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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 226

[Docket No. 970715175-7292-02; I.D. No. 042997B]

RIN 0648-AG58

#### Designated Critical Habitat; Umpqua River Cutthroat Trout

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

**ACTION:** Final rule.

**SUMMARY:** NMFS is designating critical habitat for the Umpqua River cutthroat trout (*Oncorhynchus clarki clarki*). Designated critical habitat includes all river reaches of the Umpqua River accessible to cutthroat trout, including all Umpqua River estuarine areas and tributaries upstream from the Pacific Ocean to the confluence of the North and South Umpqua Rivers; the North Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to Soda Springs dam; the South Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to its headwaters. Critical habitat includes all waterways below longstanding, naturally impassable barriers (i.e., natural water falls in existence for over several hundred years). Such areas represent the current freshwater and estuarine range of the listed species. The economic and other impacts resulting from this critical habitat designation are expected to be minimal.

NMFS is excluding areas above Soda Springs dam on the North Umpqua River from critical habitat. Available information indicates that habitat above Soda Springs dam is not currently essential for the conservation of this species. NMFS may revise this determination in the future should new information indicate habitat above Soda Springs dam is essential for the conservation of the species.

**DATES:** This rule is effective February 9, 1998. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of February 9, 1998.

**FOR FURTHER INFORMATION CONTACT:** Jim Lynch, NMFS, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR, 97232-2737, telephone (503/230-5422), internet (jim.lynch@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

On August 9, 1996, NMFS published its determination to list Umpqua River cutthroat trout (*Oncorhynchus clarki clarki*) as endangered under the Endangered Species Act (ESA) (61 FR 41514). In its final listing determination, NMFS concluded that all cutthroat trout life history forms (i.e., anadromous, potamodromous, and resident) should be included in the listed Umpqua River cutthroat trout Evolutionarily Significant Unit. This conclusion was based on studies conducted by Oregon Department of Fish and Wildlife (ODFW) and others that indicate these life history forms are not completely reproductively isolated and, therefore, should be considered a single "distinct population segment," under the ESA and NMFS' ESA species policy (61 FR 41516).

Historically, anadromous, potamodromous, and resident cutthroat trout likely existed throughout the Umpqua River basin. The current freshwater distribution of anadromous and potamodromous life forms is thought to be limited primarily to the mainstem, Smith, and North Umpqua Rivers. Resident cutthroat trout appear to remain broadly distributed throughout the Umpqua River basin, including areas of the South Umpqua River thought to support insignificant numbers of anadromous cutthroat trout populations.

Section 4(a)(3)(A) of the ESA requires that, to the maximum extent prudent and determinable, NMFS designate critical habitat concurrently with a determination that a species is endangered or threatened. On July 19, 1993, NMFS published a **Federal Register** notice soliciting information and data regarding the present and historic status of the Umpqua River cutthroat trout, as well as information on areas that may qualify as critical habitat (58 FR 38544). At the time of final listing, critical habitat was not determinable, since information necessary to perform the required analyses was not available.

On July 30, 1997, NMFS published a proposed rule designating critical habitat for the listed species (62 FR 40786). In that proposed rule, NMFS solicited public comments and announced public hearings on the

proposed action. This final rule considers new information and comments received in response to the proposed rule.

Use of the term "essential habitat" within this final rule refers to critical habitat as defined by the ESA and should not be confused with the requirement to describe and identify Essential Fish Habitat (EFH) pursuant to the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*

##### Definition of Critical Habitat

Critical habitat is defined in section 3(5)(A) of the ESA as "(i) the specific areas within the geographical area occupied by the species \* \* \* on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species \* \* \* upon a determination by the Secretary [of Commerce] that such areas are essential for the conservation of the species." (See 16 U.S.C. 1532(5)(A).) The term "conservation," as defined in section 3(3) of the ESA, means, " \* \* \* to use and 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 this Act are no longer necessary." (See 16 U.S.C. 1532(3).)

In designating critical habitat, NMFS considers the following requirements of the species, space for individual and population growth, and for normal behavior, food, water, air, light, minerals, or other nutritional or physiological requirements, cover or shelter, sites for breeding, reproduction, or rearing of offspring; and, generally, habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of this species (See 50 CFR § 424.12(b)). In addition to these factors, NMFS also focuses on the known physical and biological features (primary constituent elements) within the designated area that are necessary to the conservation of the species and may require special management considerations or protection. These essential features may include, but are not limited to, spawning sites, food resources, water quality and quantity, and riparian vegetation (See 50 CFR § 424.12(b).)

