weight of the data collected from other ozone emission studies indicate that emissions from Kane and DuPage Counties can contribute significantly to high ozone concentrations observed in the Chicago area and its downwind environs. It should be noted that the commentor has not provided photochemical dispersion modeling results or other adequate data to prove otherwise.

*Comment No. 18.* A commentor submitted comments previously filed with respect to USEPA's June 6, 1988 (53 FR 20722), nationwide ozone designation proposal. The commentor requested that these comments also be considered in the proposed rulemaking on Kane and DuPage Counties.

*Response.* Review of these comments shows that those relevant to Kane and DuPage Counties were addressed in response to other comments directed specifically at the December 29, 1988, proposed rulemaking. The other comments should be addressed when USEPA finalizes the rulemaking proposed on June 6, 1988.

**Final Rulemaking Action**

Review of public comments shows that USEPA's policy and technical basis for disapproving the redesignation of Kane and DuPage Counties to attainment for ozone are sound. Therefore, USEPA disapproves the State's request to redesignate Kane and DuPage Counties to attainment of the ozone NAAQS.

Under Executive Order 12291, today's action is not "Major". It has been submitted to the Office of Management and Budget (OMB) for review.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 3, 1989. This action may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2)).

**List of Subjects in 40 CFR Part 81**

Air pollution control, Environmental protection, National parks, Wilderness areas.

Authority: 42 U.S.C. 7401–7642.

Dated: July 31, 1989.

William K. Reilly,

*Administrator.*

[FR Doc. 89–18341 Filed 8–3–89; 8:45 am]

BILLING CODE 6560–50–M

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**[Docket No. 90778–0178]**

**50 CFR Part 226 and 227**

**Endangered and Threatened Species; Critical Habitat; Winter-run Chinook Salmon**

**AGENCY:** National Marine Fisheries Service (NMFS) NOAA, Commerce.

**ACTION:** Emergency interim rule.

**SUMMARY:** NMFS is taking emergency action to list the winter-run chinook salmon as threatened under the Endangered Species Act (ESA) and to designate portions of the Sacramento River as critical habitat.

Since the fall of 1985, NMFS has been monitoring the status of the winter-run chinook salmon population in the Sacramento River, California, to determine if it qualified for addition to the list of threatened and endangered species under the provisions of the ESA. Between 1967 and 1985 the run declined from a 3-year (1967–1969) mean run size of nearly 84,000 fish to a 3-year (1983–1985) mean run size of 2,962 fish. However, the California Department of Fish and Game (CDFG) has estimated the 1989 return of winter-run chinook salmon to the Sacramento River at about 500 fish. This is a decline of over 75 percent below a consistent run size of 2,000 to 3,000 fish in recent years. NMFS believes this is a precariously low run size, and that the protection afforded by the Endangered Species Act, particularly the section 7 consultation process, is needed immediately to ensure that the spawning and rearing habitat is maintained to maximize production from the fish that spawn in 1989 and to ensure that Federal fishery management programs are providing protection to the population.

Also, NMFS is designating as critical habitat the portion of the Sacramento River from Red Bluff Diversion Dam, Tehama County (River Mile 243) to Keswick Dam, Shasta County (River Mile 302) including the adjacent riparian zones, the water in the river, and the river bottom for the winter-run. This section includes the portion of the river in which suitable conditions can be maintained for spawning, incubating eggs, and rearing juvenile fish.

During the 240 days this emergency rule is in effect, NMFS will publish a proposed and final rule (with comment periods) to add winter-run chinook salmon to the list of threatened species and designate critical habitat.

**EFFECTIVE DATE:** Winter-run chinook salmon in the Sacramento River are listed as threatened under the ESA and critical habitat is designated effective April 2, 1990.

**FOR FURTHER INFORMATION CONTACT:** James H. Lecky, NOAA Fisheries, Southwest Region, Protected Species Management Branch, 300 South Ferry Street, Los Angeles, CA 90731, 213–514–6664, or Margaret Lorenz, NMFS, Office of Protected Resources, 1335 East-West Highway, Silver Spring, MD 20910, 301–427–2322.

**SUPPLEMENTARY INFORMATION:**

**Background**

Winter-run chinook salmon are distinguishable from the other runs of chinook salmon in the Sacramento River based on the timing of their upstream migration and spawning season. They return to the river almost exclusively as 3-year-old fish, thus the population is composed of essentially 3-year classes which are monitored by the California Department of Fish and Game (CDFG) as they migrate through the fish ladders at Red Bluff Diversion Dam.

