BEFORE THE OREGON FISH & WILDLIFE
COMMISSION & DEPARTMENT

Michael Finley, Chair
Oregon Fish and Wildlife Commission

And

Robert Webber, Vice-Chair
Holly Akenson, Commissioner
Jim Bittle, Commissioner
Bruce Buckmaster, Commissioner
Greg Wolley, Commissioner

And

Curt Melcher, Director
Oregon Department of Fish and Wildlife

Petitioners:
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PETITION TO ADOPT RULES TO IDENTIFY COLD WATER REFUGIA AND ESTABLISH SPORT FISHING REGULATIONS TO PROVIDE PROTECTION AND SANCTUARY FOR MIGRATING WILD SALMON AND STEELHEAD
Petitioners

A. The Conservation Angler

The Conservation Angler is a wild fish conservation organization based in Edmonds, WA with offices in Portland, OR. The Petitioner is David A. Moskowitz, Executive Director of The Conservation Angler.

B. Trout Unlimited

Trout Unlimited is a national organization with over 300,000 members and 400 chapters across North America whose mission is to conserve, protect and restore North America’s coldwater fisheries and their watersheds. Dean Finnerty is NW Director of the Sportsman’s Conservation Project and Wild Steelhead Initiative

I. Authority to Adopt Rules and Temporary Rules

The Oregon Fish and Wildlife Commission (Commission) has the authority to adopt permanent, temporary or emergency regulations. This authority is granted by ORS 496.138 and further detailed in Oregon Administrative Rules under the title OAR 635-011-0050:

SPORT FISHING REGULATIONS FOR FISH, SHELLFISH, AND MARINE INVERTEBRATES: DIVISION 11: STATEWIDE ANGLING REGULATIONS

Procedures for Promulgation of Angling Regulations

1) In accordance with ORS 496.162. Department staff shall continually monitor status of fish, shellfish, and marine invertebrates and report promptly to the Director and Commission any serious or abnormal changes in health or abundance of the resource.

2) Except as provided in subsections (2)(a) and (2)(b), the Commission shall annually adopt those rules prescribing seasons, bag limits, method of harvest, and specific restrictions considered necessary to provide optimum recreational and aesthetic benefits to anglers and other citizens;

(a) In the event more restrictive rules are needed to protect or preserve a species or stock experiencing depletion or drastic decline in health or abundance the Commission shall consider adopting rules at its earliest opportunity to prevent further depletion or decline;

III. Summary of Findings Supporting Permanent Rulemaking:

The Oregon Fish and Wildlife Commission, under its authority granted by Oregon Revised Statute and related administrative rules, find the following to be true:

1. The pre-season forecasts for Columbia River wild steelhead are extremely low for the fifth consecutive year.
2. The actual in-season run-size for both wild and hatchery summer steelhead has come in under the low forecast for all three summer steelhead components (Skamania, A-run and B-run) for the past several years.

3. Environmental factors including drought, predicted warm water temperatures and recent poor NOAA ocean productivity forecasts for the next several years will create downward pressure on returning wild steelhead and recent and forthcoming juveniles throughout Oregon.

4. Wild steelhead spawning escapements are not being met in other Oregon tributaries where warm water – cold water mixing zones attract large numbers of fish and make these resting, holding wild fish vulnerable to angling-related stress.

5. Wild steelhead have an extremely plastic and variable life history and their migratory behaviors do not conform to aggregated and artificial management structures placed upon them by fishery managers, which inevitably places wild steelhead diversity at risk.

Based on these factors, the Commission finds it must take immediate actions in 2019 to further conserve wild salmon and steelhead in the Columbia River, and in other basins.

IV. Introduction to the Rule Adoption Request

Pursuant to OAR 137-001-0070, The Conservation Angler and Trout Unlimited (collectively “Petitioners”) hereby petition the Oregon Department of Fish and Wildlife (ODFW) to amend an existing rule. In light of recent scientific studies indicating that wild steelhead and salmon extensively use specific, identifiable cold water refugia to mitigate the effects of warm water encountered during their migration to their spawning grounds, Petitioners propose the Oregon
Sport Fishing Regulations be amended to prohibit sport fishing within or near specific, identifiable areas to protect migrating wild steelhead and salmon. The Administrative Procedures Act requires that the Commission either deny the petition in writing or initiate rulemaking proceedings within 90 days after receipt of a rulemaking petition. ORS 183.390(1). The 90-day period is a maximum period and the Commission may deny or initiate a rulemaking request at any time after receipt.