##### Benefits of Critical Habitat Designation

A designation of critical habitat provides a clear indication to Federal

agencies as to when section 7 consultation is required, particularly in cases where the proposed action would not result in direct mortality, injury, or harm to individuals of a listed species (e.g., an action occurring within the critical area when a migratory species is not present). The critical habitat designation, describing the essential features of the habitat, also assists in determining which activities conducted outside the designated area are subject to section 7 (i.e., activities outside critical habitat that may affect essential features of the designated area).

A critical habitat designation will also assist Federal agencies in planning future actions, since the designation establishes, in advance, those habitats that will be given special consideration in section 7 consultations. With a designation of critical habitat, potential conflicts between Federal actions and endangered or threatened species can be identified and possibly avoided early in the agency's planning process.

Another indirect benefit of a critical habitat designation is that it helps focus Federal, state, and private conservation and management efforts in such areas. Management efforts may address special considerations needed in critical habitat areas, including conservation regulations to restrict private as well as Federal activities. The economic and other impacts of these actions would be considered at the time of the proposed regulations and, therefore, are not considered in the critical habitat designation process. Other Federal, state, and local authorities, such as zoning or wetlands and riparian lands protection, may also provide special protection for critical habitat areas.

#### Summary of Comments

Two public hearings were held on the proposed action—one in Roseburg, Oregon, on August 16, 1997, and one in Reedsport, Oregon, on August 17, 1997. Twenty-four individuals provided oral testimony at the two public hearings. Ten written comments were submitted in response to the proposed rule. The majority of the oral and written comments opposed designation of critical habitat. New information and comments received in response to the proposed rule are summarized here.

#### Economic Considerations

*Comment:* Several commenters stated that NMFS improperly minimized the economic impacts by separating the designation of critical habitat from the listing process (i.e., considering only the incremental economic effects of designating critical habitat beyond the effects associated with listing the

species as threatened or endangered). These commenters are concerned that by separating the costs associated with the various administrative actions (e.g., listing, critical habitat designation, section 7 consultations), NMFS underestimated the real economic consequences of protecting listed Umpqua River cutthroat trout as required by the ESA. Several commenters objected to NMFS' interpretation that the impact of critical habitat designation only duplicates the protection provided under section 7 of the ESA. Also, several commenters believe that using an incremental approach for critical habitat designation renders sections of the ESA meaningless and circumvents the intent of Congress.

*Response:* NMFS disagrees with the assertion that it has improperly minimized the economic impacts by separating the designation of critical habitat from the listing process, or that this incremental approach for critical habitat designation renders sections of the ESA meaningless. Rather, the ESA is unambiguous in how it addresses economic impacts; it prohibits the consideration of economic impacts in the listing process, but requires analysis of economic impacts when designating critical habitat. These separate requirements for each determination lead to an incremental analysis in which only the economic impacts resulting from the designation of the critical habitat are considered.

Since NMFS is designating the current range of the listed species as critical habitat, this designation will not impose any additional requirements or economic effects beyond those which may accrue from section 7 of the ESA. Section 7 requires Federal agencies to insure that any action they carry out, authorize, or fund is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat which is determined to be critical. The consultation requirements of section 7 are nondiscretionary and are effective at the time of species listing. Therefore, Federal agencies must consult with NMFS and ensure their action does not jeopardize a listed species regardless of whether critical habitat is designated.

The designation of critical habitat remains important notwithstanding its lack of economic impact because it identifies habitat that is essential for the continued existence of a species and that may require special management attention. This facilitates and enhances Federal agencies' ability to comply with section 7 by ensuring that they are aware of their activities on listed species

and habitats essential to support them. In addition to aiding Federal agencies in determining when consultations are required pursuant to section 7(a)(2), critical habitat can aid an agency in fulfilling its broader obligation under section 7(a)(1) to use its authority to carry out programs for the conservation of listed species.

*Comment:* Several commenters asserted that the incremental approach fails to take into account the substantial effect on non-Federal interests that will be harmed by critical habitat designation to the extent they must receive Federal approvals or funds to conduct their activities.

*Response:* Most of the effect on non-Federal interests will result from the taking prohibition of section 9, or the no-jeopardy requirement of section 7, both of which are a function of the listing of the species, not of the designation of critical habitat. Whether or not critical habitat is designated, non-Federal interests must conduct their actions consistent with the requirements of the ESA. When a species is listed, non-Federal interests must comply with the prohibitions on takings under section 9 of the ESA or associated regulations. If the activity is funded, permitted, or authorized by a Federal agency, that agency must comply with the non-jeopardy mandate of section 7 of the ESA, which is also a result of the listing of a species, not of the designation of critical habitat. Once critical habitat is designated, the agency must avoid actions that destroy or adversely modify that critical habitat. However, pursuant to NMFS' ESA implementing regulations, any action that destroys or adversely modifies critical habitat is also likely to jeopardize the continued existence of the species (See 50 CFR § 402.02). Therefore, NMFS does not anticipate that the designation will result in significant additional requirements for non-Federal interests.

