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RE: Proposed rule: Designation of Critical Habitat for 13 Evolutionarily Significant Evolutionarily Significant Units of Pacific Salmon (*Oncorhynchus* spp.) and Steelhead (*O. mykiss*) in Washington, Oregon, and Idaho: Docket Number [030716175-4327-03]; RIN Number [0648-AQ77]

Proposed rule: Designation of Critical Habitat for Seven Evolutionarily Significant Units of Pacific Salmon (*Oncorhynchus tshawytscha*) and Steelhead (*O. mykiss*) in California: Docket Number [041123329-4329-01]; RIN Number [0648-AO04]

INTRODUCTION

In April 2002, the National Marine Fisheries Service (“NMFS”) entered into a consent decree vacating critical habitat for 19 Evolutionarily Significant Units (“ESUs”) of salmon and steelhead listed pursuant to the Endangered Species Act (“ESA”). National Ass’n of Home Builders v. Evans, No. 1:00-CV-02799 CKK (D.D.C. April 30, 2002). The designated critical habitat covered over 150 river basins in California, Oregon, Washington, and Idaho. See 65 Fed. Reg. 7,764 (February 16, 2000) (designating critical habitat); 68 Fed. Reg. 55,900 (Sept. 29, 2003) (vacating critical habitat). Subsequently, NMFS entered into a second

consent decree, pledging to re-designate the critical habitat by January 2005.¹ Pacific Coast Federation of Fishermen's Ass'ns v. NMFS, No. 03-1833 JR (D.D.C. Sept. 13, 2003). As a result, on December 10, 2004, NMFS issued a proposed rule for the designation of critical habitat for seven ESUs in California (SW proposed rule). 69 Fed. Reg. 71880 (Dec. 10, 2004). Additionally, on December 14, 2004, NMFS issued a proposed rule for the designation of critical habitat for the remaining 13 ESUs, in Washington, Oregon, and Idaho (NW proposed rule). 69 Fed. Reg. 74572 (Dec. 14, 2004). Pacific Rivers Council submits the following comments in response to the proposed rules. While not intended to be exhaustive, our comments below note some of our concerns and issues with regard to the critical habitat designation.

COMMENTS

I. NMFS SHOULD INCLUDE RIPARIAN AREAS IN THE CRITICAL HABITAT DESIGNATION

NMFS' proposal to designate the lateral extent of critical habitat as the ordinary or extreme high water mark is arbitrary, unjustified, and contrary to the best available science. In the February 16, 2000, final rule designating critical habitat, NMFS designated riparian areas that provided essential functions for salmonid habitat. 65 Fed. Reg. 7764 (Feb. 16, 2000). NMFS now proposes to eliminate riparian areas from protection, limiting the boundary of critical habitat to the ordinary or extreme high water mark. However, NMFS' has failed to provide sufficient justification for the change, and has failed to provide any scientific basis for the shift.

Critical habitat includes "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection." Endangered Species Act (ESA), 16 U.S.C. § 1532(5)(A). The physical habitat forming processes, associated functions, and biological features essential to the conservation of salmonids can be found not only within the high water mark of a stream, but also in the adjacent riparian area (Reiser and Bjornn, 1979; Andrus et al. 1988; Meehan, 1991; Gregory et al. 1991; Bilby and Ward 1991; Benda et al. 1992; Naiman et al. 1992; Johnson and Ryba, 1992; FEMAT, 1993; Montgomery and Buffington 1993; O'Conner and Harr 1994; Castelle *et al.* (1994); Spence *et al.*, 1996; Stouder et al. 1997; Sedell et al. 1998; Naiman and Bilby 1998; Chesney 2000; Benda et al. 2003). As explained in NMFS's 2000 final rule, "[r]iparian areas form the basis of healthy watersheds and affect the[] primary constituent elements; therefore, they are essential to the conservation of the species and need to be included as critical habitat." 65 Fed. Reg. at 7768. Furthermore, according to NMFS,

Streams and stream functioning are inextricably linked to adjacent riparian and upland (or upslope) areas. Streams regularly submerge portions of the riparian zone via floods and channel migration, and portions of the riparian zone may

¹ Because NMFS never designated critical habitat for the northern California steelhead, listed as threatened in 2000, the consent decree involved 20 ESUs of salmon and steelhead.

contain off-channel rearing habitats used by juvenile salmonids, especially during periods of high flow. The riparian zone also provides an array of important watershed functions that directly benefit salmonids.