On November 7, 1985, NMFS received a petition from the American Fisheries Society (AFS) to list the winter-run of chinook salmon in the Sacramento River as a threatened species under the ESA. NMFS reviewed the petition and determined that it contained substantial information indicating that the petitioned action might be warranted. On February 13, 1986, NMFS announced (51 FR 5391) its intention to conduct a review of the status of the run to determine whether listing was appropriate.

The status review was based on a consideration of available information on the run relative to the five criteria specified in section 4(a)(1) of the ESA and a consideration of the conservation efforts of the State of California and Federal resource management agencies to restore the run, as required by section 4(b)(1)(A) of the ESA. Information was provided by the petitioner, the State, Federal agencies that affect the run or its habitat, and the public. The results of the status review, along with the Notice of Determination, were published on February 27, 1987 (52 FR 6041).

In the Notice of Determination, NMFS concluded that the Sacramento River winter-run chinook was a species in the context of the ESA, recognized that the run had declined over a period of less than two decades, and was approaching a level below which genetic diversity might diminish. The primary reasons for this decline were the construction and

operation of Red Bluff Diversion Dam and other human activities that had degraded spawning and rearing habitat in the Sacramento River to a point where productivity of the run declined.

Based on its assessment that restoration and conservation efforts being implemented or planned by State and Federal resource management agencies adequately provided for the rebuilding of the population, NOAA Fisheries decided not to list winter-run chinook in the Sacramento River as a threatened species. Subsequent to this determination, these restoration actions were incorporated in a Ten-point Winter-run Restoration Plan and implemented through a Cooperative Agreement signed by the CDFG, the Bureau of Reclamation (BR) in the Department of the Interior (DOI), the Fish and Wildlife Service (FWS) in DOI, and NMFS. The Restoration Plan is reviewed in NOAA Fisheries' original decision not to list the run (52 FR 6041) and again after a reconsideration of that decision (53 FR 49722).

The tasks expected to be of most immediate benefit to winter-run are raising the gates at Red Bluff Diversion Dam from December 1 through April 1 to allow free passage of winter-run to suitable spawning habitat and maintaining water temperatures at levels below lethal limits in the reach of river above Red Bluff Diversion Dam used for spawning.

In the spring of 1988, prevailing weather patterns indicated that the drought conditions that had developed in the spring and summer of 1987 would persist through 1988. These conditions caused concern among the resource agencies that the conservation measures in place to enhance the run might not be adequate to address the adverse effects of anticipated drought conditions. Specifically, water forecasts indicated that river temperatures might reach levels lethal to some developing winter-run eggs. Therefore, NMFS decided to reconsider its decision not to list the run and to re-evaluate the adequacy of the Restoration Plan for protecting the run during drought conditions. On June 2, 1988, NMFS announced this decision and requested comments to ensure that all information on the status of the run and factors affecting it was available for the reconsideration (53 FR 20155).

NMFS reviewed the available information and found that the status of the winter-run population had not changed since the original determination not to list the run as threatened. None of the comments received during the reconsideration provided substantial new information indicating listing was necessary. Also, the Ten Point Winter-run Restoration Plan was being implemented, and unprecedented actions were being carried out to minimize the adverse effects of the drought.

On December 9, 1988, NMFS published its determination that the actions of State and Federal agencies to restore the winter-run chinook salmon population and its habitat adequately addressed the threats to the population and that the population was not likely to become in danger of extinction throughout all or a significant portion of its range in the foreseeable future (53 FR 49722).

At the time of NMFS' review of the status of the winter-run population, the CDFG was conducting an independent review pursuant to a petition for listing the run under the State's Endangered Species Act. The CDFG concluded its review in February 1989, and recommended to the California Fish and Game Commission that the run not be listed because the restoration actions underway or planned for the future had a high probability of restoring the run.

For the water year beginning in October 1988, precipitation and runoff were again below normal, and, in February 1989, the Bureau of Reclamation (BR) announced cuts of up to 50 percent in water supply for central valley water contractors. However, heavy precipitation in March 1989 in the northern Sacramento River drainage basin restored Lake Shasta storage equal to the storage in October 1987. As a result of the heavy March rains, the BR was able to increase water supplies to contractors and maintain sufficient storage to manage water temperatures in the river. The BR was also able to leave the gates at Red Bluff Diversion Dam out of the water two weeks beyond the April 1 deadline agreed to in the Cooperative Agreement.