#### Scope and Extent of Critical Habitat

*Comment:* Several commenters questioned NMFS' delineation of critical habitat as including all areas currently accessible to the species. One commenter stated that NMFS should only designate areas as critical habitat that have been proven to contain the species. Several commenters questioned why NMFS had not designated critical habitat in marine areas while one commenter agreed that omitting such areas was appropriate at this stage.

*Response:* Critical habitat is defined in section 3(5)(A) of the ESA as the specific areas within the geographic area occupied by the species on which are

found those physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. Based on commenters' concerns and on new information received during the public comment period, NMFS has refined its designation of critical habitat for Umpqua River cutthroat trout. The following sections address these commenters' concerns and clarify NMFS' designation of critical habitat for this species.

#### Estuarine and Marine Habitats

NMFS recognizes that the Umpqua River estuary is an essential rearing area and migration corridor for listed Umpqua River cutthroat trout, and has maintained the designation of the estuary as critical habitat in this final rule. Although they are also important, NMFS believes that marine habitats (i.e., oceanic or nearshore areas seaward of the mouth of the Umpqua River) used by listed Umpqua River cutthroat trout do not presently warrant designation and do not appear to be in need of special management consideration or protection. Degradation of this portion of the species' habitat does not appear to have been a significant factor in the decline of the species. Specifically, existing laws appear adequate to protect these areas, and special management of this habitat is not considered necessary at this time. If additional evidence supports the inclusion of marine areas, NMFS may revise designated critical habitat in accordance with 50 CFR § 424.16. NMFS will, of course, continue to consult under section 7 of the ESA to address Federal actions that may affect the species or result in takings in the ocean, such as Federal management of ocean fishing.

#### Freshwater Habitats

NMFS has determined that it is possible to determine most river reaches and lakes critical to the conservation of listed Umpqua River cutthroat trout. However, Umpqua River cutthroat trout inhabit a wide range of habitats, from the mainstem Umpqua River to small perennial and intermittent streams. This use of diverse habitats coupled with the inadequacy of existing species distribution maps makes it extremely difficult to identify all specific river reaches required by this species. Furthermore, designating each specific river reach would not necessarily aid current conservation efforts for this species since there is the potential of excluding small, yet important, tributaries from the critical habitat designation. Therefore, it is presently

not feasible to designate each particular river reach that could be considered as critical habitat for Umpqua River cutthroat trout. Accordingly, NMFS has determined that it is prudent to designate specific hydrologic units (i.e., federally-designated river basin boundaries) that include or contain river reaches presently or historically accessible to this species (except reaches upstream of impassable natural falls, and Soda Springs dam). These reaches are known to contain physical and biological features vital to the conservation of Umpqua River cutthroat trout (see Table 4 in the regulatory text). Figure 9 identifies the general geographic extent of larger rivers, lakes, and streams within hydrologic units designated as critical habitat for Umpqua River cutthroat trout. Note that Figure 9 does not constitute the definition of critical habitat, but instead is provided as a general reference to guide Federal agencies and interested parties in locating the general boundaries of critical habitat for listed Umpqua River cutthroat trout. The complete text delineating critical habitat for this species can be found in the final regulation below. Table 4 to this part provides a list of affected counties.

NMFS acknowledges that many of the river reaches within the hydrologic units designated as critical habitat may not presently be inhabited by the listed species. Salmonids and cutthroat trout in particular, are highly migratory and utilize numerous types of habitat throughout their life cycles. This species' life history is not fully understood. However, three separate life forms have been identified and are included in the listed ESU: anadromous fish (ocean-migrating), potamodromous fish (in-river migrating), and resident fish (freshwater dwelling). Given the complexity of cutthroat trout's life history and the diversity of its habitat needs, NMFS believes that all areas that are currently accessible to the listed species may be critical to its recovery and survival. Furthermore, the vast majority of streams in the Umpqua River basin contribute essential elements such as food, gravel, large woody debris, and water quality to this species' habitat. Hence, their inclusion as part of the critical habitat is in keeping with the ESA's purpose " \* \* \* to provide a means whereby the ecosystems upon which endangered species or threatened species depend may be conserved \* \* \* " (16 U.S.C. 1532(b)). Until information is developed that allows more definitive and detailed characterization of stream reaches as critical or noncritical, NMFS chooses to

adopt a more inclusive critical habitat designation incorporating river reaches in hydrologic units presently or historically accessible (except reaches upstream of impassable natural falls, and Soda Springs dam) to cutthroat trout.

