

NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION

Diana Hynek 06/06/2003
Departmental Paperwork Clearance Officer
Office of the Chief Information Officer
14th and Constitution Ave. NW.
Room 6625
Washington, DC 20230

In accordance with the Paperwork Reduction Act, OMB has taken the following action on your request for approval of the reinstatement of an information collection received on 04/10/2003.

TITLE: Limits on Application of Take Prohibitions

AGENCY FORM NUMBER(S): None

ACTION : APPROVED WITHOUT CHANGE

OMB NO.: 0648-0399

EXPIRATION DATE: 06/30/2006

BURDEN:	RESPONSES	HOURS	COSTS(\$,000)
Previous	0	0	0
New	547	4,235	2
Difference	547	4,235	2
Program Change		4,235	2
Adjustment		0	0

TERMS OF CLEARANCE: None

OMB Authorizing Official Title

Donald R. Arbuckle Deputy Administrator, Office of
Information and Regulatory Affairs

PAPERWORK REDUCTION ACT SUBMISSION

Please read the instructions before completing this form. For additional forms or assistance in completing this form, contact your agency's Paperwork Clearance Officer. Send two copies of this form, the collection instrument to be reviewed, the supporting statement, and any additional documentation to: Office of Information and Regulatory Affairs, Office of Management and Budget, Docket Library, Room 10102, 725 17th Street NW, Washington, DC 20503.

<p>1. Agency/Subagency originating request</p>	<p>2. OMB control number b. <input type="checkbox"/> None a. _____ - _____</p>
<p>3. Type of information collection (<i>check one</i>)</p> <p>a. <input type="checkbox"/> New Collection</p> <p>b. <input type="checkbox"/> Revision of a currently approved collection</p> <p>c. <input type="checkbox"/> Extension of a currently approved collection</p> <p>d. <input type="checkbox"/> Reinstatement, without change, of a previously approved collection for which approval has expired</p> <p>e. <input type="checkbox"/> Reinstatement, with change, of a previously approved collection for which approval has expired</p> <p>f. <input type="checkbox"/> Existing collection in use without an OMB control number</p> <p>For b-f, note Item A2 of Supporting Statement instructions</p>	<p>4. Type of review requested (<i>check one</i>)</p> <p>a. <input type="checkbox"/> Regular submission</p> <p>b. <input type="checkbox"/> Emergency - Approval requested by _____ / _____ / _____</p> <p>c. <input type="checkbox"/> Delegated</p>
	<p>5. Small entities Will this information collection have a significant economic impact on a substantial number of small entities? <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
	<p>6. Requested expiration date</p> <p>a. <input type="checkbox"/> Three years from approval date b. <input type="checkbox"/> Other Specify: _____ / _____</p>
<p>7. Title</p>	
<p>8. Agency form number(s) (<i>if applicable</i>)</p>	
<p>9. Keywords</p>	
<p>10. Abstract</p>	
<p>11. Affected public (<i>Mark primary with "P" and all others that apply with "x"</i>)</p> <p>a. ___ Individuals or households d. ___ Farms</p> <p>b. ___ Business or other for-profit e. ___ Federal Government</p> <p>c. ___ Not-for-profit institutions f. ___ State, Local or Tribal Government</p>	<p>12. Obligation to respond (<i>check one</i>)</p> <p>a. <input type="checkbox"/> Voluntary</p> <p>b. <input type="checkbox"/> Required to obtain or retain benefits</p> <p>c. <input type="checkbox"/> Mandatory</p>
<p>13. Annual recordkeeping and reporting burden</p> <p>a. Number of respondents _____</p> <p>b. Total annual responses _____</p> <p> 1. Percentage of these responses collected electronically _____ %</p> <p>c. Total annual hours requested _____</p> <p>d. Current OMB inventory _____</p> <p>e. Difference _____</p> <p>f. Explanation of difference</p> <p> 1. Program change _____</p> <p> 2. Adjustment _____</p>	<p>14. Annual reporting and recordkeeping cost burden (<i>in thousands of dollars</i>)</p> <p>a. Total annualized capital/startup costs _____</p> <p>b. Total annual costs (O&M) _____</p> <p>c. Total annualized cost requested _____</p> <p>d. Current OMB inventory _____</p> <p>e. Difference _____</p> <p>f. Explanation of difference</p> <p> 1. Program change _____</p> <p> 2. Adjustment _____</p>
<p>15. Purpose of information collection (<i>Mark primary with "P" and all others that apply with "X"</i>)</p> <p>a. ___ Application for benefits e. ___ Program planning or management</p> <p>b. ___ Program evaluation f. ___ Research</p> <p>c. ___ General purpose statistics g. ___ Regulatory or compliance</p> <p>d. ___ Audit</p>	<p>16. Frequency of recordkeeping or reporting (<i>check all that apply</i>)</p> <p>a. <input type="checkbox"/> Recordkeeping b. <input type="checkbox"/> Third party disclosure</p> <p>c. <input type="checkbox"/> Reporting</p> <p> 1. <input type="checkbox"/> On occasion 2. <input type="checkbox"/> Weekly 3. <input type="checkbox"/> Monthly</p> <p> 4. <input type="checkbox"/> Quarterly 5. <input type="checkbox"/> Semi-annually 6. <input type="checkbox"/> Annually</p> <p> 7. <input type="checkbox"/> Biennially 8. <input type="checkbox"/> Other (describe) _____</p>
<p>17. Statistical methods</p> <p>Does this information collection employ statistical methods</p> <p style="text-align: center;"><input type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p>18. Agency Contact (person who can best answer questions regarding the content of this submission)</p> <p>Name: _____</p> <p>Phone: _____</p>