V. Rule Change Requested

The 2018 Oregon Sport Fishing Regulations describe areas open or closed for recreational angling in Oregon rivers. The various zone regulations currently allow recreational fishing within all areas that are otherwise not specifically limited or closed. Existing administrative rules already prohibit commercial and Treaty subsistence and commercial fishing in specific river mouth areas identified as sanctuaries where most commercial fishing is already prohibited by administrative rule. -

Any proposed amended permanent rule would add language clarifying the location of any sanctuaries.

VI. Background

OAR 137-001-0070(1)(b) Reasons for the request

Sport fishers commonly fish at confluences of tributaries and mainstem river reaches within Oregon waterways. Anglers target fall Chinook, Coho, summer steelhead and sockeye salmon which all use these confluence areas
during migration. The upstream migration of summer and fall salmon and steelhead regularly occurs as the mainstem water temperatures begin to rise above temperatures considered harmful to wild salmon productivity and health.

Where both large and small tributaries enter mainstem areas, wild salmon and steelhead will congregate in the cold water plume to hold and rest before further migration. Research shows that wild steelhead will use these cold water refugia (CWR) for days and weeks when the temperatures of the receiving water body rise from 64f to 68f. That research also shows that wild steelhead residency within the CWR increases to weeks and months when the mainstem water temperatures rise above 68.5f. Anglers target steelhead and salmon within these CWR because that is where the fish are congregated – creating, in angler's terms – a "bucket." Anglers will fish in these areas for days and weeks. Although no studies have yet calculated the encounter rate of wild steelhead and salmon in these CWR and the overall effect of catch and release fishing on wild salmon populations, the link between increased fish density, fishing effort, encounter rate and mortality in migrating wild steelhead and salmon should not be ignored. In order to protect, preserve, and promote the protection and recovery of these important fish species, the Sport Fishing Regulations should be amended to establish sanctuaries to reduce the impact of sport angling within these cold water refugia.

OAR 137-001-0070(2)(a) Options for achieving the existing rule's substantive goals while reducing the negative economic impact on businesses
The principle goal of the Oregon Fish and Wildlife Commission (the Commission) and ODFW, through its Sport Fishing Regulations, is to conserve and enhance Oregon’s indigenous species and prevent their depletion. The secondary goal is to provide for the use and enjoyment of Oregon’s indigenous species for both present and future generations. It is this secondary goal, to provide use and enjoyment through both recreational and commercial fisheries, that ODFW also maintains both Sport and Commercial fishing regulations.

Limiting the places and times permissible for sport fishing in Oregon is one component of that goal. By adding language that prohibits the fishing in certain specific areas during specific periods of time, the Commission and ODFW further the goal of preventing the serious depletion of indigenous fish species, while still providing the use and enjoyment to both present and future generations.

Although the limits proposed by these rules may reduce important elements of "use and enjoyment" in specific geographic zones, increased recruitment and population resiliency should increase overall, resulting in increased "use and enjoyment" for present and future anglers. These regulations should also increase the duration and geographic scope of fishable populations.

Amending the basic rule to prohibit angling within CWR directly addresses the source of the issue which is preventing high encounter rates with ESA-listed wild steelhead and salmon under stressful environmental conditions. A rule prohibiting angling within CWR is also fitting with "fair chase" principles that are an important element of big game hunting.

OAR 137-001-0070(2)(b) Continued need for the existing rule
The existing rule specifies permissible areas of the Columbia River where recreational fishing for food and game fish is open in Oregon, and continues to be necessary to further ODFW’s goals of protecting and preserving all indigenous fishes in Oregon, while allowing the “use and enjoyment” of these species. The proposed amendment only prohibits recreational fishing in specific areas to better achieve the goal of protecting and recovering ESA-listed indigenous fishes in the Columbia River Zone and other specific areas throughout Oregon.

