



## Questions and Answers

### 4(d) Rules to Protect Threatened Salmon & Steelhead

June 20, 2000



**Q: What is a 4(d) rule?**

**A:** Section 4(d) of the ESA directs NMFS to issue regulations that are “necessary and advisable to provide for the conservation of the species.” In the past NMFS has simply adopted 4(d) rules that prohibit the take of listed species. In the 4(d) rules signed today, the agency has taken a new approach. These rules do not apply to actions that are carried out under approved state, local or tribal programs. NMFS approves those programs that are adequate to conserve the listed species-- those that are “salmon-safe.” This simplifies things for citizens because compliance with local regulations will also mean compliance with the ESA.

**Q: Are these rules necessary?**

**A:** Yes. Salmon and steelhead have been in decline for years, leading to recent listings of 14 population groups as threatened and another three as endangered. Federal actions alone will not be enough to recover these threatened fish. To turn this crisis around and avoid their extinction, it’s also necessary to prohibit people from harming or “taking” these fish.

**Q: Were any changes made between the proposal and this final rule?**

**A:** Yes. We received constructive and meaningful input, which led to important changes in the final rule. The Federal Register Notice includes a summary of changes to the rule. The responses to comments discuss reasons for the changes.

**Q: Where do these rules apply?**

**A:** The rules prohibit take of 14 salmon and steelhead population groups (see map). The geographic scope of the rules includes anywhere these fish are found, whether it is in the ocean, estuaries or rivers.

**Q: Why do the rules for chinook, coho, chum and sockeye salmon not take effect until 180 days following publication of the rules in the Federal Register?**

**A:** These rules are complicated and have important consequences for the activities and programs of states, tribes and local governments, stakeholder groups, and citizens across four states. Those affected by the rules need to assess the consequences of their individual activities and authorities and make any necessary changes to protect salmon and comply with the rules. NMFS will hold several educational workshops to help people understand and comply with these regulations. The steelhead 4(d) rule schedule is controlled by a court order, so it will take effect 60 days after publication.

**Q: What is an ESU?**

**A:** Climate, soils, vegetation, geology and wildlife differ from area to area, and so do salmon and steelhead. An ESU, or “evolutionarily significant unit,” is a distinctive group of salmon or steelhead that is uniquely adapted to a particular area or environment, which cannot be replaced.

**Q: Does every activity or program need authorization under these rules?**

**A:** No. Activities or programs that do not kill or harm (“take”) protected salmon and steelhead do not require any authorization under this rule. No “take,” no problem.

**Q: Isn't the real problem just a down cycle in ocean conditions?**

**A:** No. Salmon and steelhead have been declining for decades through ups and downs in ocean conditions. Despite very good ocean conditions, this year's return of wild spring/summer chinook returning to the Snake River basin will amount only to 5-10 percent of what returned in 1960. No matter what happens in the ocean, these species depend on healthy watersheds to survive. Watersheds up and down the coast are producing fewer and fewer fish as rivers continue to be channelized, paved over, de-watered, polluted, denuded of mature vegetation, and cut off from fish altogether by dams, diversions, temporary berms and thousands of road culverts.

**Q: What is “take,” and where can I get some help in understanding what kinds of activities could involve “take”?**

**A:** To “take” is to harass, harm, pursue, hunt, shoot, wound, kill, trap, or collect a protected species; or to attempt any of these. The term “harm” includes modifying or degrading habitat where it kills or injures a species by impairing its ability to breed, spawn, rear, migrate, feed or find shelter. These are fact-specific, case-by-case determinations. The 4(d) rules identify some activities that have a high risk of take associated with them, as well as activities that are unlikely to take listed fish. People can also call their nearest NMFS office if they need further assistance (see last page for NMFS contacts).

**Q: If my program or activity is not included in the rule does that mean it is prohibited?**

**A:** No. The 4(d) rules do not prohibit general activities or programs per se; they prohibit take-- unless that take occurs under a program that has been approved as “salmon-safe”. So, activities that do not take listed salmon or steelhead will not violate the rules.

