

U.S.C. 801(a)(1)(A). A copy of this IRFA will also be published in the **Federal Register**.

B. Paperwork Reduction Act of 1995 Analysis

29. The requirements proposed in this Notice have been analyzed with respect to the Paperwork Reduction Act of 1995 (the "1995 Act") and would impose new and modified information collection requirements on the public. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to take this opportunity to comment on the proposed information collection requirements contained in this Notice, as required by the 1995 Act. Public comments are due June 30, 1998. Comments should address: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information would have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

30. Written comments by the public on the proposed new and modified information collection requirements are due June 30, 1998. Comments should be submitted to Judy Boley, Federal Communications Commission, Room 234, 1919 M Street, NW., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov. For additional information on the proposed information collection requirements, contact Judy Boley at 202-418-0214 or via the Internet at the above address.

C. Ex Parte Presentations

31. The *NPRM* is a permit but disclose notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 CFR 1.1202, 1.1203, and 1.1206(a).

D. Comments

32. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before June 22, 1998 and reply comments on or before July 7, 1998. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. Parties are also asked to submit, if possible, draft rules that reflect their positions. If you want each

Commissioner to receive a personal copy of your comments, you must file an original and eleven copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, NW., Room 222, Washington, D.C. 20554, with a copy to Thomas Horan of the Cable Services Bureau, 2033 M Street, NW., 7th Floor, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, NW., Washington, D.C. 20037. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, NW., Room 239, Washington, D.C. 20554.

33. Parties are also asked to submit comments and reply comments on diskette, where possible. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Thomas Horan of the Cable Services Bureau, 2033 M Street, NW., 7th Floor, Washington, D.C. 20554. Such a submission must be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

List of Subjects in 47 CFR Part 76

Administrative practice and procedure.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 98-11617 Filed 4-30-98; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 980414094-8094-01; I.D. No. 091797A]

RIN 0648-AK55

Endangered and Threatened Wildlife and Plants; Definition of "Harm"

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

ACTION: Proposed rule; request for comments.

SUMMARY: This proposed rule defines the term "harm," which is contained in the definition of "take" in the Endangered Species Act. The purpose of this rulemaking is to clarify the type of harm that may result in a take of a listed species under the ESA. This is not a change in existing law. This proposed rule defines the term "harm" to include any act which actually kills or injures fish or wildlife. Such acts may include significant habitat modification or degradation that significantly impairs essential behavioral patterns of fish or wildlife.

DATES: Comments must be received by June 30, 1998.

ADDRESSES: Comments should be sent to Chief, Endangered Species Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

FOR FURTHER INFORMATION CONTACT: Joe Blum, NMFS, 1315 East-West Highway, Silver Spring, MD 20910, phone (301)713-1401 or Garth Griffin, NMFS, 525 NE Oregon St, Suite 500, Portland, OR 97232, phone (503)231-2005.

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the ESA makes it illegal to take an endangered species of fish or wildlife. The definition of "take" is to "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)). The U.S. Fish and Wildlife Service (FWS) issued a regulation further defining the term "harm" to eliminate confusion concerning its meaning (40 FR 44412; 46 FR 54748). The FWS' definition of "harm" has been upheld by the Supreme Court as a reasonable interpretation of the term and supported by the broad purpose of the ESA to conserve endangered and threatened

species (See *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407, 2418, 1995). With the listings of Pacific salmon and steelhead stocks, potentially affected parties have questioned whether NMFS also interprets harm to include habitat destruction. This proposed rule clarifies that NMFS' interpretation of harm is consistent with that of FWS.

Definitions and Source of Authority

NMFS interprets the term "harm" as an act that actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding, and sheltering (Compare 50 CFR 17.3). The habitat modification or degradation contained in the definition of "harm" is limited to those actions that actually kill or injure listed fish or wildlife.

This proposed rule is reasonable for the conservation of the habitats of listed species. Congress acknowledged these needs by stating in the "Purposes" subsection of the ESA: "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved * * *." (16 U.S.C. 1531(b)). In addition to the text contained in the "Purposes" subsection, which indicates the broad goals of the ESA, the structure and legislative history of the ESA indicate Congressional intent to protect the habitats of listed species (*Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407, 2418, 1995).

