

## Questions and Answers about the ESA Proposed 4(d) Rules for Pacific Salmon

National Marine Fisheries Service

**December 1999**

*Thank you for your interest in the Endangered Species Act (ESA) and the recent listings of salmon and steelhead species throughout the Pacific Northwest. This fact sheet provides answers to frequently asked questions about the ESA proposed 4(d) rules for pacific salmon issued by the National Marine Fisheries Service (NMFS) in December 1999. The 4(d) rules are an ESA mechanism for protecting threatened species. They also propose a means by which states, tribes, government entities, developers, private citizens and others can obtain assurances that certain activities they authorize or conduct are permissible under the ESA. NMFS has issued three proposed 4(d) rules: (1) one rule covering seven threatened steelhead evolutionary significant units (ESUs); (2) another rule covering seven other threatened salmonid ESUs (three chinook, two chum, one coho and one sockeye ESU); and (3) a third proposed rule addressing tribal resource management plans affecting threatened salmonids. The proposed 4(d) rules for steelhead and chinook would apply take prohibitions to all actions except those within 13 Alimits® described in detail in the rules. The third proposal would create an additional limit for tribal resource management plans. NMFS will conduct public hearings on these proposed rules in January and February 2000. A list of the public hearing schedule can be found at the end of this fact sheet, together with a list of NMFS staff to contact if you have further questions.*

### **Q. What regulation takes effect with publication of this 4(d) rule?**

A. None. These 4(d) rules are a proposal to get public comment leading to publication of final rules. Once published in the Federal Register, there will be a 60 day comment period, as well as a number of public hearings in the four affected states: Idaho, Washington, Oregon and California.

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### **Q. What would be the effect of these rules when they become final?**

A. If these rules are final in the proposed form, the ESA Section 9 take prohibitions would apply to most, but not all, activities carried out by governmental entities and private parties. For certain activities identified as Alimits® in the proposed rules, application of the take prohibition would be limited, because NMFS has determined that such activities will minimize impacts on threatened salmonids sufficiently that additional Federal protections are not necessary.

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**Q. What is the section 9 Atake@ prohibition?**

- A. The definition of Atake@ is to Aharass, 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)). AHarm@ is an act that actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering. Actions which may result in take include habitat modification or degradation that harms listed species (64 FR 60727).

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**Q. What activities would not be subject to the take prohibitions?**

- A. Under the proposed rule, application of the take prohibitions would be limited for certain activities that NMFS has identified that will minimize impacts on threatened salmonids sufficiently that additional Federal protections are not necessary for conservation of the ESU. There are two types of Alimits@ described in the proposed rules: 1) complete programs that NMFS has evaluated and determined are adequately protective of the threatened ESU; and 2) criteria for certain activities that NMFS will use to evaluate programs still to be developed and submitted to NMFS for review.

The broad categories of activities covered by limits proposed in the rules include:

1. Scientific research conducted, supervised or permitted by state research programs
2. Fish harvest activities
3. Artificial propagation programs
4. Habitat restoration under watershed plans
5. Properly screened water diversions
6. Road maintenance (Oregon)
7. Urban development
8. Forest management practices in the State of Washington
9. Tribal plans

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**Q. How did NMFS choose which programs to review as possible limitations on take in the proposed rules?**

- A. Some limitations in the proposed rules originated in the interim Southern Oregon Northern California Coast Coho 4(d) rule issued July 18, 1997 (62 FR 3879). NMFS also conferred with numerous state, local and other government entities to identify potential limits for the rules. Some entities took proactive action and approached NMFS to discuss programs for inclusion in the rule; in other cases, NMFS identified innovative programs. NMFS has encouraged all government entities to discuss possible 4(d) limitations with us. We expect to continue to work with all of these entities and others toward the clearest and best possible final rule and toward recognizing other conservation efforts in future amendments or through other ESA mechanisms.

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**Q. How did NMFS evaluate whether to grant a limitation to certain programs? Was there a standard used for inclusion in the rule?**

- A. Whether take prohibitions or other protective regulations are necessary and advisable is in large part dependent upon the biological status of the species and the potential impacts of various activities on the species. If programs contribute to conserving the species or adequately limit the impacts on the species, NMFS may find that it is not necessary and advisable to impose the Federal take prohibitions, because those prohibitions would not meaningfully enhance the conservation of the species.

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**Q. How do I know whether something I am doing is likely to take a listed fish and put me at risk of enforcement?**

- A. The proposed 4(d) rules include information on activities NMFS believes are very likely to injure or kill salmonids and result in a take, as well as activities NMFS believes may injure or kill listed salmonids. NMFS enforcement staff has the authority to investigate whether these or any other activities are causing take. While NMFS is likely to concentrate education and enforcement resources on the former category of activities, the agency may initiate enforcement regarding any activities that harm or otherwise take protected salmonids.