**OAR 137-001-0070(2)(c) Complexity of the existing rule**

The existing rule is straightforward yet inadequate. Adopting the proposed language creating sanctuaries adds the specificity required to address the certain but un-quantified consequence of increased fish mortality rates due to higher encounter rates with indigenous ESA-listed steelhead and salmon in fisheries conducted in areas where environmental conditions force migrating steelhead and salmon to be vulnerable to intensive fisheries over a specific, condensed period.

**OAR 137-001-0070(2)(d) Extent to which the existing rule overlaps, duplicates, or conflicts with other state or federal rules and with local government regulations**

The creation of sanctuaries for ESA-listed steelhead and salmon at known and specific CWR will not conflict with or duplicate other state or federal rules or any local government regulations under current Sport Fishing Regulations. Creation of Sanctuaries applicable to recreational fishing will overlap but not conflict with existing river-mouth sanctuaries where commercial fishing is
prohibited. Creating Sanctuaries in specific CWR to protect and conserve ESA-listed wild steelhead and salmon is consistent with the duties of the Commission. Additionally, ORS 506.036 imposes upon the Commission the duty of “protection, preservation, propagation, cultivation, development and promotion of all fishes.” Existing Sport Fishing Regulations allow recreational fishing within the existing specific CWR, which results in mortalities that are preventing the conservation and recovery of ESA-listed steelhead and salmon, which directly counteracts the Commission’s duty in ORS 496.012 and 506.036.

The current Sport Fishing Regulations allow activity otherwise prohibited by federal regulations. Federal regulations prohibit unauthorized “take” of ESA-listed salmon and steelhead species without an approved Fishery Management and Evaluation Plan (FMEP) submitted by Oregon. Neither Oregon nor Washington have received authorization or approval of FMEPs for portions of the CWR that are being proposed in this rule amendment.

Amending the Sport Fishing Regulations to prohibit recreational angling in known, specific areas of main-stem rivers where CWR exist will put the anglers on notice that “fair chase” principles validly apply to sport fishing. The amendment will provide the necessary recognition for the application of the “refuge” concept to recreational fishing and help resolve the conflict between the predominant goal of the Commission to “prevent the serious depletion of any indigenous species” and the subservient, secondary goal of providing for the “use and enjoyment for present and future generations.” ORS 496.012.
OAR 137-001-0070(2)(e) Degree to which technology, economic conditions, or other factors have changed in the subject area affected by the existing rule, since the agency adopted the rule

The three primary factors that have changed in the area of sport fishing regulations and the affected area are 1) the rising water temperatures and dropping stream flows in mainstem Oregon rivers which present harmful and at times, lethal migratory conditions for indigenous salmon and steelhead; and 2) the emerging scientific research that shows the increasing and extensive use of CWR by ESA-listed steelhead and salmon which makes fish vulnerable to catch and release mortality due to focused, intensive recreational angling within the CWR; and 3) the rapidly declining populations of ESA-listed wild steelhead and salmon returning to the Columbia River since 2014, particularly the very low returns of wild B-run steelhead.

VII. CONCLUSION

ODFW and WDFW should work together to create Refuges for migrating wild salmon and steelhead in the Columbia, and ODFW should work to create other necessary Refuges in Oregon to protect migrating wild salmon and steelhead. Prohibiting recreational angling in specific CWR in the Sport Fishing Regulations is an important step in protecting, and ultimately, recovering wild steelhead and salmon from undue recreational angling encounters that result in an unknown mortality rate. Rules applying “fair chase” principles to angling in water bodies where cold water refugia attract and retain wild fish will raise awareness among recreational fishers. Establishing “fair chase” angling rules will place recreational and commercial fishers on the same page regarding protecting river mouth sanctuaries.
Respectfully submitted on February 7, 2019

David A. Moskowitz
The Conservation Angler

Dean Finnerty  (e-signature approved via phone)

Dean Finnerty
Trout Unlimited – NW Sportsman’s Conservation Project