**Q: What does “limitation from the take prohibition” mean?**

**A:** These rules prohibit “take” of threatened salmon and steelhead, unless the action that takes is covered by an approved program. The 4(d) rules identify certain programs that are approved (such as Washington's forest practices rules) and sets out criteria for getting other programs approved. Approved programs thus provide a “limitation from the take prohibition.”

**Q: Why are some programs (Washington Forest Practices and Oregon Department of Transportation Road Maintenance Guidelines) included in the rule and limited from the take prohibition, and other programs are not?**

**A:** There are dozens and dozens of programs in Washington, Oregon, California and Idaho that can be considered for 4(d) approval. Certain programs are included in the rules being signed today because the responsible entities approached NMFS to work together on crafting programs that would be eligible for approval. The rules have an option for certain kinds of programs to be approved later, if they meet the criteria in the rules.

**Q: Why do the rules include specific programs in some cases (Washington Forest Practices) and more general criteria in others (Municipal, Residential, Commercial, and Industrial Development)?**

**A:** Specific programs appear where jurisdictions have collaborated with NMFS on a specific program, such as the State of Washington's Forest Practice regulations. In other cases, general criteria are provided as an incentive for jurisdictions to develop credible programs for future approval under the rules.

**Q: Can NMFS create additional limits to the take prohibition in the future?**

**A:** Yes. While today's 4(d) rules offer 13 (plus one for tribal governments) opportunities to limit the application of the take prohibition, NMFS can amend the take prohibition to add (or subtract) limits as the agency sees fit. Adding (or subtracting) limits would be done through rulemaking, which involves making a proposal and taking public comments.

**Q: Am I assured compliance with ESA requirements if I adjust my own activities or regulatory programs to mimic a specific program already adopted under the 4(d) rules?**

**A:** No. You need written recognition of the specific program. A particular program or approach may not work everywhere, since environmental, social and regulatory considerations vary substantially across the region. Remember, one size doesn't fit all. If "take" is involved, jurisdictions need ESA authorization. To get that authorization, they need to show that their activities or regulatory programs meet the biological requirements of the species and avoid or minimize risk of "take." The ESA offers several options to get this authorization, such as Section 10 permits, Section 7 consultation, and 4(d) rules. Specific programs already adopted under the 4(d) rules signed today should help to determine what will work in a particular area.

**Q: Is there a different standard for authorizing take under 4(d) compared to ESA Section 10 or Section 7?**

**A:** No. Actions authorized under sections 7, 10 or 4(d) must conserve the species. The ESA defines "conservation" as the use of all methods and procedures which are necessary to bring any . . . threatened species to the point at which further protection under the Act is unnecessary. What the ESA requires and what the public demands is recovery of the species to the point where it can be removed from ESA protection.

**Q: How is this rule going to be enforced?**

**A:** NMFS will target flagrant or particularly damaging violations of the "take" prohibition. Unscreened diversions that are taking listed fish is an example. NMFS will generally not pursue private actions that are consistent with regulations of other federal or state agencies. An example is a farmer using a pesticide in a manner approved by the Environmental Protection Agency and the state. In that case, if the pesticide were harming listed fish, NMFS would work with EPA and the state to adjust the regulations.

**Q: Who can I talk to about these rules or about other ESA requirements?**

**A:** *Rosemary Furfey*, Natural Resource Specialist/Protective Regulations, 503-231-2149  
*Elizabeth Babcock*, Puget Sound Area Coordinator for Salmon Recovery, 206-526-4505  
*Mike Grady*, Upper Columbia Area Coordinator for Salmon Recovery, 206-526-4645  
*Kate Vandemoer*, Mid-Columbia Area Coordinator for Salmon Recovery, 503-230-5422  
*Patty Dornbusch*, Upper Willamette & Oregon Coast Area Coordinator for Salmon Recovery, 503-230-5430  
*Rob Jones*, Lower Columbia, Lower Willamette & Washington Coast Area Coordinator for Salmon Recovery, 503-230-5429