run Chinook salmon nonessential experimental population*. All Central Valley spring-run Chinook salmon within the NEP area in the upper Yuba River watershed upstream of Englebright Dam, as defined in this paragraph (d)(2), are considered part of the Upper Yuba River Central Valley spring-run Chinook salmon nonessential experimental population. The boundaries of the NEP area include Englebright Dam and all tributaries draining into Englebright Reservoir up to the ridgeline.

(3) *Prohibitions*. Except as expressly allowed in paragraph (d)(4) of this section, all prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538 (a)(1)) apply to fish that are part of the Upper Yuba River Central Valley spring-run Chinook salmon nonessential experimental population identified in paragraph (d)(2) of this section.

(4) *Exceptions to the application of section 9 take prohibitions in the NEP area*. The following forms of take in the NEP area identified in paragraph (d)(2) of this section are not prohibited by this section:

(i) Any taking of Central Valley spring-run Chinook salmon by authorized governmental entity personnel acting in compliance with § 223.203(b)(3) 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;

(ii) Any taking of Central Valley spring-run Chinook salmon that is unintentional, not due to negligent conduct, and incidental to, and not the purpose of, the carrying out of an otherwise lawful activity; and

(iii) Any taking of Central Valley spring-run Chinook salmon pursuant to a permit issued by the National Marine Fisheries Service (NMFS) under section 10 of the ESA (16 U.S.C. 1539) and regulations in part 222 of this chapter applicable to such a permit.

[FR Doc. 2022-27953 Filed: 12/27/2022 8:45 am; Publication Date: 12/28/2022]