Although this provided an additional two weeks of unrestricted access to suitable spawning habitat, lower than expected returns of winter-run were in the river to benefit. For undetermined reasons, the 1989 run returned at much lower levels than expected. The CDFG estimated the size of the 1989 run at about 500 fish * * * roughly 75 percent below the expected run size. Since 1982, the run has varied at about a mean run size of 2,382 fish, and resource agencies expected the 1989 run to be near that level.

### Reasons for Emergency Determination

Based on the low return of fish in 1989 and because the U.S. Fish and Wildlife Service's hatchery program (a task in the Ten-point Winter-run Restoration Plan) for augmenting natural production is developmental and not likely to produce substantial numbers of juvenile fish for several years, the CDFG reversed its position and recommended at the May 1989 meeting of the California Fish and Game Commission that the Commission list the winter-run as a threatened species under the California Endangered Species Act. After considering the recommendation of the CDFG, the Commission voted to list the run as endangered under State law. The State's administrative procedures for adding the run to the list will be completed in August 1989.

NMFS believes the 1989 run size is dangerously low since it has estimated that a run size between 400 and 1,000 fish is necessary to maintain genetic diversity in the winter-run population (52 FR 6041). If the returns for the remaining 2 year classes in the population are as low, NMFS believes the population will begin losing genetic diversity through genetic drift and inbreeding. Further, a small population is vulnerable to major losses from random environmental events such as droughts and other climatic episodes. However, because the 1987 and 1988 year classes, which are currently in the ocean, are expected to benefit from the Ten-point Winter-run Restoration Plan, NMFS does not believe that the winter-run currently is in danger of extinction. Nevertheless, the run is likely to become endangered if immediate action is not taken to ensure that conditions are maintained in the river for maximum production from the fish that successfully spawn in 1989. Therefore, NOAA Fisheries believes that it is necessary to take this emergency action to list winter-run chinook salmon in the Sacramento River as a threatened species.

### Available Conservation Measures

Conservation measures provided to species that are listed as threatened under the ESA include recognition, recovery actions, implementation of certain protective measures, and designation and protection of critical habitat. One of the most useful protective measures is the section 7 consultation process which requires all Federal agencies to conduct conservation programs for threatened and endangered species and to consult with NMFS concerning the potential effects of their actions on species under NMFS' jurisdiction.

As soon as this rule becomes effective, NMFS will initiate section 7 consultations with the Federal agencies whose actions may affect the continued existence of the winter-run or adversely

modify or destroy its critical habitat. Those agencies include the Bureau of Reclamation regarding temperature control measures throughout the rearing phase of this year's class of winter-run, the Army Corps of Engineers on the effects of gravel mining operations, and the Pacific Fishery Management Council on the effects of sport and commercial fishing.

Also, NMFS will continue to coordinate management of this run and its habitat with the State of California. The State's Endangered Species Act contains a provision for interagency consultation among State agencies similar to section 7 of the Federal ESA. The CDFG will review impacts of State actions on the winter-run to see if there are actions beyond the Ten-point Restoration Plan that can be taken, and they will review the State's water project for opportunities for improved water conservation. In addition, they will review their own sport and commercial fishing regulations to ensure that those fisheries do not jeopardize the continued existence of the winter-run.

NMFS will also participate in the State's review of sport and commercial fishing regulations. NMFS is charged with implementing the Magnuson Fisheries Conservation and Management Act (MFCMA) and publishes and administers regulations to implement fishery management plans developed by Regional Fishery Management Councils. Generally, inter-jurisdictional fisheries or fisheries that occur primarily in Federal waters are candidates for management under the MFCMA. The Pacific salmon fisheries are such fisheries. The Pacific Fishery Management Council manages salmon fisheries off the coasts of Washington, Oregon, and California. Generally, the Council strives to manage the fishery by consensus among the Federal and state fishery management agencies so that state regulations in state waters are consistent with Federal regulations in Federal waters.

NMFS expects consultations under the respective State and Federal laws to produce a State/Federal regulatory regime that will ensure the winter-run population is not adversely affected by sport or commercial fishing. Therefore, it is exempting fishermen, who incidentally take winter-run chinook salmon and who are fishing lawfully under State law or regulation or Federal regulations under the MFCMA, from the prohibition on taking winter-run chinook salmon. The incidental take of winter-run chinook in recreational and commercial fisheries is not believed to be a primary cause of their decline.

However, NMFS retains its right and responsibility to exert Federal authority in State waters in the event the State develops fishing regulations that are less protective than is commensurate with the designation as a threatened species under the Federal ESA.