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**Q. How do I know if the take prohibition applies to me?**

- A. The take prohibition applies to most activities, unless identified as a limitation in the proposed rules or permitted through the ESA. To determine whether an activity has the potential to cause take, it is necessary to assess your private party or government activities or actions to determine their potential effect on anadromous salmonids. This could be accomplished by creating a list of all your private party or government activities, identifying how each activity could affect anadromous salmonids, assessing the relative likelihood of the effect, and identifying how practices can be adjusted to avoid take of threatened salmonids.

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**Q. What liabilities or penalties are associated with this 4(d) rule?**

- A. This rule would put in place the take prohibitions regarding *threatened* salmonids that Section 9 of the ESA applies to *endangered* salmonids, except as limited for the activities specified in the rule. Section 11 of the ESA provides for substantial civil and criminal penalties for actions that result in the take of listed species.
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**Q. Why is there a separate Federal Register notice for the tribal 4(d) limit on take prohibitions?**

- A. The United States has a unique legal and political relationship with Indian tribes. The tribal limit on take prohibitions is similar to the limits available to states and others, except that the processes by which the tribal limitations are developed reflect the U.S. government's trust responsibility to tribes. This relationship requires the United States to harmonize its statutory responsibilities with the exercise of tribal sovereignty, tribal rights and tribal self-determination. The tribal 4(d) rule recognizes this government-to-government relationship. It establishes that Atake@ associated with a tribal resource management plan would not be subject to the Atake@ prohibition where NMFS determines, based on best available biological data, that implementation will not appreciably reduce the likelihood of survival and recovery of the species.

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**Q. How does this proposal treat the comprehensive conservation program under development in Puget Sound region?**

- A. These proposed rules do not identify a limitation on the take prohibition for activities that impact salmon in the Puget Sound region. A broad array of county, municipal and local governments in the Puget Sound region are working on a comprehensive framework for the conservation of salmonids. In January 2000, NMFS expects to seek public comment on this framework by sending notification of availability of that framework to the Federal Register. Assuming there is a completed program by April 2000, NMFS will seek comment on the completed program through a proposal by NMFS to limit take prohibitions for related activities.

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**Q. What are the differences between the 4(d) rule limit, Section 7 and Section 10 of the Endangered Species Act?**

- A. The broad purposes of the ESA are to conserve the ecosystems upon which endangered and threatened species depend and to conserve those species. The ESA defines "conservation" in part as "the use of all methods and procedures which are necessary to bring any threatened species to the point at which the measures provided pursuant to this Chapter (the Act) are no longer necessary" (16 U.S.C 1532(3)). The 4(d) rule limits, section 7 and section 10 are all mechanisms through which Federal agencies, local governments and individuals can assure that their activities are legal under the ESA and consistent with the conservation of listed species.

Section 7 of the ESA applies to Federal agencies. For any Federal action (whether a Federal project or a permit, lease or funding for another entity) which may have an impact on listed salmonids, the Federal agency must consult with NMFS to assure that the action will not jeopardize the species. Under section 7 a certain amount of take incidental to an otherwise lawful activity may be authorized.

Section 10 of the ESA provides a mechanism to authorize the take of listed species for Federal and non-Federal entities for two general categories of activities: (1) intentional take for scientific research and enhancement of the listed species, and (2) incidental take when that take is incidental to and not the purpose of otherwise lawful activities. The issuance of an incidental take permit requires the applicant to submit a conservation plan that includes steps to monitor, minimize and mitigate incidental take.

Section 4(d) establishes protective regulations that apply to a species listed as threatened under the ESA. These protective regulations for *threatened* species may include any or all of the ESA section 9 prohibitions that apply automatically to protect *endangered* species. In addition, they may contain specific proscriptions or limitations instead of, or in addition to, the general prohibitions against harming or killing a listed species.

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**Q. How do the 4(d) rules relate to recovery planning?**

- A. Comprehensive recovery plans provide a framework for addressing problems across the entire geographic range of the species and a means of evaluating and identifying the entire suite of actions necessary to achieve conservation goals. The programs approved as limitations under the proposed 4(d) rule will be important components of the entire suite of activities that contribute to recovery.
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**Q. Currently, several threatened ESUs are subject to take prohibitions with no or few limitations in place. Will NMFS now go back and revise its determinations to add limitations, e.g. in the Snake River chinook ESU?**

- A. NMFS intends to reevaluate the existing 4(d) rules for the threatened ESUs not in the proposed 4(d) rules. Based on this assessment, NMFS may revise the current 4(d) rules.
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**Q. What are the next steps after the final 4(d) rule is issued? How do I get my program considered for inclusion as a limit on the take prohibitions in a future 4(d) rule?**

- A. NMFS intends to update and amend these 4(d) rules regularly so that we can continue to incorporate additional take limitations as they are developed by state and local governments and other entities. NMFS is particularly interested in broad programmatic approaches that are best suited to rule making. A list of NMFS staff contacts are listed below if you want to discuss potential 4(d) limits with the NMFS.
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**Q. How do I get additional information on the proposed 4(d) rules?**

A. Please visit the NMFS Northwest Region Web Site at <http://www.nwr.noaa.gov> for additional information on the three proposed 4(d) rules, for copies of question and answer fact sheets and documents referenced in the rules. Additional information is also available on listed species, including *Federal Register* notices, species maps, status reviews and fact sheets. In addition, the following NMFS staff members can provide information on the proposed rules.