Id. Despite these explanations by NMFS, in the current proposal NMFS proposes to abandon protections of the riparian area. Yet NMFS fails to provide any credible justification for this change. The sole explanation for the change appears to be that "[d]esignating a functional buffer . . . makes it difficult for Federal agencies to know in advance what areas are critical habitat." SW proposed rule, 69 Fed. Reg. at 71891; NW proposed rule, 69 Fed. Reg. at 74584. The purported difficulty of agencies in identifying critical habitat is a legally insufficient justification for failing to designate riparian areas as critical habitat. It does not change the fact that these riparian areas contain physical and biological features that are essential to the species and that require special management consideration. Furthermore, instead of providing a justification for its proposal, NMFS restates the intrinsic connection between riparian zones and aquatic habitat quality, and explains that human activities in these areas can adversely modify aquatic habitat. *Id.* There is no rational connection between these explanations and the proposal to exclude riparian areas from critical habitat designation.

NMFS' proposal to designate the lateral extent of critical habitat as the high water mark is also contrary to the best available science. Current science does not support the conclusion that proper functioning of aquatic habitat ends at a high water mark. Rather, the high water mark is an arbitrary mark that NMFS has chosen as the boundary for critical habitat protection. Neither the principles of geomorphology, watershed processes, nor the biological needs of salmonids support the conclusion that essential physical habitat forming processes or biological features end at a high water mark (Andrus et al. 1988; Gregory et al. 1991; Bilby and Ward 1991; Benda et al. 1992; Naiman et al. 1992; Montgomery and Buffington 1993; O'Conner and Harr 1994; Stouder et al. 1997; Sedell et al. 1998; Naiman and Bilby 1998; Chesney 2000; Benda et al. 2003; Brososke et al. 1997; Hewlett and Fortson 1982; see also Baxter and Hauer 2000; Baxter et al. 1999). In fact, NMFS fails to provide any scientific basis for its proposal. In its 2000 final rule, NMFS cited multiple scientific studies describing the need to protect riparian areas, and "the functions of riparian zones that are essential to development and maintenance of aquatic habitats favorable to salmonids." 65 Fed. Reg. at 7768-69. Yet in the proposed rule, it cites no studies at all regarding riparian function, in particular failing to provide any studies that draw the conclusions of the prior cited studies into question.

As explained in the proposal, "human activities that occur outside the area inundated by extreme or ordinary high water can modify or destroy physical and biological features" of salmonid habitat. SW proposed rule, 69 Fed. Reg. at 71891; NW proposed rule, 69 Fed. Reg. at 74584. Furthermore, as NMFS explained in its 2000 final rule, "[w]ith a designation of critical habitat, potential conflicts between Federal actions and endangered or threatened species can be identified and possibly avoided early in an agency's planning process." 65 Fed. Reg. at 7765. Under NMFS' current proposal, activities that occur in the riparian area will not necessarily be identified nor avoided, resulting in modification and destruction of salmonid habitat. Therefore, the proposal to eliminate riparian protection is unjustified.

II. NMFS' PROPOSAL RELIES UPON AN OVERLY NARROW INTERPRETATION OF OCCUPIED HABITAT AND IGNORES THE BENEFITS OF UNOCCUPIED HABITAT

The ESA defines critical habitat to include both occupied and unoccupied habitat. Specifically, critical habitat includes occupied areas "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i). Critical habitat also includes unoccupied areas that are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). Thus the focus in designating critical habitat must be upon whether an area is essential to conserve and recover a listed species, and not whether the species is actually occupying the area at a given moment in time. In its current proposal, however, NMFS ignores the best available science and undermines the ESA by proposing to narrowly designate critical habitat to include only the areas it believes are "actually occupied." SW proposed rule, 69 Fed. Reg. at 71887; NW proposed rule, 69 Fed. Reg. at 74580.

NMFS has failed to sufficiently explain why it is abandoning its prior method of designating critical habitat to include accessible reaches of all rivers and why its rationale for using this method no longer applies. In its 2000 rule, NMFS used a more precautionary approach in determining occupied habitat, in compliance with the ESA's adoption of the precautionary principle (see e.g. *TVA v. Hill*, 427 U.S. 153, 194 (1978), H.R. Rep. No. 93-412, p 4-5 (1973)). The agency explained,

NMFS believes that adopting a more inclusive, watershed-based description of critical habitat is appropriate because it: (1) recognizes the species' use of diverse habitats and underscores the need to account for all of the habitat types supporting the species' freshwater and estuarine life stages, from small headwater streams to migration corridors and estuarine rearing areas; (2) takes into account the natural variability in habitat use that makes precise mapping problematic (e.g. some streams may have fish present only in years with abundant rainfall); and (3) reinforces the important linkage between aquatic areas and adjacent riparian/upland areas.