Activities That May Constitute a Take

A principle purpose of this proposed rule is to provide clear notification to parties that habitat modification or degradation may harm listed species and, therefore, constitute a "take" under the ESA. The following list identifies several examples of habitat-modifying activities that may fall within the scope of this proposed rule when the activities actually kill or injure fish or wildlife. This list is not exhaustive:

1. Constructing or maintaining barriers that eliminate or impede a listed species' access to habitat essential for its survival or recovery;
2. Removing, poisoning, or contaminating plants, fish, wildlife, or other biota required by the listed species for feeding, sheltering, or other essential functions;
3. Discharging pollutants, oil, toxic chemicals, radioactivity, carcinogens,

mutagens, or teratogens into a listed species' habitat;

4. Removing or altering rocks, soil, gravel, vegetation, or other physical structures that are essential to the integrity and function of a listed species' habitat;

5. Removing water or otherwise altering streamflow when it is likely to impair spawning, migration, or other essential functions;

6. Releasing non-indigenous or artificially propagated individuals into a listed species' habitat;

7. Constructing or operating inadequate fish screens or fish passage facilities at dams or water diversion structures in a listed species' habitat;

8. Constructing or using inadequate bridges, roads, or trails on stream banks or unstable hill slopes adjacent or above a listed species' habitat; and

9. Constructing or using inadequate pipes, tanks, or storage devices containing toxic substances, where the release of such a substance is likely to significantly modify or degrade listed species' habitat.

Incidental Take Exceptions

The ESA authorizes NMFS to exempt parties from its take prohibitions under certain circumstances. Under section 7 of the ESA, NMFS conducts consultations on proposed Federal actions and determines whether the proposed action is likely to jeopardize the continued existence of a listed species or to result in the destruction or adverse modification of its critical habitat. If the proposed action does not do so or would not if specified reasonable and prudent alternatives were followed, NMFS may then issue a biological opinion and incidental take statement. The incidental take statement estimates the expected incidental take of a listed species resulting from the action and specifies those terms and conditions required to implement the reasonable and prudent measures necessary or appropriate to minimize this incidental take. If the proposed action is conducted in accordance with these terms and conditions, the incidental take is exempted from the ESA's take prohibitions.

Under section 10(a)(1)(B), NMFS may permit non-Federal parties to take a listed species if such a taking is incidental to, and not the purpose of, an otherwise legal activity. Prior to receiving an incidental take permit pursuant to 10(a)(1)(B), a non-Federal party must prepare a permit application and conservation plan. A conservation plan must contain a description of (1) the impact that will likely result from the taking; (2) what steps the applicant

will take to minimize and mitigate the impacts and how these steps will be funded; (3) what alternative actions to the take were considered and why they are not being utilized; and (4) any measures the Secretary of Commerce (Secretary) may require as being necessary or appropriate for the purposes of the plan (16 U.S.C. 1539(a)(2)(A)). If the Secretary finds that the applicant will minimize and mitigate the impacts of any incidental take, and will meet other requirements of section 1539 (a)(2)(B), the Secretary may issue a permit, legally binding the applicant to the conservation measures set forth in the conservation plan.

Congress intended that the conservation planning process be used to reduce conflicts between listed species and private development and to provide a framework that would encourage "creative partnerships" between the private sector and local, state, and Federal agencies in the interest of endangered and threatened species and habitat conservation. NMFS encourages the development of conservation plans and intends to continue pursuing such agreements in the future with willing parties.

Classification

The Assistant Administrator for Fisheries, NOAA, has determined that this proposed rule will make no change in the existing law. 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 on a substantial number of small entities, as described in the Regulatory Flexibility Act. Codifying NMFS' current definition of harm, as proposed in this rule, will not result in any additional economic impact on affected entities. NMFS is not implementing a new policy or definition. NMFS' definition of harm would remain the same whether or not it is codified.

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 the clarification of what is contained in the definition of harm. Since, under sections 9 and 7, not harming a species

is included in the statutory prohibition, affected entities are currently required to meet the existing standards that would be codified by this proposed rule, thus, promulgating this rule would not result in any additional impact. As such, no initial regulatory flexibility analysis has been prepared.

A draft Environmental Assessment will be made available to provide for adequate public review prior to finalizing this regulation.

This rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act.

List of Subjects in 50 CFR Part 217

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

Dated: April 28, 1998.

Rolland A. Schmitt,
*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 217 is proposed to be amended as follows:

PART 217—GENERAL PROVISIONS

1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 742a *et seq.*, 1361 *et seq.*, and 1531-1544, unless otherwise noted.

2. In § 217.12, the definition for “Harm” is added in alphabetical order to read as follows:

§ 217.12 Definitions.

* * * * *

Harm in the definition of “take” in the Act means an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding, and sheltering.

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