19. Certification for Paperwork Reduction Act Submissions

On behalf of this Federal Agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9

NOTE: The text of 5 CFR 1320.9, and the related provisions of 5 CFR 1320.8(b)(3), appear at the end of the instructions. *The certification is to be made with reference to those regulatory provisions as set forth in the instructions.*

The following is a summary of the topics, regarding the proposed collection of information, that the certification covers:

- (a) It is necessary for the proper performance of agency functions;
- (b) It avoids unnecessary duplication;
- (c) It reduces burden on small entities;
- (d) It used plain, coherent, and unambiguous terminology that is understandable to respondents;
- (e) Its implementation will be consistent and compatible with current reporting and recordkeeping practices;
- (f) It indicates the retention period for recordkeeping requirements;
- (g) It informs respondents of the information called for under 5 CFR 1320.8(b)(3):
 - (i) Why the information is being collected;
 - (ii) Use of information;
 - (iii) Burden estimate;
 - (iv) Nature of response (voluntary, required for a benefit, mandatory);
 - (v) Nature and extent of confidentiality; and
 - (vi) Need to display currently valid OMB control number;
- (h) It was developed by an office that has planned and allocated resources for the efficient and effective management and use of the information to be collected (see note in Item 19 of instructions);
- (i) It uses effective and efficient statistical survey methodology; and
- (j) It makes appropriate use of information technology.

If you are unable to certify compliance with any of the provisions, identify the item below and explain the reason in Item 18 of the Supporting Statement.

Signature of Senior Official or designee

Date

Agency Certification (signature of Assistant Administrator or head of MB staff for L.O.s, or of the Director of a Program or Staff Office)	
Signature	Date
Signature of NOAA Clearance Officer	
Signature	Date

**SUPPORTING STATEMENT
LIMITS ON APPLICATION OF TAKE PROHIBITIONS -
THREATENED SALMONIDS
OMB CONTROL NO. 0648-0399**

A. JUSTIFICATION

1. Explain the circumstances that make the collection of information necessary.

Section 4(d)¹ of the Endangered Species Act of 1973 (ESA) requires the National Marine Fisheries Service (NOAA Fisheries) to adopt such regulations as it “deems necessary and advisable to provide for the conservation of” threatened species. Those regulations may include any or all of the prohibitions provided in section 9(a)(1) of the ESA, which specifically prohibits “take” of any endangered species (“take” includes actions that harass, harm, pursue, kill, or capture). There are now 21 separate Evolutionarily Significant Units (ESUs) of west coast salmonids listed as threatened, covering a large percentage of the land base in California, Oregon, Washington and Idaho. The first 4 salmonid species listed by NOAA Fisheries as threatened were protected by virtually blanket application of the section 9 take prohibitions. On July 10, 2000 and January 9, 2002 NOAA Fisheries issued final rules which makes section 9 prohibitions generally applicable to 14 of those threatened ESUs except in 14 programs and circumstances. NOAA Fisheries is obligated to enact necessary and advisable protective regulations for the remaining 3 ESUs currently without protections.