65 Fed. Reg. at 7767. All three of these reasons for more broadly designating critical habitat still apply today. NMFS has not adequately explained why it no longer supports these reasons for a more inclusive approach to designating critical habitat. Nor is it clear why NMFS no longer "believes that the most prudent approach to characterizing critical habitat is to include all areas accessible to listed salmon and steelhead." *Id.* It is apparent that NMFS does not have a reasonable basis for this policy shift, and is instead ignoring the best available science in order to further its political agenda of reducing protections for listed species.

NMFS' attempts to explain its new proposal are inadequate and flawed. NMFS explains that in its 2000 critical habitat designations, habitat was designated as all accessible areas because available species distribution data were inadequate to designate critical habitat at a finer scale.

NMFS now claims that it has more current data that enable the agency to more precisely declare which areas are occupied and which are not. In fact, NMFS is attempting to define the area "occupied" by a listed ESU in an overly simplistic and narrow manner, which is contrary to the best available science. Current data on occupation do not reliably indicate the extent of habitat that salmon historically or currently utilize. Whether a particular stream reach is occupied cannot be determined with certainty based upon "occupation" data alone, especially for fragmented, declining, or depressed populations of fish.

According to NMFS "current mapping identifies occupied stream reaches where the species has been observed." NW proposed rule, 69 Fed. Reg. at 74580; see also SW proposed rule, 69 Fed. Reg. at 71887. Whether or not a species has been observed in a particular stream reach is not determinative of whether that stream reach is part of the species' habitat. In many cases, local and regional population fluctuations are severely limited by reduced escapement levels directly resulting from historic and current commercial fishing pressure (Brown et al. 1994; Huntington et al. 1996; Johnson et al. 1997; Hassemer and Petrosky 1997; Kostow 1997; Mills et al. 1997; Mundy 1997; Seiler 1997; Reisenbichler 1997; Gresh et al. 2000). A species' habitat and associated watershed may simply be "under-seeded" as a direct result of state and regional fisheries management policies and practices. Other well documented factors affecting salmonid distribution and occupation include watershed processes that are highly degraded due to the legacy affects of forest practices, reduced water quality and quantity resulting from historic and current water allocation and use, or any combination of the above which may cumulatively affect their distribution and occupation (Reeves et al. 1989; Meehan 1991; Naiman et al. 1992; Simpson Timber Co. 1998; Gregory and Bisson 1997; Seiler et al. 1995; Seiler et al. 1997; Gresh et al. 2000). The species may have frequented the stream reach in the past, and may again in the future, even if a biologist did not actually observe the species at the time of the proposal.

It is contrary to the best available science to attempt to define species occupation based upon observation within a narrowly defined time frame. To some degree, salmonid populations demonstrate metapopulation processes, although the processes of extinction and colonization are not necessarily in balance. (Rieman and Dunham 2000; Policansky and Magnuson 1998; Konkel and McIntyre 1987; Lawson 1993; Huntington et al. 1996; Lichatowich 1997; Nothcote and Atagi 1996). If salmonid populations are operating under a metapopulation structure, suitable habitat will not necessarily be occupied at a given time, even though it may have been in the past or might be in the future. (Rieman and Dunham 2000). Thus determining whether a species occupies a given stream reach requires using a broad time scale, and cannot be evaluated by relying on annual observations. NMFS acknowledges that observation is not sufficient to determine occupation, proposing to designate critical habitat based upon the judgment of biologists whether the species is presumed to occur in a given stream reach. However, NMFS goes on to state "such presumptions may not be sufficiently rigorous or consistent to support a critical habitat designation," implying that NMFS believes actual observation is the most appropriate means to determine what constitutes occupied habitat. NW proposed rule, 69 Fed. Reg. at 74570; see also SW proposed rule, 69 Fed. Reg. at 71887. As explained, determining whether a stream reach provides habitat for salmonids based upon human observation is not based upon scientific principles of ecology and population biology; such a narrow definition

undermines the ESA's purpose to "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

