



Endangered Species Act Alert 2000-6

RE: Final Rules for Listed Salmon and Steelhead

DATE: June 21, 2000

The National Marine Fisheries Service (NMFS) has finalized rules under section 4(d) of the Endangered Species Act to protect 14 populations of salmon and steelhead in Oregon, Washington and California. The rules were released in draft form in January of 2000; NMFS received more than 6,500 public comments on the proposed rules.

Rules are developed under section 4(d) of the Endangered Species Act (ESA) to protect threatened species from take caused by non-federal actions.¹ The 4(d) rules apply take prohibitions to certain activities, and can provide exceptions to take prohibitions, or “limits”, for other activities.

The following bullets outline important points about the final 4(d) rules, and summarize key differences between the draft and final versions:

- Three draft 4(d) rules were published in January of 2000. There was one draft rule for seven populations of steelhead; one draft rule for seven populations of salmon; and one draft rule for tribal activities. In their final form, the three rules have been combined into two: one final rule for tribal activities, and one final rule for all 14 populations of salmon and steelhead. Go to <http://www.nwr.noaa.gov/1salmon/salmesa/maps/allesu.jpg> for a map of where the 14 fish populations occur.
- **Effective Dates:** The 4(d) rules will become effective for steelhead populations 60 days after the final rule appears in the Federal Register (expected before Friday, June 30). For salmon ESUs, the rules will come into effect 180 days following publication. The reason for this difference is that the steelhead rules are controlled by a court order.
- Some changes were made to several of the 13 “limits” that appeared in the draft rules. The limits of greatest interest to local governments include:

¹ Take of threatened species through federal actions is automatically prohibited as soon as the species is listed. Likewise, take of *endangered* species is prohibited as soon as the species is listed, for both federal and non-federal actions.

- Habitat restoration:** The final rules clarify that habitat restoration activities carried out under approved watershed conservation plans (WCPs) will be exempt from take prohibitions. NMFS will not directly review and approve local watershed conservation plans; rather, NMFS has established criteria for evaluating each state’s guidelines for WCPs. The states of Washington, Oregon and California will establish guidelines for local WCPs; these guidelines will be reviewed and approved by NMFS. Then, local WCPs will be reviewed and approved by the state, and habitat restoration activities carried out under these plans will be exempt from take prohibitions. The list of six categories of habitat restoration actions included in the draft rules (placement of large woody debris, riparian fencing, etc.) has been removed from the final rules, and the two-year “window” for completing WCPs is deleted. This means that habitat restoration activities will be exempt from take prohibitions at whatever point a WCP is completed and approved.
- Water Diversion Screening:** The new rules allow NMFS to designate staff of other agencies or tribes to review and recommend certification of screen designs to NMFS. Previously, only NMFS engineers would have been authorized to recommend screen certification. The final rule also provides for exemptions to be granted to water diversion upgrade projects before they are completed, as long as they follow an approved design and construction plans and schedules, and take precautions to avoid take in the interim.
- Routine Road Maintenance Activities:** In the draft rules, Oregon Department of Transportation’s (ODOT) Routine Road Maintenance program² was proposed as a limit. The final rules explain that not only will the limit apply to ODOT’s road maintenance activities, but that the limit will be available to other jurisdictions³ whose road maintenance program is substantially similar to the ODOT program. Jurisdictions that wish to come under this limit must enter into a memorandum of agreement with NMFS, and a 30-day public comment period will be required. Road maintenance programs that are not substantially similar to ODOT’s program can also be considered under this limit; these must be reviewed by NMFS and will also be subject to public notification in the Federal Register. The expectation is that programs not similar to ODOT’s may be subject to more rigorous review by NMFS.
- Municipal, Residential, Commercial and Industrial (MRCI) Development and Redevelopment** (formerly the Urban Development limit): In the proposed rules, NMFS set out a list of 12 criteria that would be used to evaluate local development ordinances and plans for protectiveness of listed salmon and steelhead. The final rules clarify several points. First, cities, counties, and regional government entities are eligible to submit plans under

²Maintenance of Water Quality and Habitat Guide, ODOT, June 1999. Go to: <http://www.odot.state.or.us/eshtm/images/4dman.pdf>

³ Any state, county, city or port.

this limit. Second, not all 12 criteria are necessarily applicable to all local plans. Finally, all plans submitted for approval under this limit (as well as amendments, additions and withdrawals) must be published in the Federal Register and available for public comment for 30 days. In addition, the final rules clarify several of the 12 criteria, and provide more information about the “proper functioning conditions” that NMFS deems adequate to protect listed fish.