The final regulations describe 13 programs or circumstances that contribute to the conservation of, or are being conducted in a way that adequately limits impacts on, listed salmonids. Certain of these 13 limits on the take prohibitions entail voluntary submission of a plans to NOAA Fisheries and require annual or occasional reports by entities wishing to take advantage of these limits, or continue within them.

Each of the 13 limits applies to a different sector of activity, and to different potential populations of responders. The sectors include Tribal Resource Management Plans (Joint State and Tribal Resource Management Plans), Fishery Harvest and Hatchery Plans, Scientific Research Activities, Diversion Screening, Routine Road Maintenance in which any city, state, county or port or regional government therein may adopt the Oregon Department of Transportation (ODOT’s) program or submit an equally protective program, Urban Development, Reports of Salmonids Assisted, Disposed of, or Salvaged, Artificial Propagation, and Annual Reports. A brief description of each follows, and the burdens associated with each of these is discussed below (see ## 12-14).

¹ Section 4(d) of the Endangered Species Act, 16 U.S.C. et seq., states:
“Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1)”

Tribal Resource Management Plans and Joint State and Tribal Resource Management Plans: This (limit 6) is available to any tribe, tribal member, tribal permittee, tribal employee, or tribal agent provided the Secretary determines their action will not appreciably reduce the likelihood of survival and recovery of that species. The applicant would prepare a plan that addresses fishery harvest, artificial propagation, research, or water or land management and submit it to NOAA Fisheries. NOAA Fisheries evaluates and plan for it's completeness and impact on the listed species and agrees or disagrees with the action. If NOAA Fisheries disagrees, the plan is returned to the applicant for revision.

Fishery Management (Harvest/Hatchery) Plans: This (limit 4 and 5) is mainly used by states. The state would prepare a plan that addresses fishery harvest and submits it to NOAA Fisheries. NOAA Fisheries evaluates and plan for it's completeness and impact on the listed species and agrees or disagrees with the action. If NOAA Fisheries disagrees, the plan is returned to the state for revision. If NOAA Fisheries agrees, the plan is approved.

Scientific Research Activities: Research activities involving listed salmonids have typically been authorized solely in the context of the ESA's section 7 and section 10 processes. While these processes remain valid (and in many cases necessary) pathways for researchers, the new "research limit" is significant in that it provides both NOAA Fisheries and the state fishery agencies with a way to streamline the ESA's traditional authorization processes in a manner that allows the state fishery agencies to maintain key oversight and coordination roles. Specifically, coverage under the limit requires that the state fishery agencies either conduct or oversee research/monitoring efforts, or become involved in coordinating those efforts. In addition, compliance with the limit will require that the state fishery agencies submit annual reports describing research-related take for each of the affected ESUs. These provisions have intentionally been crafted to provide state fishery agencies with considerable discretion in determining eligibility under the research limit. However, they also underscore the fact that NOAA Fisheries and the state fishery agencies will share the responsibility of ensuring that authorized research involving listed salmonids is both coordinated and conducted in a manner that prevents overutilization of the resource. NOAA Fisheries intends to work closely with the state fishery agencies to develop a 4(d) research review process that will adapt existing state permit processes to the ESA's accountability requirement for research-related take of listed species.

Diversion Screening Limit: Water diversion structures (gravity flow or pumps) that have not been screened to prevent fish from being injured or diverted into fields are a significant source of injury and mortality to listed salmonids, particularly to juveniles. State laws and Federal programs have long recognized these problems in varying ways, and encouraged or required adequate screening of diversion ditches, structures, and pumps to prevent much of the anadromous fish loss attributable to this cause. Nonetheless, large numbers of diversions are not adequately screened and elimination of that source of injury or death is vital to conservation of listed salmonids. This limit should prompt diverters to move quickly to provide adequate screening or other protections for their diversions, because once so screened, take prohibitions would not apply. The diversion must be screened in accord with NOAA Fisheries' Southwest Region "Fish Screening Criteria for Anadromous Salmonids, January 1997" or any subsequent

revision (available by contacting NOAA Fisheries). The operator would need to provide documentation for the screening installed, including plans, for a written acknowledgment from NOAA Fisheries' engineering staff or designated agent that the screens are in compliance with the above criteria.