Even if NMFS believes "occupation" to narrowly encompass only the specific stream reaches in which it has observed salmonids, the ESA clearly does not limit critical habitat designation so narrowly. The ESA specifically does not limit critical habitat to areas that are "occupied" by a species; instead the ESA recognizes that *historically* occupied habitat may be essential to the conservation of the species, even if it is not currently occupied at the time of designating critical habitat. The goal of critical habitat is to conserve listed species, to recover them to the point that listing is no longer necessary. Some of the most significant reasons that species numbers decline to the point that ESA protections are necessary are habitat degradation and fragmentation (Reeves et al. 1995). If a species' habitat has been so diminished that the species faces extinction, protecting only the remaining occupied habitat will likely not provide the species enough habitat to recover from the threat of extinction. (FEMAT, 1993) Therefore, ESA critical habitat designations are intended to protect existing habitat and historically occupied habitat, which may be used in the future as the species recovers to sustainable levels. In light of the ESA's broad focus on habitat and ecosystem protection, as well as its emphasis of the precautionary principle, there is no basis in the ESA for NOAA's proposal to define critical habitat and occupation as narrowly as possibly.

III. NMFS' PROPOSED EXCLUSIONS BASED UPON OTHER EXISTING REGULATORY AND VOLUNTARY MECHANISMS ARE ARBITRARY, ILLOGICAL, AND NOT BASED UPON THE BEST AVAILABLE SCIENCE

NMFS' proposal to exclude areas from critical habitat designation based upon other existing regulatory mechanisms and voluntary conservation efforts is arbitrary and contrary to the ESA. One of the major purposes of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). To that end, Congress developed multiple mechanisms to ensure that species and their habitats are protected. For example, Congress adopted take prohibitions, provisions to prevent federal agencies from jeopardizing species, and provisions for creating habitat conservation plans to protect private lands. By creating multiple layers of protections, Congress attempted to address the various sources of species declines. Critical habitat is a particularly important element of the ESA because it is designed to *recover* species, not just to maintain them at current levels. *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*, 378 F.3d 1059, 1069-70 (9th Cir. 2004).² Thus critical habitat provides benefits beyond those resulting from section 7 jeopardy analyses, and other existing regulatory and non-regulatory mechanisms.

Congress specifically defined "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 provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3)

²In *Gifford Pinchot Task Force*, the Ninth Circuit concluded that federal actions adversely modify critical habitat if they threaten the recovery of listed species. The court rejected FWS' illogical position that a project only adversely modifies critical habitat if it threatens both a species' recovery *and* survival. *Id.*

(emphasis added). This definition does not allow one conservation method to be used in the place of another if both methods are necessary to recover a species. Nevertheless, NMFS proposes to circumvent congressional intent in its current proposal by excluding areas covered by other regulatory and voluntary mechanisms from critical habitat protections. Other regulatory and voluntary mechanisms do not provide the same protections as critical habitat and therefore cannot substitute for designating critical habitat.

The ESA requires NMFS to designate critical habitat "to the maximum extent prudent." 16 U.S.C. § 1533(a)(3)(A). Critical habitat includes areas "on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5). The plain language of the ESA does not state that the areas need require *additional* special management considerations or protection beyond that provided by other regulatory and non-regulatory mechanisms in order to warrant critical habitat designation. The sole question is whether the area needs *any* special management considerations or protections in order to ensure recovery of the species; if so, then the area should be designated as critical habitat.

Even if NMFS insists upon its interpretation that additional special management considerations or protection must be required before critical habitat can be designated, "special management considerations or protection" include "*any* methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species." 50 C.F.R. 424.02(j). Therefore, critical habitat must be designated, to the extent prudent, anywhere that any additional methods or procedures may be required to recover a listed species. NMFS explicitly recognizes that many different activities may adversely impact listed species. Impacts from activities including "(1) Forestry; (2) grazing; (3) agriculture; (4) road building/maintenance; (5) channel modifications/diking; (6) urbanization (7) sand and gravel mining; (8) mineral mining; (9) dams; (10) irrigation impoundments and withdrawals; (11) river, estuary, and ocean traffic; (12) wetland loss/removal; (13) beaver removal; [and] (14) exotic/invasive species introductions" must be addressed in order to recover listed species. NW proposed rule, 69 Fed. Reg. at 74582; see also SW proposed rule, 69 Fed. Reg. at 71889. Existing regulatory and non-regulatory mechanisms, however, are targeted to specific activities such as forestry. They do not address the full suite of activities that have contributed to the decline of listed species. Other methods are necessary and "useful in protecting physical and biological features of the environment for the conservation of listed species." 50 C.F.R. 424.02(j). Therefore critical habitat must be designated regardless of existing regulatory and non-regulatory mechanisms, which may or may not adequately address particular habitat altering activities. Even if NMFS could justify some exclusions on the basis that the costs of designation outweigh the benefits, NMFS' proposal to exclude multiple areas on the basis of existing regulatory and voluntary mechanisms falls far short of designating critical habitat "to the maximum extent prudent." 16 U.S.C. § 1533(a)(3)(A).