Experience gained by NMFS through section 7 consultations clearly demonstrates the importance of assessing potential impacts of actions within entire watersheds. It is well documented that human activities in areas outside the immediate stream channel can have a demonstrable effect on physical and biological features essential to the conservation of listed Umpqua River cutthroat trout. For example, road building and timber harvest operations in upland areas can result in adverse modifications to cutthroat trout spawning and rearing areas via landslides, sedimentation, fuel spills, and loss of riparian vegetation that provides shade, cover, and other habitat functions.

*Comment:* Several commenters questioned why NMFS designated riparian areas 300 ft. (91.4 m) on each side of the stream channel high water line as critical habitat. Several commenters also questioned if the 300-ft. (91.4 m) riparian buffer applied to nonfish-bearing streams.

*Response:* Riparian habitats provide several essential elements for cutthroat trout. The reduction in riparian tree shade canopy can produce significant increases in water temperatures (Bottom et al., 1985; California Department of Fish and Game, 1994; Forest Ecosystem Management Assessment Team (FEMAT), 1993). Riparian vegetation protects stream banks from erosion through soil binding by root masses and the presence of ground litter and dense overstory canopy, which impedes the rate of surface runoff (FEMAT, 1993). Riparian vegetation provides important substrates for aquatic invertebrates, cover for predator avoidance, and resting habitat for many fish species. Riparian vegetation that is carried from upland areas and deposited in estuaries is a major source of food and habitat for obligatory, wood-boring marine invertebrates which break down and pass usable carbon into the water's current where it enters the detrital-based marine food web (Sedell and Maser, 1994). As much as 99 percent of the annual energy input, the food base for all aquatic communities, comes from riparian vegetation (Reynolds et al., 1993). Removal of streamside vegetation simplifies channel banks and destroys shelter for rearing fish species, simplifies channel shape so there are fewer pools and riffles, and eventually

leads to a widening of channels that are more prone to warming by sunlight (Botkin *et al.*, 1995; California Advisory Committee on Salmon and Steelhead Trout, 1988; California Department of Fish and Game, 1994).

Biophysical characteristics and processes that create riparian zones vary considerably throughout the range of listed Umpqua River cutthroat trout. However, riparian zones along the Umpqua River are considered essential for the conservation of the listed species because they provide important space, cover, and shelter, and increase river productivity. Furthermore, healthy riparian zones help ensure that water quality parameters support physiological and behavioral requirements of the listed species.

In the Umpqua River basin, critical habitat includes the water, waterway bottom, and the adjacent riparian zone. A 1992 report by the U.S. Fish and Wildlife Service (FWS) states that riparian streambanks are composed of natural, eroding substrates supporting vegetation that either overhangs or protrudes into the water and, consequently, provides shade and escape cover for salmonids and other wildlife. Furthermore, according to a 1993 report by FEMAT, riparian zones consist of "areas where the vegetation complex and microclimate conditions are products of the combined presence and influence of perennial and/or intermittent water, associated high water tables, and soils that exhibit some wetness characteristics." The FEMAT report contains a comprehensive review of riparian ecosystem components, and specifies that riparian zones for fishbearing streams should consist of "\* \* \* the area on either side of the stream extending from the edges of the active stream channel to the top of the inner gorge, or to the outer edges of the 100-year floodplain, or to the outer edges of riparian vegetation, or to a distance equal to the height of two site-potential trees, or 300 ft. (91.4m) slope distance (600 ft. (182.8 m), including both sides of the stream channel), whichever is greatest."

Since adverse modification of riparian zones may impede the recovery of the endangered Umpqua River cutthroat trout, the adjacent riparian zone is included in the critical habitat designation. It is important to note that this critical habitat designation includes all river reaches of the Umpqua River currently accessible to endangered Umpqua River cutthroat trout. In most cases, this critical habitat designation will encompass fishbearing streams only.

NMFS recognizes that the influences of riparian vegetation progressively decrease away from the water source (e.g., river), making it difficult to identify discrete boundaries for the riparian zones. As a reasonable benchmark, NMFS defines the "adjacent riparian zone" as those areas within a slope distance of 300 ft. (91.4 m) from the normal line of high water of a stream channel or from the shoreline of a standing body of water. NMFS points out that this definition is adopted solely as a means by which agencies can evaluate the potential risk of proposed actions on designated critical habitat. The actual delineation of riparian zones at the site of a proposed action can be more accurately identified through section 7 consultations.