Routine Road Maintenance: This limit is available to any city, state, county or port or regional government therein, provided that: (1) they are conducted by the employees or agents of the state or any county, city, or port under a program that is substantially similar to that contained in the ODOT Guide or under a program that has been determined by NOAA Fisheries to meet or exceed the protections provided by the ODOT guide, or that (2) they are conducted by employees or agents of the State or any county, city, or port in a manner that has been found by NOAA Fisheries to contribute to properly functioning habitat conditions for the threatened salmonid ESUs considered in the rule. The city or county would need to prepare an agreement detailing how it will assure adequate training and compliance with the ODOT or equivalent guidance, and describing any dust abatement practices it wishes to be within the limit.

The ODOT guide governs the manner in which crews should proceed on a wide variety of routine maintenance activities, including surface and shoulder work, ditch, bridge, and culvert maintenance, snow and ice removal, emergency maintenance, mowing, brush control and other vegetation management. The program directs activity toward favorable weather conditions, increases attention to erosion control, prescribes appropriate equipment use, governs disposal of vegetation or sediment removed from roadsides or ditches, and includes other improved protections for listed salmonids, as well as improving habitat conditions generally. Routine road maintenance conducted in compliance with the ODOT program or an equivalent program will adequately address the problems potentially associated with such activity.

Urban Development: This limit would be available to any city or county affected by the take prohibitions, if it has land development ordinances in a sufficiently comprehensive form that they could satisfy the criteria set out in the regulation. The jurisdiction would need to provide NOAA Fisheries with copies of those comprehensive ordinances, and provide any necessary explanatory materials showing how the ordinances meet those standards.

Reports of Salmonids Assisted, Disposed of, or Salvaged: This limit relieves certain agency (including tribes) and official personnel (or their designees) from the take prohibitions when they are acting to: (1) aid a sick, injured, or stranded salmonid, (2) to dispose of a dead salmonid, or (3) to salvage a dead salmonid for scientific study. Each agency acting under this limit on the take prohibition must annually report to NOAA Fisheries on the numbers of fish handled and their status (see Annual Reports below).

Artificial Propagation: The artificial propagation section ("Limit 5") of the 4(d) rule provides a way to continue to conserve listed species while implementing a variety of hatchery purposes. To qualify for limitation on take prohibitions under Limit 5, a state or Federal hatchery management agency must develop a Hatchery and Genetics Management Plan (HGMP) that meets the criteria of Limit 5 and seek NOAA Fisheries' approval of the plan. Some of the

benefits of the HGMP approach are long-term management planning, more public involvement, and less government paperwork.

Annual Reports: Some form of a reporting requirement is built into all programs or limits that are approved by NOAA Fisheries. These reports help NOAA Fisheries to determine: (1) that the conditions or activities under that limit are being followed, (2) the impact of the activities on the listed species, and (3) new information about the species which may then help NOAA Fisheries to better manage it.

2. Explain how, by whom, how frequently, and for what purpose the information will be used. If the information collected will be disseminated to the public or used to support information that will be disseminated to the public, then explain how the collection complies with all applicable Information Quality Guidelines.

NOAA Fisheries will review plans submitted to determine whether they provide sufficient biological protections to warrant not applying the take prohibitions to activities governed by that plan. NOAA Fisheries' biologists will review the plans against the criteria associated with the applicable limit on take prohibitions. Those criteria have been carefully crafted to assure that plans meeting them will adequately limit impacts on threatened salmonids, such that additional protections in the form of a federal take prohibition are not necessary and advisable.

The annual reporting associated with approved limits would aid NOAA Fisheries in understanding the cumulative impacts of each action on listed ESUs, and to determine whether additional protections are required to provide for the conservation of the species (or, alternatively, whether some additional limits on federal protections may be warranted). Annual reporting also provides NOAA Fisheries with the numbers of threatened salmonids being affected by such actions. This information is necessary as part of the tracking of the status of the affected threatened species.

Many plans/programs have been submitted to NOAA Fisheries since the rules (65 FR 42422, July 10, 2000 and January 9, 2002) became effective. NOAA Fisheries expects more programs to be submitted in the future. Reports are required for limits each year.