NMFS' purported basis for excluding areas from critical habitat designation based upon existing regulatory and voluntary mechanisms is illogical. The critical habitat proposal states that, for example, in areas where the Northwest Forest Plan controls, critical habitat "potentially offer[s] a

negligible conservation benefit in light of the other existing conservation measures provided by the plan[]." SW proposed rule, 69 Fed. Reg. at 71912; NW proposed rule, 69 Fed. Reg. at 74624. At the same time, NMFS explains that "[i]mposing an overlay of critical habitat in these areas could threaten the provision of . . . other multiple uses." *Id.* Critical habitat serves a vital role because it requires agencies to ensure that their actions do not adversely modify critical habitat. If federal agencies intend to propose actions that would adversely impact crucial habitat, then critical habitat designation in fact provides significant conservation benefits because it prevents these degrading activities from going forward. Critical habitat is specifically necessary because it limits the "multiple uses" that have contributed to the decline of the species to the point that listing was necessary. The prevention of degrading activities is the conservation benefit that critical habitat provides. It is illogical to claim that the stopping of such activities creates costs, but no benefits, when the very reason that the activity would be stopped is because it threatens the recovery of the species. NMFS might argue that critical habitat provides only negligible benefits if federal agencies designed all their actions such that they never adversely modified the habitat; however, if that were the case, the critical habitat designation would not "threaten the provision of . . . other multiple uses," because the designation would not prevent these actions from going forward. *Id.*

NMFS' assumption that existing regulatory and voluntary mechanisms may substitute for critical habitat is flawed because NMFS is deliberately downplaying the benefits that critical habitat provides. In the current proposal, NMFS has minimized the benefits of critical habitat, shifting away from its prior acknowledgement and discussion of the benefits of critical habitat. Specifically, in its 2000 final rule designating critical habitat for salmon and steelhead ESUs, NMFS explicitly recognized the benefits of designating critical habitat. As NMFS explained, in its "benefits of critical habitat designation" section, "[w]ith a designation of critical habitat, potential conflicts between Federal actions and endangered or threatened species can be identified and possibly avoided early in an agency's planning process." 65 Fed. Reg. at 7765. In its current proposal, NMFS fails to explain why this, and other benefits, are no longer meaningful. Instead NMFS has buried its discussion of the benefits of critical habitat within its section on "exclusions" and eliminated altogether its section on the "benefits of critical habitat designation." It is clear that NMFS is unfairly tipping the scale in favor of excluding lands from critical habitat designation, without fairly discussing and acknowledging the important benefits of critical habitat designation.

Furthermore, existing regulatory and voluntary mechanisms are clearly inadequate to protect and recover listed species because the species are still listed. In fact, NMFS recognized that existing regulatory mechanisms are not a substitute for critical habitat in the 2000 final rule. The adequacy of existing regulatory mechanisms as a substitute for critical habitat was raised by commenters when the 2000 rule was proposed. In response to suggestions that existing regulatory mechanisms obviated the need for critical habitat designation, NMFS stated that "[t]he designation of critical habitat relies on evaluating which areas are occupied and essential for the species' conservation" (the implication being that existing regulatory mechanisms are irrelevant to whether an area is essential to the species' conservation). 65 Fed. Reg. at 7772. NMFS also

explained when consideration of existing regulatory mechanisms is proper (implying that it is not proper in designating critical habitat):

NMFS did consider existing regulatory mechanisms and conservation plans applicable to salmon and steelhead and their habitats in the final listing determinations for each species . . . NMFS concluded that available regulatory mechanisms were inadequate and that regulated activities continued to represent a potential threat to the species' existence.

Id. The current proposal fails to explain why this rationale was appropriate in 2000, but is no longer appropriate. The species are still listed; the conclusion that regulatory mechanisms are inadequate to protect listed species has not changed as evidenced by the fact that they are still listed. Given that the species have not recovered to the point that listing is not required, habitat essential for the species' conservation still needs to be designated as critical to ensure their recovery.