*Comment:* One commenter stated that NMFS should exclude areas above Soda Springs dam on the North Umpqua River from a critical habitat designation since: (1) cutthroat trout do not currently inhabit the area above Soda Springs dam, and (2) available habitat above Soda Springs dam is not essential for the conservation of the species.

*Response:* Since the proposed listing, several new sources of information indicate that cutthroat trout do not occur in the North Umpqua River above Soda Springs dam. Surveys conducted by PacifiCorp in the North Umpqua River and tributaries above Soda Springs dam indicate that these areas are dominated by rainbow trout, brown trout, and brook trout and do not contain cutthroat trout (PacifiCorp, 1997).

PacifiCorp's analysis appears to be supported by recent survey work conducted by the U.S. Forest Service (USFS) in this area. In a recent survey conducted by USFS biologists in Fish Creek, a tributary to the North Umpqua River just above Soda Springs dam, USFS personnel collected samples of fish thought to be cutthroat trout, or cutthroat trout-rainbow trout hybrids (USFS, 1997). These samples were sent to NMFS for genetic analysis. Initial lab results indicate that all the fish submitted are rainbow trout, not cutthroat trout (NMFS, 1997).

Aside from new information submitted by PacifiCorp and USFS, the Oregon Department of Fish and Wildlife (ODFW) has previously stated its belief that no cutthroat trout occur above Soda Springs dam (ODFW, 1996).

Regardless whether cutthroat trout currently occur above Soda Springs dam, NMFS may designate areas as critical habitat outside the current species range if it finds that designation of the present range would be inadequate to ensure conservation of the

species (50 CFR § 424.12(e)). In the present case, areas above Soda Springs dam appear to be inhabited by species that could outcompete or hybridize with introduced cutthroat trout, reducing the species' viability in this area (PacifiCorp, 1997).

Based on new information submitted by PacifiCorp and USFS and on previous comments from ODFW, NMFS concludes that habitat areas above Soda Springs dam are not currently essential for the conservation of listed Umpqua River cutthroat trout. Therefore, NMFS is revising the proposed critical habitat designation to exclude areas above Soda Springs dam on the North Umpqua River from Umpqua River cutthroat trout critical habitat. NMFS may, in the future, revise this designation should new information come to light indicating that such habitat areas are essential for conservation purposes.

Even though NMFS is not designating areas above Soda Springs dam as critical habitat for Umpqua River cutthroat trout, this in no way affects NMFS' listing of resident or potamodromous cutthroat trout should they be found in the future to exist above Soda Springs dam. If cutthroat trout are found to occur above the dam in the future, parties will have the duty to avoid "take" under section 9 of the ESA.

#### **Adequacy of Existing Management Plans**

*Comment:* Several commenters stated that existing management plans and conservation initiatives were sufficient to protect Umpqua River cutthroat trout and its habitat, and, therefore, the proposed critical habitat designation is not warranted.

*Response:* NMFS considered existing regulatory mechanisms and conservation plans applicable to Umpqua River cutthroat trout and its habitat in the August 9, 1996, final listing determination (61 FR 41514). In that **Federal Register** notice, a variety of Federal and state laws and programs were found to have affected the abundance and survival of anadromous fish populations in the Umpqua River Basin (61 FR 41520). NMFS concluded that available regulatory mechanisms were inadequate and continued to represent a potential threat to the species' existence (61 FR 41520).

Since the final listing determination, the State of Oregon completed a significant conservation initiative entitled the *Oregon Coastal Salmon Restoration Initiative* (OCSRI). The OCSRI currently focuses on factors that have led to the decline of coastal coho salmon. In addressing these factors, the State has implemented measures to

improve habitat quality and lessen impacts from hatchery and harvest practices.

NMFS believes that habitat measures contained in the OCSRI will likely provide benefits for Umpqua River cutthroat trout over the long term. However, the OCSRI relies exclusively on Federal measures to protect salmon habitat on Federal lands. The majority of lands within the range of Umpqua River cutthroat trout are in Federal ownership. Therefore, under the OCSRI, it is imperative that existing Federal protections under the Northwest Forest Plan and related Federal measures that are described in the OCSRI protect the species to the greatest extent. On private lands, the OCSRI relies heavily upon voluntary measures to protect and enhance aquatic habitat. NMFS believes that these voluntary measures may benefit Umpqua River cutthroat trout. However, given the present status of the species (endangered), NMFS concludes that it would be imprudent to rely on voluntary measures on private lands to conserve this species and its habitat. Critical habitat designation will assure careful scrutiny of and priority attention to Federal actions that may impact Umpqua River cutthroat trout habitats, resulting in strengthened protection for this endangered species.