**Critical Habitat**

Section 4(a)(3)(A) of the ESA includes the requirement that critical habitat be designated concurrently with the determination that a species is an endangered species or is a threatened species. Therefore, as part of this emergency rule, NOAA Fisheries is designating the portion of the Sacramento River between Red Bluff Diversion Dam, Tehama County (River Mile 243) and Keswick Dam, Shasta County (River Mile 302) including the adjacent riparian zones, the water in the river, and the river bottom as critical habitat for the winter-run of chinook salmon. This portion of the river contains almost all of the habitat in which winter-run can spawn successfully, if water management strategies for maintaining suitable temperatures are implemented, and habitat in which most juvenile winter-run will rear.

Section 4(b)(2) requires that economic impacts of specifying an area as critical habitat be considered in the process of designating critical habitat. NMFS is designating only that portion of the river that is necessary to ensure the survival and development of spawned eggs and successful rearing of juveniles during the 240 days the emergency rule is in effect. This is the minimum amount of habitat that is necessary to ensure the continued existence of the species. During the development of the proposed rule, other alternatives for critical habitat designation will be considered including habitat in which winter-run has spawned successfully during exceptionally good water years.

Only two Federal agencies, the Bureau of Reclamation and the Corps of Engineers, are expected to experience a direct economic impact from this 240-day emergency designation. However, individual customers of the BR may eventually be charged higher rates for power if water used to generate power is lost to maintain a certain water temperature in the area designated as critical habitat. During the time the emergency rule is in effect, the amount of water that can be made available for irrigation is not expected to be reduced. If additional water is needed to maintain a certain temperature in the critical habitat area, it will be recovered downstream.

**Effects of Designating Critical Habitat**

Federal agencies conducting, authorizing, or funding actions will incur additional administrative costs in evaluating the effects of their actions on critical habitat. This expense will be minimal since these agencies will be reviewing these same actions to assess their effects on the continued existence of the species.

The BR will be required to ensure that suitable water temperatures are maintained in the portion of the critical habitat where spawning, egg development, and growth of juvenile fish are expected to occur. During the 1987–1988 drought, the BR maintained, under the Cooperative Agreement, suitable water temperatures between Keswick Dam and Cottonwood Creek (approximately 14 river miles above Bend Bridge). Generally, about 80 percent of the run spawns above Cottonwood Creek. The major action implemented by the BR was using the low level outlet for releasing water from Shasta Lake. This was done for the first time in 1987 and again in 1988. Because the low level outlet is below the outlet that runs water to the powerhouse, it releases cold deep water during periods of the year when the powerhouse outlet is draining warmer water nearer the surface. While the low level outlet releases cold water to the benefit of the winter-run, the water bypasses the powerhouse, and power can not be generated from the release of that water. Between July 21 and September 17, 1988, the BR released almost 400,000 acre-feet of water through the low level outlet at the expense of $3.65 million in foregone power revenues. However, this cost should not be attributed to the designation of critical habitat because it would be incurred under the Ten-Point Winter-run Restoration Plan and the Conservation Agreement to which the BR has already agreed.

Since storage in Shasta Lake in March was equivalent to the level at the beginning of the 1988 water year, NMFS expects the Bureau to use the low level outlet again in 1989 to maintain suitable temperatures for development of eggs and fry throughout the stretch of the river designated as critical habitat. The 1988 cost provides an estimate of the expense that the BR will incur in 1989 as a result of foregone power revenues. However, this cost should not be attributed to the designation of critical habitat because it would be incurred under the Ten-point Winter-run Restoration Plan and the Cooperative Agreement which the Bureau of Reclamation has agreed to.

The BR is expected to raise the gates in the Red Bluff Diversion Dam on December 1, 1989, and keep them raised through April 1, 1990, consistent with past performance under the Cooperative Agreement implementing the Ten-point Winter-run Restoration Plan. This will facilitate passage of juvenile fish downstream in December and provide access for adults to critical habitat. Because this activity occurs during the non-irrigation season, it is not expected to affect agricultural operations that depend on water diverted at the Red Bluff Diversion Dam.

Because the BR has been cooperating in the conservation of habitat by raising the gates at Red Bluff Diversion Dam and by maintaining suitable temperatures and because failure to conduct these actions could adversely modify critical habitat, NMFS has determined that the economic impact of these actions to the BR does not outweigh the benefits to be derived from implementing measures to conserve the winter-run's spawning habitat during the 240 days the emergency rule is in effect.