NMFS' reliance upon the Oregon Plan is especially improper given that the agency has recognized that this plan has failed to provide for the recovery of salmonids. . 62 Fed. Reg. 24588, 24607 (May 6, 1997). .NMFS' reliance upon Washington Forest and Fish rules is also improper and premature because the agency has never concluded that implementation of these programs will not jeopardize the species, let alone meet the recovery standard that critical habitat is designed to ensure. Similarly, although the Northwest Forest Plan may ensure that listed species' will not be driven to extinction with these areas, the Northwest Forest Plan has not been approved as a method to *recover* listed species. When the Northwest Forest Plan was evaluated in section 7 consultations, the agencies only determined that the Northwest Forest Plan would not appreciably reduce the likelihood of survival of listed species. NMFS has never concluded that this plan will not appreciably reduce the likelihood of recovery of listed species, or modify habitat in a way that will not appreciably reduce the likelihood of recovery of listed species. Eliminating critical habitat designation within areas covered by the plan is a way for NMFS to avoid the recent Ninth Circuit decision *Gifford Pinchot Task Force* that the agency must consider recovery when evaluating whether a proposed action will adversely modify critical habitat. 378 F.3d 1059, 1069-70 (9th Cir. 2004). If the agency fails to designate critical habitat in these areas, it will never consider whether actions within this area are inhibiting the recovery of listed ESUs. NMFS attempted to avoid properly implementing the ESA through its regulatory definition of adverse modification, and now that the court has rejected this definition, it is clear that NMFS is simply looking for other means to avoid using critical habitat for its most important purpose, to recover listed species.

It is clear that NMFS is attempting to shift its rationale for designating critical habitat in this proposal, but it is unclear from the proposal how NMFS reached the conclusion that existing regulatory mechanisms may obviate the need for critical habitat protection for the ESUs at issue in the proposal. In designating critical habitat, NMFS must evaluate the biological needs of the species and determine whether protection of those needs is necessary. However, NMFS specifically explains that, although it convened teams of salmonid biologists and habitat

specialists, it did not solicit the expertise of these scientists for critical information necessary to make the proposed exclusions:

[t]he Teams were not asked to evaluate the effects of existing management protections on the species, or analyze the usefulness of protective methods or procedures in addressing risks to PCEs. Thus, the Teams' evaluations do not reflect the extent to which an area will contribute to conservation of the species in the absence of a critical habitat designation.

SW proposed rule, 69 Fed. Reg. at 71890; NW proposed rule, 69 Fed. Reg. at 74583. The proposal does not explain why this critical information was not requested. The proposal fails to explain the scientific basis for NMFS' claim that existing regulatory programs are sufficient to eliminate the need for critical habitat designation, when it failed to obtain the underlying scientific assessment needed. The proposal further fails to explain what the scientific basis is for its claim that certain areas offer "negligible conservation benefit[s]" as critical habitat in light of existing regulatory mechanisms. E.g. SW proposed rule, 69 Fed. Reg. at 71912; NW proposed rule, 69 Fed. Reg. at 74624.

NMFS' proposed basis for excluding intermingled lands is also flawed. Nothing in the ESA suggests that NMFS should exclude one area of habitat because another area is excluded. Such a methodology could create a domino effect, whereby NMFS virtually eliminates critical habitat designation by allowing one exclusion to trigger another exclusion and so forth. According to NMFS, "[t]here may be little policy justification for designating non-Federal land as critical habitat in a watershed dominated by excluded Federal lands." SW proposed rule, 69 Fed. Reg. at 71912; NW proposed rule, 69 Fed. Reg. at 74624. NMFS fails to clearly explain its rationale for the assumption that excluding federal land from critical habitat designation reduces the benefit of designating state and private land as critical habitat. Whether or not critical habitat is crucial for the recovery of listed species depends upon physical and biological criteria, not whether it is state, private, or federal land. In fact, both state and private land may be critical to the recovery of listed ESUs. Although NMFS is downplaying the role of private land in protecting listed ESUs for purposes of excluding habitat from designation, it specifically points out effects of critical habitat designations upon private entities. "[N]umerous private entities also may be affected by this critical habitat designation because of the direct and indirect linkages to an array of Federal actions, including Federal projects, permits, and funding." SW proposed rule, 69 Fed. Reg. at 71920; NW proposed rule, 69 Fed. Reg. at 74636. If activities on private lands may adversely impact critical habitat for listed salmonids, then the policy justification for designating these lands as critical habitat is that the designation will protect vital habitat for these ESUs. NMFS has provided no scientific basis for its apparent assumption that only Federal lands are critical for the recovery of listed ESUs.