#### **Changes From the Proposed Rule**

Section 226.22 incorrectly amended references to the hydrologic unit maps in the proposed rule. These maps have been correctly referenced in this final rule.

#### **Critical Habitat of Umpqua River Cutthroat Trout**

Available biological information for listed Umpqua River cutthroat trout can be found in the species' status review (Johnson *et al.*, 1994) and in **Federal Register** notices of proposed and final listing determinations (see 59 FR 35089, July 8, 1994; 61 FR 41514, August 9, 1996). Critical habitat consists of five components, spawning and juvenile rearing areas, juvenile migration corridors, areas for growth and development to adulthood, adult migration corridors, and over-wintering habitat. The Pacific Ocean areas used by listed cutthroat trout for growth and development to adulthood are not well understood, and essential areas and features have not been identified.

The current geographic range of Umpqua River cutthroat trout includes nearshore ocean areas, the mainstem Umpqua River and its tributaries, and the North and South Umpqua Rivers and their tributaries. NMFS has determined that the current freshwater

and estuarine range (referred to as the in-river range) of the species is adequate to ensure the species' conservation. The species' current in-river range encompasses all critical habitat features (e.g., riverine conditions, estuaries, headwater areas) in sufficient quantity to ensure conservation of the species. Therefore, designation of habitat areas outside the species' current in-river range is not necessary.

NMFS recognizes the Umpqua River estuary is an essential migration corridor for listed Umpqua River cutthroat trout and, accordingly, has included estuary areas as critical habitat in this designation. However, the importance of marine habitats (i.e., oceanic or near shore areas seaward of the mouth of the Umpqua River) is not well understood (Pauley, 1989; Behnke, 1992). In addition to a lack of biological information concerning the marine life history phase of cutthroat trout, a need for special management consideration or protection of this habitat is not apparent. Based on present information, degradation of this portion of the species' habitat does not appear to have been a significant factor in the decline of the species.

Essential features of the designated in-river areas include adequate substrate, water quality, water quantity, water temperature, food, riparian vegetation, and access. Juvenile migration corridors include the North and South Umpqua Rivers and the mainstem Umpqua River to the Pacific Ocean. Essential features of the juvenile migration corridors include adequate: (1) Substrate; (2) water quality; (3) water quantity; (4) water temperature; (5) water velocity; (6) cover/shelter; (7) food; (8) riparian vegetation; (9) space; and (10) safe passage conditions. Adult migration corridors and their essential features are the same as those identified for juvenile migration corridors.

#### **Critical Habitat: Geographic Extent**

Critical habitat includes all river reaches accessible to listed Umpqua River cutthroat trout from a straight line connecting the west end of the South jetty and the west end of the North jetty and including all Umpqua River estuarine areas (including the Smith River) and tributaries proceeding upstream from the Pacific Ocean to the confluence of the North and South Umpqua Rivers; the North Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to Soda Springs dam; the South Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to its headwaters (including Cow Creek, tributary to the

South Umpqua River). Critical habitat includes all waterways below longstanding, naturally impassable barriers (i.e., natural water falls in existence for over several hundred years). Critical habitat includes the bottom and water of the waterways and adjacent riparian zone. The riparian zone includes those areas within 300 ft. (91.4 m) of the normal line of the high water mark of the stream channel or from the shoreline of a standing body of water.

#### **Expected Economic Impacts of Designating Critical Habitat**

The economic impacts to be considered in a critical habitat designation are the incremental effects of critical habitat designation above the economic impacts attributable to listing or attributable to authorities other than the ESA (see Consideration of Economic, Environmental and Other Factors section of this preamble). Incremental impacts result from special management activities in areas outside the present distribution of the listed species that have been determined to be essential to the conservation of the species. However, NMFS has determined that the species' present in-river range contains sufficient habitat for conservation of the species. Therefore, NMFS finds that there are no incremental impacts associated with this critical habitat designation.

