



Endangered Species Act Program Alert 2000-2

RE: Proposed 4(d) Rules and Local Governments
DATE: February 3, 2000

The previous Program Alert (formerly called Action Alerts) provided an overview of the three 4(d) rules recently proposed by National Marine Fisheries Service (NMFS). This week's Program Alert provides more detailed information about the role of *local governments* in salmon recovery under Section 4(d) of the Endangered Species Act.

How can local governments gain relief from take prohibitions under the proposed 4(d) rules?

In the proposed rules, NMFS provides a mechanism by which local governments and other entities can be assured that their activities are consistent with the ESA. This provision acts as an umbrella under which local governments can be sheltered from liability for take of threatened salmon (not endangered), and from the threat of enforcement activities (fines, penalties, etc.) by NMFS, as well as citizen suits under the ESA.

What kinds of plans will be considered?

NMFS will consider plans (prepared by state, local and other entities) for habitat restoration, control of development, water diversion screening, routine road maintenance, and other activities. If a plan is found to adequately avoid or minimize take of listed salmon, NMFS will "exempt" activities under the plan from 4(d) take prohibitions.

What should the plan contain?

The proposed rules outline the criteria for plans of several types. The following criteria address plans relating to urban development, which may be of greatest interest to local governments. NMFS proposes to use criteria based on Metro's Urban Growth Management Functional Plan for evaluating urban development plans¹. A plan must

¹ Metro is the directly elected regional government that serves three counties and 24 cities in the Portland metropolitan area. Metro provides transportation and land-use planning services, oversees regional garbage and recycling programs, manages a regional parks and greenspaces program and oversees operation of convention facilities, Civic Stadium, the Portland Center for the Performing Arts and the Oregon Zoo. Metro's Urban Growth Management Functional Plan establishes regional policies to implement its regional growth management goals; these policies will apply to all cities

assure that urban development contributes to salmon conservation by addressing the following issues:

1. Avoid inappropriate areas such as unstable slopes, wetlands, areas of high habitat value, and similarly constrained sites.
2. Avoid stormwater discharge impacts to water quality and quantity, or to the hydrograph of the watershed.
3. Require adequate riparian buffers around all perennial and intermittent streams, lakes or wetlands (buffers of 200 feet are proposed).
4. Avoid stream crossings by roads wherever possible, and where one must be provided, minimize impacts through choice of mode, sizing, or placement.
5. Protect historic stream meander patterns and channel migration zones; avoid hardening of stream banks.
6. Protect wetlands and wetland functions.
7. Preserve the hydrologic capacity of any intermittent or permanent stream to pass peak flows.
8. Landscape to reduce need for watering and application of herbicides, pesticides and fertilizer.
9. Prevent erosion and sediment runoff during construction.
10. Assure that water supply demands for new development can be met without impacting flows needed for threatened salmon either directly or through groundwater withdrawals, and that any new water diversions are positioned and screened to prevent injury or death of salmon.
11. Provide all necessary enforcement, funding, reporting, and implementation mechanisms.
12. Development must comply with all other State and Federal environmental or natural resource laws and permits.

What is the process for submitting a plan for review and approval by NMFS?

When the proposed 4(d) rules become final, NMFS will review local governments' development plans for consistency with the ESA and the criteria listed above. Within 30 days of NMFS' determination that the plan is acceptable in concept, the plan will be published in the Federal Register for a 30-day public review and comment period. Following the comment period, NMFS will make a final determination to either approve the plan as a "limit" to 4(d) take prohibitions, or find it inadequate to protect and conserve threatened salmon and not approve it as a limit.

Since the criteria for the urban density development take limit are proposed and still subject to change, no new plans will be reviewed by NMFS before the rules become final

and counties within the Metro region, and relies upon changes to local governments' comprehensive plans and implementing ordinances to carry out its policies. Title 3 of the Functional Plan (Stream and Floodplain Protection Plan) protects the region's health and public safety by reducing flood and landslide hazards, controlling soil erosion and reducing pollution of the region's waterways. Title 3 contains specific requirements and recommendations to protect streams, rivers, wetlands and floodplains by avoiding, limiting or mitigating the impact on these areas from development.

in June.² However, local governments interested in developing programs under the urban density limit are strongly encouraged to begin talking with NMFS at the outset of the planning process. This will allow for clarification of NMFS' expectations for the plan, and will decrease the chance of last-minute "surprises" that could necessitate time-consuming revisions and redrafts.

What are the benefits of operating under an approved plan?

Local governments with an approved urban development plan would enjoy a measure of certainty that activities carried out under the plan would not be subject to take prohibitions or NMFS enforcement actions. This certainty will enable local governments to undertake long-term planning activities with fewer "unknowns" in terms of the scope and cost of salmon recovery.

How do local governments go about developing comprehensive plans?

The first task is to compare the criteria proposed in the 4(d) rule to existing local development regulations to assess their consistency and their effectiveness in protecting and conserving listed salmon. If gaps are identified, local governments are advised to start planning NOW to address those gaps. Watershed-based salmon recovery planning is a long-term endeavor; the Parametrix ESA Team is well-equipped to assist local governments in successfully addressing the challenge of the proposed 4(d) rules.

Parametrix project managers are encouraged to share this information with clients who may be interested in, or affected by, ESA listings and issues. Additional questions should be addressed to Megan Callahan Grant, ESA Program Policy Analyst, who can direct them to the appropriate ESA Program staff member.

² The Proposed Tri-County 4(d) Rule Framework is one exception. Three counties in the Puget Sound area (King, Snohomish, and Pierce) are in the process of developing recommendations pertaining to the draft 4(d) rule issued by NMFS in December 1999. The framework relies upon implementation of codes and ordinances at the city and county levels to regulate development and other activities so that salmon and their habitat are protected and restored. Since Tri-County participants initiated discussions with NMFS about the proposed framework before the release of the draft 4(d) rule, NMFS expects to review the framework for possible inclusion in the final rule. The schedule for the completion and possible inclusion of the framework in the final rule is as follows:

February 2000: Final draft "framework" for Tri-County proposal completed and published in Federal Register

March 2000: Final draft of Tri-County proposal completed

April 2000: Final draft proposal published in Federal Register

June 19, 2000: Tri-County proposal adopted by NMFS as part of final 4(d) rule.