Taking a closer look at the specific activities that are occurring within the habitat of the listed ESUs reveals that existing regulatory and other mechanisms are not adequate to protect these ESUs. Critical habitat designations remain essential to fill in the gaps. The following chart illustrates activities that are occurring within the Umpqua basin, including the Umpqua, South

Fork, and North Fork Umpqua subbasins, and the limitations of the already existing regulatory and non-regulatory mechanisms. Designating critical habitat in these areas ensures that activities which would adversely modify habitat, and which existing regulatory mechanisms do not prevent, can be stopped or altered.

Types of habitat degrading activities, and other activities that may decrease wild salmonid viability, within the Umpqua Basin	Specific past, ongoing, and proposed projects within Umpqua Basin	Existing regulatory or other mechanisms that potentially provide protections to listed salmonids	Specific protections provided by existing regulatory or other mechanisms	Limitations of these protections in recovering listed salmonids
Timber harvest on federal lands	-Green Thunder Timber Sale -Christopher Folly Timber Sale -Cow Catcher Timber Sale -Can Can Timber Sale -Diamondback Timber Sale -Broken Buck Timber Sale -Crowdog Thinning -Little Rock Creek Stewardship -Mjollnir Timber Sale and Project Area -PJ Timber Sale and Project Area -Ash Creek Fire Salvage - Baked Apple Fire Salvage	Northwest Forest Plan	- Riparian reserves (which include timber harvest, roads, grazing, and mining management standards and guidelines) - Key watersheds (limits road building, requires watershed analysis, key watersheds established as priority for watershed restoration) - Watershed Analysis - Watershed Restoration	The current administration recently revised the Aquatic Conservation Strategy (ACS) to eliminate the requirement that all projects must be consistent with the ACS objectives. The agency also limited the enforceability of the ACS by narrowing what in the ACS constitute "standards and guidelines." These revisions seriously undermine the ACS and limit the enforceable standards that would protect listed ESUs in the Northwest Forest Plan Area.

	-Spam Timber Sale -Summit Timber Sale	Wild and Scenic Rivers Act: North Umpqua Wild and Scenic River	- Wild and Scenic Rivers must be managed primarily for preservation. - Designation provides protection from watershed damage and other development. - Particular attention is given to timber harvesting, which may be contrary to purpose of wild and scenic designation.	- The act leaves federal agencies with a great deal of discretion in managing wild and scenic rivers. - The focus on "outstanding rivers" is too narrow to adequately protect listed ESUs. - Wild and scenic designation does not effectively protect watershed processes because it does not protect areas outside arbitrarily designated corridors. - The Act provides no clear mandate to restore degraded rivers.
Roadbuilding and	- Broken Buck Timber sale, 1.9	Northwest Forest Plan	Same as above	Same as above

<p>and reopening projects</p>	<p>Timber sale, 1.9 miles permanent road - Cotton Snake Timber Sale, 2.4 miles permanent road, .4 miles temporary road - Cow Creek Sale, .3 miles permanent road - Green Thunder Sale, .1 mile permanent road, 1.6 mile temporary roads - Christopher Folly Sale, .1 miles temporary road -Ward Creek Thinning, .1 miles temporary road - Shingle Lane, .8 miles temporary roads - Baked Apple Fire Salvage, .93 miles temporary roads -Diamond Drive Reconstruction Project -Seneca Jones Road 30-2-25 reopening</p>	<p>Wild and Scenic Rivers Act: North Umpqua Wild and Scenic River</p>	<p>-Wild and Scenic river must be managed primarily for preservation. - Designation provides protection from viewshed damage and other development. - Particular attention must be given to road construction, which may be contrary to the purpose of the wild and scenic designation.</p>	<p>Same as above</p>
<p>Grazing</p>	<p>-Grazing authorized on three allotments in the Umpqua National Forest: Drew Creek, Diamond Rock and Divide.</p>	<p>Northwest Forest Plan</p>	<p>Same as above</p>	<p>Same as above</p>
<p>Mining</p>	<p>Red Hill Mine, Umpqua National</p>	<p>Northwest Forest Plan</p>	<p>Same as above</p>	<p>Same as above</p>