#### **Activities That May Affect Critical Habitat**

A wide range of activities may affect the essential habitat requirements of listed Umpqua River cutthroat trout. These activities include water and land management actions of Federal agencies (i.e., U.S. Forest Service, U.S. Bureau of Land Management, U.S. Bureau of Reclamation, the Federal Highway Administration, and the Federal Energy Regulatory Commission) and related or similar actions of other federally-regulated projects and lands, including livestock grazing allocations in the Umpqua River Basin by the U.S. Forest Service and U.S. Bureau of Land Management; hydropower operators (i.e., PacifiCorp) in the Umpqua River system licensed by the Federal Energy Regulatory Commission; timber sales in the Umpqua River Basin conducted by the U.S. Forest Service and U.S. Bureau of Land Management; road building activities authorized by the Federal Highway Administration, U.S. Forest Service, and U.S. Bureau of Land Management; and mining and road building activities authorized by the State of Oregon. Other actions of concern include dredge and fill, mining,

and bank stabilization activities authorized and/or conducted by the U.S. Army Corps of Engineers throughout the Umpqua River Basin.

Federal agencies that will most likely be affected by this critical habitat designation include the U.S. Forest Service, U.S. Bureau of Land Management, U.S. Bureau of Reclamation, U.S. Army Corps of Engineers, the Federal Highway Administration, and the Federal Energy Regulatory Commission. This designation will provide clear notification to these agencies, private entities, and the public of critical habitat designated for listed Umpqua River cutthroat trout and the protection provided for that habitat by the ESA section 7 consultation process. This designation will also assist these agencies and others in evaluating the potential effects of their activities on listed Umpqua River cutthroat trout and their critical habitat and in determining when consultation with NMFS would be appropriate.

#### **Need for Special Management Considerations or Protection**

To ensure that the essential areas and features are maintained or restored, special management may be needed. Activities that may require special management considerations for listed Umpqua River cutthroat trout spawning and juvenile rearing areas include, but are not limited to: (1) Land management; (2) timber harvest; (3) water pollution; (4) livestock grazing; (5) habitat restoration; (6) irrigation water withdrawal; (7) mining; (8) road construction; and (9) dam operation and maintenance. For juvenile and adult migration corridors, special management considerations also include dredge and fill activities, and dam operations. Not all of these activities are necessarily of current concern; however, they indicate the potential types of activities that will require consultation in the future. No special management considerations have been identified for listed Umpqua River cutthroat trout residing in the ocean environment.

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

NMFS has determined that an Environmental Assessment or an Environmental Impact Statement, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared for this critical habitat designation. See *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

#### **Classification**

The Assistant Administrator for Fisheries, NOAA (AA), has determined that this rule is not significant for purposes of E.O. 12866.

NMFS is designating only the current range of this species as critical habitat. The current range encompasses a wide range of habitat, including small tributary reaches, as well as mainstem, off-channel and estuarine areas. Areas excluded from this final designation include nearshore habitats in the Pacific Ocean, historically occupied areas above Soda Springs dam, and headwater areas above impassable natural barriers (e.g., long-standing, natural waterfalls). NMFS has concluded that currently inhabited areas within the range of Umpqua River cutthroat trout are the minimum habitat necessary to ensure conservation and recovery of the listed species.

Since NMFS is designating the current range of the listed species as critical habitat, this designation will not impose any additional requirements or economic effects upon small entities, beyond those which may accrue from section 7 of the ESA. Section 7 requires Federal agencies to ensure that any action they carry out, authorize, or fund is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat (16 U.S.C. § 1536(a)(2)). The consultation requirements of section 7 are nondiscretionary and are effective at the time of species' listing. Therefore, Federal agencies must consult with NMFS and ensure their actions do not jeopardize a listed species, regardless of whether critical habitat is designated.

In the future, if NMFS determines that designation of habitat areas outside the species' current range is necessary for conservation and recovery, NMFS will analyze the incremental costs of that action and assess its potential impacts on small entities, as required by the Regulatory Flexibility Act. Until that time, a more detailed analysis would be premature and would not reflect the true economic impacts of the proposed action on local businesses, organizations, and governments.

Accordingly, the Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that the proposed rule, if adopted, would not have a significant economic impact of a substantial number of small entities, as described in the Regulatory Flexibility Act.

This rule does not contain a collection-of-information requirement

for purposes of the Paperwork Reduction Act.

The AA has determined that the proposed designation is consistent, to the maximum extent practicable, with the approved Coastal Zone Management Program of the State of Oregon. This determination has been submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act.

#### **References**

The complete citations for the references used in this document can be obtained by contacting Jim Lynch, NMFS (see **FOR FURTHER INFORMATION CONTACT**).

#### **List of Subjects in 50 CFR Part 226**

Endangered and threatened species, Incorporation by reference.

Dated: December 18, 1997.