- **Washington Forest Management Activities:** New language is added to the final rules that allow a limit on take prohibitions to be granted to activities under plans other than Washington’s *Forests and Fish Report*, as long as the plans meet established criteria and receive state approval.
- **City of Portland’s Integrated Pest Management Plan:** The final rules provide an updated list of allowable pesticides.
- **Other Limits:** Limits for ESA-permitted activities, ongoing scientific research, rescue and salvage actions, fishery management activities, artificial propagation, joint tribal and state plans, and scientific research, appear in the new rules without significant changes from the proposed rules.
- **Take Guidance:** NMFS states that it will focus its enforcement actions on Federal, state and local regulatory authorities that issue permits for activities that do not comply with the 4(d) rules, rather than on entities or individuals whose activities are in compliance with existing permits. If NMFS determines that the regulatory program does not adequately protect listed salmon and steelhead, NMFS will work with the regulatory agency to modify the program, rather than pursue individual enforcement actions against permit holders. A list of activities that are likely to result in take of listed species is provided (see attachment). In this section of the final rule, NMFS expresses support for, and encourages further development of, state and local efforts to protect and conserve listed salmon and steelhead. These include: the *Oregon Plan for Salmon and Watersheds*, the State of Washington’s *Extinction is Not an Option Plan*, Metro’s *Functional Plan*, the Puget Sound Tri-County Initiative, the Lower Columbia Fish Recovery Board, the Eugene (Oregon) Area Metro ESA Coordinating Team, and the Willamette Restoration Initiative.

What’s Next?

Although the final rules have been signed, they may not appear in the Federal Register for several days. In the meantime, an overview of the rules is available at www.nwr.noaa.gov/1salmon/salmesa/final4d.htm. Over the next several months, NMFS plans to provide workshops around the region to educate governments, businesses and citizens about the new rules and the overall salmon recovery landscape. Look for NMFS’ *Citizen’s Guide to the 4(d) Rule* to be released shortly.

Help Spread the Word

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 (mcallahan@parametrix.com), ESA Program Policy Analyst, who can direct them to the appropriate specialist.

ATTACHMENT: Activities Likely to Cause Take

Activities listed in A thru J below are as cited in NMFS' harm rule 64 FR 215 (November 8, 1999).

- A. Constructing or maintaining barriers that eliminate or impede a listed species' access to habitat or ability to migrate.
- B. Discharging pollutants, such as oil, toxic chemicals, radioactivity, carcinogens, mutagens, teratogens or organic nutrient-laden water including sewage water into a listed species' habitat.
- C. Removing, poisoning, or contaminating plants, fish, wildlife, or other biota required by the listed species for feeding, sheltering, or other essential behavioral patterns.
- D. Removing or altering rocks, soil, gravel, vegetation or other physical structures that are essential to the integrity and function of a listed species' habitat.
- E. Removing water or otherwise altering streamflow when it significantly impairs spawning, migration, feeding or other essential behavioral patterns.
- F. Releasing non-indigenous or artificially propagated species into the listed species' habitat or where they may access the habitat of listed species.
- G. Constructing or operating dams or water diversion structures with inadequate fish screens or fish passage facilities in a listed species' habitat.
- H. Constructing, maintaining, or using inadequate bridges, roads, or trails on stream banks or unstable hill slopes adjacent to or above a listed species' habitat.
- I. Conducting timber harvest, grazing, mining, earth-moving, or other operations which result in substantially increased sediment input into streams.
- J. Conducting land-use activities in riparian areas and areas susceptible to mass wasting and surface erosion, which may disturb soil and increase sediment delivered to streams, such as logging, grazing, farming, and road construction.
- K. Illegal fishing. Harvest in violation of fishing regulations will be a top enforcement concern.
- L. Various streambed disturbances may trample eggs or trap adult fish preparing to spawn. The disturbance could be mechanical disruption caused by constructing push-up dams, removing gravel, mining, or other work in a stream channel. It may also take the form of egg trampling or smothering by livestock in the streambed or by vehicles or equipment being driven across or down the streambed (as well as any similar physical disruptions).
- M. Interstate and foreign commerce dealing in listed salmonids and importing or exporting listed salmonids may harm the fish unless it can be shown—through an ESA permit—that they were harvested in a manner that complies with ESA requirements.
- N. Altering lands or waters in a manner that promotes unusual concentrations of predators.
- O. Shoreline and riparian disturbances (whether in the riverine, estuarine, marine, or floodplain environment) may retard or prevent the development of certain

habitat characteristics upon which the fish depend (e.g., removing riparian trees reduces vital shade and cover, floodplain gravel mining, development, and armoring shorelines reduces the input of critical spawning substrates, and bulkhead construction can eliminate shallow water rearing areas).

- P. Filling or isolating side channels, ponds, and intermittent waters (e.g., installing tide gates and impassable culverts) can destroy habitats that the fish depend upon for refuge areas during high flows.