Due to the emergency brought on by the low return of spawning adults in 1989, there has not been an opportunity to complete a more detailed economic analysis. Other Federal actions, such as consideration of the City of Redding's Federal Energy Commission applications, are not likely to progress to the point that resources will be irreversibly or irretrievably committed during the 240 days this emergency rule is in effect. Therefore, these actions were not considered in this brief economic assessment.

A complete economic analysis of the impact of designating critical habitat will be included in the proposed rule for listing this population as threatened.

## Classification

Since the Assistant Administrator for Fisheries, NOAA, (Assistant Administrator) has determined that the present situation poses a significant risk to the well-being of the Sacramento River winter-run chinook salmon, emergency regulations can be issued under 16 U.S.C. 1533(b)(7).

The Assistant Administrator finds that reasons justifying promulgation of this rule on an emergency basis make it impracticable and contrary to the public interest to provide notice and opportunity for prior comment or to delay for 30 days its effective date under section 553(b) and (d) of the Administrative Procedure Act.

This emergency rule is exempt from the normal review procedures of Executive Order 12291 as provided in section 8(a)(1) of that order. This rule is being reported to the Director of the Office of Management and Budget with an explanation of why it is not possible to follow the usual procedures of that order.

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

The Regulatory Flexibility Act does not apply to this rule, because as an emergency rule, it is issued without opportunity for prior public comment. Since notice and opportunity for comment are not required to be given under section 553 of the Administrative Procedure Act, and since no other law requires that notice and opportunity for comment be given for this rule, under sections 603(a) and 604(a) of the Regulatory Flexibility Act, no initial or final regulatory flexibility analysis has been or will be prepared.

## National Environmental Policy Act

The National Oceanic and Atmospheric Administration (NOAA) has determined that certain categories of its activities do not normally have the potential for a significant effect on the human environment and are, therefore, exempt from the requirement for preparation of either an environmental assessment or an environmental impact statement (NOAA Directives Manual 02-10 5c(3)). Listing actions under section 4(a) of the ESA and designation of critical habitat are among those actions NOAA has determined are exempted (NOAA Directives Manual 02-10 5c(3)(h)). The main environmental impact from this emergency rule will be modification of water temperatures in the area designated as critical habitat for the benefit of incubating winter-run eggs and developing young. This is not expected to produce a significant impact to the human environment.

## List of Subjects in 50 CFR Parts 226 and 227

Designated critical habitat and threatened fish and wildlife.

Dated: July 31, 1989.

James E. Douglas, Jr.,

*Deputy Assistant Administrator for Fisheries.*

Accordingly, Parts 226 and 227 of Chapter II of Title 50 of the Code of Federal Regulations are amended as follows:

## PART 226—[AMENDED]

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

Authority: 16 U.S.C. 1533.

2. The title of Subpart C under Part 226 is revised to read as follows:

### Subpart C—Critical Habitat for Marine and Anadromous Fish

3. Section 226.21 is added to Subpart C to read as follows:

**§ 226.21 Sacramento River winter-run chinook salmon (Oncorhynchus tshawytscha).**

The Sacramento River, California, between Red Bluff Diversion Dam, Tehama County (River Mile 243) and Keswick Dam, Shasta County (River Mile 302) including the adjacent riparian zone, the water, and the river bottom.

## PART 227—[AMENDED]

1. The authority citation for Part 227 continues to read as follows:

Authority: 16 U.S.C. 1533.

2. Section 227.4 under Subpart A is amended by adding a new paragraph (e) to read as follows:

**§ 227.4 Enumeration of threatened species.**

* * * * *

(e) Sacramento River winter-run chinook salmon (*Oncorhynchus tshawytscha*).

3. The title of Subpart C under Part 227 is revised to read as follows:

### Subpart C—Threatened Marine and Anadromous Fish

4. Section 227.21 is added to Subpart C to read as follows:

**§ 227.21 Sacramento River winter-run chinook salmon.**

(a) *Prohibitions.* The prohibitions of section 9 of the Act (16 U.S.C. 1538) relating to endangered species apply to the Sacramento River winter-run chinook salmon for the 240-day period the emergency rule is in effect.

(b) *Exceptions.* Excepted from the prohibitions are any acts involving winter-run chinook salmon which were taken lawfully under a State of California fishing law or regulation, or which were taken lawfully under a fishing regulation under the Magnuson Fishery Conservation and Management Act. There will be a rebuttable presumption that the winter-run chinook involved in any acts are not entitled to the exemption contained in this subsection.

[FR Doc. 89-18302 Filed 8-3-89; 8:45 am]

BILLING CODE 3510-22-M