<u>For information on....</u>	<u>Contact:</u>
Proposed 4(d) Rules	Rosemary Furfey 503-231-2149 Rosemary.Furfey@noaa.gov
Puget Sound	Elizabeth Babcock 206-526-4505 Elizabeth.Babcock@noaa.gov
Upper Columbia Basin	Mike Grady 206-526-4645 Michael.Grady@noaa.gov
Mid-Columbia Basin	Kate Vandemoer 503-230-5422 Kate.Vandemoer@noaa.gov
Lower Columbia River and SW Washington	Rob Jones 503-230-5429 Rob.Jones@noaa.gov
Willamette Basin	Patty Dornbusch 503-230-5430 Patty.Dornbusch@noaa.gov
Oregon Coast	Patty Dornbusch 503-230-5430 Patty.Dornbusch@noaa.gov
California Coast	Greg Bryant 707-441-3684 Greg.Bryant@noaa.gov

**Q. What is the public hearing schedule for the December 1999 proposed 4(d) rules?**

**Public Hearings in Washington, Idaho and Oregon**

<b>Date</b>	<b>Time</b>	<b>Location</b>	<b>City</b>
January 10, 2000	6:00 B 9:00 p.m.	Metro Regional Center, Council Chamber, 600 N.E. Grand Ave	Portland, Oregon
January 11, 2000	6:00 B 9:00 p.m.	Quality Inn, 3301 Market St NE	Salem, Oregon
January 12, 2000	6:00 B 9:00 p.m.	Lewiston Community Center, 1424 Main Street	Lewiston, Idaho
January 13, 2000	6:00 B 9:00 p.m.	Natural Resource Center, Bureau of Land Management , 1387 South Vinnell Way	Boise, Idaho
January 18, 2000	6:00 B 9:00 p.m.	City Library, 525 Anderson Ave.	Coos Bay, Oregon
January 19, 2000	6:00 B 9:00 p.m.	Hatfield Science Center, 2030 SE Marine Science Drive	Newport, Oregon
January 20, 2000	6:00 B 9:00 p.m.	Columbia River Maritime Museum, 1792 Marine Drive	Astoria, Oregon
January 24, 2000	6:00 B 9:00 p.m.	Eugene Water and Electric Board Training Room, 500 East 4 <sup>th</sup> Ave.	Eugene, Oregon
January 25, 2000	6:00 B 9:00 p.m.	City Hall, 2 <sup>nd</sup> Floor Council Chamber, 500 SW Dorian Ave.	Pendleton, Oregon
January 26, 2000	6:00 B 9:00 p.m.	Yakima County Courthouse, Room 420, 128 North 2 <sup>nd</sup> St.	Yakima, Washington
January 27, 2000	6:00 B 9:00 p.m.	Mid Columbia Senior Center, John Day Room, 1112 West 9 <sup>th</sup>	The Dalles, Oregon
January 31, 2000	6:00 B 9:00 p.m.	City Hall, Dining Room (Basement), 904 6 <sup>th</sup> St.	Anacortes, Washington
February 1, 2000	6:00 B 9:00 p.m.	Northwest Fisheries Science Center Auditorium, 2725 Montlake Blvd. East	Seattle, Washington
February 2, 2000	6:00 B 9:00 p.m.	City Hall, Council Chamber, 321 E. 5 <sup>th</sup> ,	Port Angeles, Washington
February 3, 2000	6:00 B 9:00 p.m.	Sawyer Hall, 510 Desmond Drive	Lacey, Washington

### Public Hearings in California

<b>Date</b>	<b>Time</b>	<b>Location</b>	<b>City</b>
January 25, 2000	6:30 B 9:00 p.m.	Double Tree (now Red Lion), 1830 Hilltop Drive	Redding, California
January 26, 2000	6:30 B 9:00 p.m.	Heritage Hotel, 1780 Tribute Rd.	Sacramento, California
January 27, 2000	6:30 B 9:00 p.m.	Modesto Irrigation District, 1231 11 <sup>th</sup> St.	Modesto, California
January 31, 2000	6:30 B 9:00 p.m.	Eureka Inn, 518 Seventh St.	Eureka, California
February 1, 2000	6:30 B 9:00 p.m.	Double Tree, One Double Tree Drive	Rohnert Park, California
February 2, 2000	6:30 B 9:00 p.m.	Best Western, 2600 Sand Dunes Drive	Monterey, California
February 3, 2000	7:00 B 9:30 p.m.	Embassy Suites, 333 Madonna Rd.	San Luis Obispo, California

### Special Accommodations

These hearings are physically accessible to people with disabilities. Requests for sign language interpretation or other aids should be directed to Garth Griffin at (503) 231-2005 for Washington, Idaho and Oregon; and Craig Wingert at (562) 980-4021 for California hearings seven days prior to each meeting date.