	Forest			
<p>Timber harvest on private lands</p>	<p>The following are examples of the prevalence of private forestry within the Umpqua basin:</p> <p>Deer Creek Watershed (of the Lower South Umpqua Watershed): At least 27% of land used for private forestry</p> <p>Lower South Umpqua Watershed: at least 13% of land used for private forestry</p> <p>Middle Cow Creek Watershed: in Douglas County, which accounts for 109,000 acres out of a total 112,900 acres in this watershed, at least 45% of the land is used for private forestry</p> <p>Calapooya Creek Watershed: At least 55% of land used for private forestry</p> <p>Lower North Umpqua Watershed:</p>	<p>Oregon Plan for Salmon and Watersheds</p>	<p>- Riparian management areas (RMA) require tree retention and retention of downed wood and snags; width of RMA (if any) depends upon stream size and whether perennial or non-perennial typing, and whether fish or non-fish bearing</p>	<p>-Allows logging on steep, landslide-prone slopes</p> <p>- Buffers for protection of small and medium fish-bearing streams are inadequate.</p> <p>- Protections for small perennial and non-perennial non-fish bearing streams, which feed into salmon habitat, are inadequate because they have little or no retention requirements.</p>

	<p>At least 20% of land used for private forestry</p> <p>Middle South Umpqua Watershed: Approximately 38% of land used for private forestry</p> <p>Myrtle Creek Watershed: At least 36% of land used for private forestry</p> <p>Lower Cow Creek Watershed: At least 51% of land used for private forestry</p> <p>West Fork Cow Creek Watershed: Approximately 42% of land used for private forestry</p> <p>South Umpqua River Watershed: At least 44% of land used for private forestry</p> <p>Olalla/Lookingglass Watershed: At least 48% of land used for private forestry</p> <p>(estimates from Umpqua Watershed Council Watershed</p>			
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	assessment maps)			
Timber harvest on state lands	<ul style="list-style-type: none"> - Curvy Pucket: clearcut 100 acres - Salander Top: clearcut 93 acres - Ash Valley School: clearcut 72 acres - Brown Ridge Corner: clearcut 85 acres - Cedar Top: Clearcut 40 acres 	<ul style="list-style-type: none"> - Oregon Plan for Salmon and Watersheds - Habitat conservation plan addressing Northern spotted owl on Elliott State Forest 	<ul style="list-style-type: none"> - Some riparian buffers 	<ul style="list-style-type: none"> - Riparian buffers are inadequate to protect coho, e.g. no buffers on non-fish-bearing intermittent streams - Plans to increase logging in the Elliott State Forest
Hatcheries	<ul style="list-style-type: none"> -North Umpqua River Hatchery - Cow Creek Hatchery 	<ul style="list-style-type: none"> Oregon Plan for Salmon and Watersheds 	<ul style="list-style-type: none"> Improvements in hatchery programs to reduce negative impacts of hatcheries upon wild salmonids 	<ul style="list-style-type: none"> - Hatchery improvements cannot eliminate all the negative effects of hatcheries. - The proposed federal hatchery policy potentially allows abundance of hatchery fish to reduce the focus upon habitat restoration.

Dams	-Cooper Creek Dam -Ben Irving Dam -Galesville Dam -North Umpqua Hydroelectric Project	FERC licensing	- Under the Clean Water Act, the state must certify that the project will meet state water-quality standards. - FERC must consider the public interest including the preservation of anadromous fish and provide equal consideration to specific purposes, including enhancement of fish. - FERC must provide adequate protection of fish. - FERC must include licensing conditions to protect and enhance fish.	- Regulatory mechanisms to manage dams don't protect the habitat that listed ESUs need to recover.
		Wild and Scenic Rivers Act: North Umpqua Wild and Scenic River	FERC shall not license dam construction on a wild and scenic river	Designating segments of a riverine system may protect those individual segments from dams, but the entire system is not protected as dams can be licensed in other segments that have not been designated.

CONCLUSION

PRC believes that the designation of critical habitat is important for the long-term survival of the salmon and steelhead included in these proposals. Indeed, critical habitat may prove to be a key element that will enable these species not only to persist but also to rebound to

the point that they no longer need ESA protection. PRC is pleased that NMFS is undertaking the re-designation of critical habitat, but the process needs to be supported by sound scientific, legal, and economic analyses. These proposals, however, raise serious concerns about some of the assumptions, scientific rationales, and policies underlying NMFS's critical habitat effort. PRC presents the foregoing comments in the hope that NMFS will reconsider certain aspects of its approach, highlighted above.

Sincerely,

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On Behalf of Pacific Rivers Council

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