The practical utility of these submissions is that, assuming a plan or program is found to meet the criteria associated with the particular limit in the 4(d) rule, the state or other entity submitting the plan, and individuals acting in compliance with the plan, can carry on with their activity knowing that they are in full compliance with the ESA and need not be concerned with any possibility of ESA enforcement. It is anticipated that the information collected will be disseminated to the public or used to support publicly disseminated information. As explained in the preceding paragraphs, the information gathered has utility. NOAA Fisheries will retain control over the information and safeguard it from improper access, modification, and destruction, consistent with NOAA standards for confidentiality, privacy, and electronic information. See response #10 of this Supporting Statement for more information on confidentiality and privacy. The information collection is designed to yield data that meet all applicable information quality guidelines. Prior to dissemination, the information will be

subjected to quality control measures and a pre-dissemination review pursuant to Section 515 of Public Law 106-554.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.

NOAA Fisheries in conjunction with Oregon State has developed an electronic form for applicants in the state of Oregon to use in applying for a scientific research permit. It is expected that other states will use this approach to applying for research permits in the future. There is a high degree of variability between applications, and the information requested is mostly text and descriptions. In addition, the rule does not require any particular method of submission of plans or reports; however, NOAA Fisheries Office of Protected Resources has requested funds to start an electronic filing system where applicants from other states can apply for section 10 coverage on line. However, NOAA Fisheries is uncertain if the funds will be granted. The time line for this project is expected to be 18-20 months once funds are approved. The reason this has not been implemented in the past is due to the lack of budget, resources and staff availability.

4. Describe efforts to identify duplication.

NOAA Fisheries has not identified any examples where the July rule involves duplication with other collections of information. This information collection is unique. As NOAA Fisheries gains experience with this approach to 4(d) protections, it is likely that many of the plans or reports submitted may serve to relieve the take prohibitions for an even broader range of listed species.

In the absence of 4(d) rules, NOAA Fisheries provides ESA coverage through section 10 research, enhancement, and incidental take permits with private entities, or through section 7 consultation with Federal agencies. The section 7 and section 10 processes have their own specific reporting requirements associated with them.

5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

None of these collections will have a significant economic impact on small entities. Any economic impact of these rules flows from the application of the take prohibition in the first instance, which has no associated collection of information.

6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.

If NOAA Fisheries were not to provide the opportunity for entities to seek a limit on take prohibitions, those entities would in all cases remain subject to the take prohibitions. Before embarking on activity that may impact threatened salmonids, those entities would need to assess the risk of actual take, and determine whether to seek an ESA section 10 permit. Unless the

entity procured a section 10 permit or a completed ESA section 7 consultation, the entity would remain at risk of ESA enforcement for violation of the take prohibitions. Less than annual reporting would hinder NOAA Fisheries' ability to conserve listed species.

7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.

Not Applicable. This collection is consistent with the guidelines.

8. Provide a copy of the PRA Federal Register notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

Public comment was solicited in a Federal Register Notice (copy attached). No comments were received.

9. Explain any decisions to provide payments or gifts to respondents, other than remuneration of contractors or grantees.

No payments, gifts or remuneration are associated with these voluntary collections of information.

10. Describe any assurance of confidentiality provided to respondents and the basis for assurance in statute, regulation, or agency policy.

There are no assurances of confidentiality associated with these voluntary collections of information. The information supplied would be a matter of public record.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

No sensitive questions are asked.

12. Provide an estimate in hours of the burden of the collection of information.

See Table Below #14.

13. Provide an estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection.

See Table Below #14.

14. Estimate of the total annual cost burden to the respondents or record-keepers resulting from the collection and Estimates of annualized cost to the Federal government.

Cost to Public										
	Diversion Screen	Road Maint. Agreemt.	Urban Develop Ordinance Packages	Tribal Plans & Joint State/ Tribe Plans	Fishery Harvest & Hatchery Plans	Report of Aided, etc., Salmon	Research Permits	Art. Prop.	Annual Report	TOTAL
Annual # of Responses	60	50	20	80	10	20	200	7	100	547
Number of Hours per Response	5	20	30	15	10	5	2	5	5	
Total Hours (Annually)	300	1000	600	1200	100	100	400	35	500	4235
Cost per Response (@ \$18/hr)	\$90	\$360	\$540	\$360	\$180	\$90	\$36	\$90	\$180	
Burden Hour Costs (Annual)	\$5,400	\$18,000	\$10,800	\$43,200	\$5,400	\$1,800	\$3,600	\$900	\$9,000	\$98,100
O&M Costs (Annual)*	\$50	\$100	\$70	\$200	\$80	\$20	\$80	\$20	\$1,200	\$1,820
Cost to Government										
Processing: Federal Government Hours per Response	15	20	70	40	20	5	5	15	16	
Total Annual Hours)	600	400	1400	320	120	100	500	150	800	4390
Cost per Response (@ \$18/hr)	\$270	\$360	\$1,260	\$720	\$360	\$90	\$90	\$270	\$288	\$3,708
Total Annual Cost	\$10,800	\$7,200	\$25,200	\$5,760	\$2,160	\$1,800	\$9,000	\$2,700	\$14,400	\$79,020