#### **Rolland A. Schmitt,**

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

For the reasons set out in the preamble, 50 CFR part 226 is to be amended as follows:

#### **PART 226—DESIGNATED CRITICAL HABITAT**

1. The authority citation for part 226 continues to read as follows:

**Authority:** 16 U.S.C. 1533.

2. Section 226.22, introductory paragraph, is amended by revising the sixth sentence to read as follows:

**§ 226.22 Snake River Sockeye Salmon (*Oncorhynchus nerka*), Snake River Spring/Summer Chinook Salmon (*Oncorhynchus tshawytscha*), Snake River Fall Chinook Salmon (*Oncorhynchus tshawytscha*).**

\* \* \* Hydrologic units (table 3) are those defined by the Department of the Interior (DOI), U.S. Geological Survey (USGS) publication, "Hydrologic Unit Maps, United States Geological Survey Water Supply Paper 2294, 1987", and the following DOI, USGS, 1:500,000 scale hydrologic unit map: State of Oregon, 1974; State of Washington, 1974; State of Idaho, 1974, which are incorporated by reference. \* \* \*

3. Section 226.23 is added to subpart C to read as follows:

**§ 226.23 Umpqua River cutthroat trout (*Oncorhynchus clarki clarki*).**

(a) The following areas consisting of the water, waterway bottom, and adjacent riparian zone of specified lakes and river reaches in hydrologic units presently accessible to listed Umpqua River cutthroat trout. Adjacent riparian zones are defined as those areas within

a slope distance of 300 ft. (91.4 m) from the normal line of high water of a stream channel (600 ft. or 182.8 m, when both sides of the stream channel are included) or from the shoreline of a standing body of water. Figure 9 to this part identifies the general geographic extent of larger rivers, lakes, and streams within hydrologic units designated as critical habitat for Umpqua River cutthroat trout. Note that Figure 9 does not constitute the definition of critical habitat but, instead, is provided as a general reference to guide Federal agencies and interested parties in locating the general boundaries of critical habitat for listed Umpqua River cutthroat trout. The complete text delineating the critical habitat for the species follows. Hydrologic units are those defined by the Department of the Interior (DOI), U.S. Geological Survey (USGS) publication, "Hydrologic Unit Maps, Water Supply Paper 2294, 1986, and the following DOI, USGS, 1:500,000 scale hydrologic unit map: State of Oregon (1974) which is incorporated by reference. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the USGS publication and maps may be obtained from the USGS, Map Sales, Box 25286, Denver, CO 80225. Copies may be inspected during

normal business hours at NMFS, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR 97232-2737, or NMFS, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

(b) *Geographic boundaries.* All river reaches accessible to listed Umpqua River cutthroat trout in the Umpqua River from a straight line connecting the west end of the South jetty and the west end of the North jetty and including all Umpqua River estuarine areas (including the Smith River) and tributaries proceeding upstream from the Pacific Ocean to the confluence of the North and South Umpqua Rivers; the North Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to Soda Springs dam; the South Umpqua River, including all tributaries, from its confluence with the mainstem Umpqua River to its headwaters (including Cow Creek, tributary to the South Umpqua River). Critical habitat includes all river reaches below longstanding, naturally impassable barriers (i.e., waterfalls in existence for several hundred years) in the following hydrologic units: North Umpqua, South Umpqua, and Umpqua. Critical habitat borders on or passes through the following counties in

Oregon: Douglas, Lane, Coos, Jackson, and Klamath counties. Perennial rivers and creeks within the defined areas are also included in the critical habitat designation (but are not specifically named), unless otherwise noted. Critical habitat maps are available upon request from NMFS, Protected Resources Division, 525 NE Oregon St., Suite 500, Portland, OR 97232-2737, telephone (503/230-5422).

4. Table 4 is added to part 226 to read as follows:

Table 4.—Hydrologic Units<sup>1</sup> Containing Critical Habitat for Endangered Umpqua River Cutthroat Trout and Counties Contained in Each Hydrologic Unit.

Hydrologic unit name	Hydro-logic unit No.	Counties contained in hydro-logic unit
North Umpqua	17100301	Douglas, Lane, Klamath.
South Umpqua	17100302	Douglas, Jackson, Coos.
Umpqua .....	17100303	Douglas, Lane, Coos.

<sup>1</sup> 1 Hydrologic units and names taken from DOI, USGS 1:500,000 scale State of Oregon (1974) hydrologic unit map (available from USGS).

6. Figure 9 to part 226 is added to read as follows:

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Figure 9. Umpqua River Cutthroat Trout Critical Habitat