* Incidentals = materials, printing, mailing, etc.

15. Explain the reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB 83-I.

This request contains an 1,845 hour program change to cover additional types of submissions allowed (fishery harvest and hatchery plans, research permits, and artificial propagation) or to expand existing submissions (tribal plans and annual reports). Adjustments have also been made to the number of respondents to previously-approved requirements for diversion screening and urban development ordinances). Reductions in costs are due to a couple of reasons: 1) use of electronic devices to generate, and submit reports, and 2) in some cases, there was a reduction in the number of respondents requesting applications. Where there are increases or new program changes, it was due to: 1) applicants seeking take coverage under limits not listed in the previous report, or 2) there was an increase in respondents seeking coverage.

16. For collections whose results will be published, outline the plans for tabulation and publication.

There are no plans to publish the data.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.

Not seeking such approval.

18. Explain each exception to the certification statement identified in Item 19 of the OMB 83-I.

There are no exceptions to the certification requirement. The submission does not indicate the retention period for record keeping requirements, since the rules do not specify any retention period.

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS.

Not applicable. The collection will not employ statistical methods.



(5) *Exemptions.* Paragraph (a)(2) of this section does not apply to any activity authorized by a prior written exemption from the Director, Alaska Region, National Marine Fisheries Service. Concurrently with the issuance of any exemption, the Assistant Administrator will publish notice of the exemption in the FEDERAL REGISTER. An exemption may be granted only if the activity will not have a significant adverse affect on Steller sea lions, the activity has been conducted historically or traditionally in the buffer zones, and there is no readily available and acceptable alternative to or site for the activity.

(6) *Navigational transit.* Paragraph (a)(2) of this section does not prohibit a vessel in transit from passing through a strait, narrows, or passageway listed in this paragraph if the vessel proceeds in continuous transit and maintains a minimum of 1 nautical mile from the rookery site. The listing of a strait, narrows, or passageway does not indicate that the area is safe for navigation. The listed straits, narrows, or passageways include the following:

Rookery	Straits, narrows, or pass
Akutan Island.....	Akutan Pass between Cape Morgan and Unalga Island.
Clubbing Rocks.....	Between Clubbing Rocks and Cherni Island.
Outer Island.....	Wildcat Pass between Rabbit and Ragged Islands.

(c) *Penalties.* (1) Any person who violates this section or the Act is subject to the penalties specified in section 11 of the Act, and any other penalties provided by law.

(2) Any vessel used in violation of this section or the Endangered Species Act is subject to forfeiture under section 11(e)(4)(B) of the Act.

[55 FR 49210, Nov. 26, 1990, as amended at 56 FR 42542, Aug. 28, 1991; 56 FR 58184, Nov. 18, 1991; 58 FR 16371, Mar. 26, 1993; 58 FR 53139, 53141, Oct. 14, 1993; 58 FR 58594, Nov. 2, 1993; 62 FR 24355, May 5, 1997. Redesignated and amended at 64 FR 14068-14069, Mar. 23, 1999]

[\[TOP\]](#)

§223.203 Anadromous fish.

Available guidance documents cited in the regulatory text are listed in Appendix A to this section.

(a) *Prohibitions.* The prohibitions of section 9(a)(1) of the ESA (16 U.S.C. 1538(a)(1)) relating to endangered species apply to the threatened species of salmonids listed in § 223.102(a)(1) through (a)(10), and (a)(12) through (a)(22), except as provided in paragraph (b) of this section and § 223.209(a).

(b) *Limits on the prohibitions.* (1) The exceptions of section 10 of the ESA (16 U.S.C. 1539) and other exceptions under the Act relating to endangered species, including regulations in part 222 of this chapter implementing such exceptions, also apply to the threatened species of salmonids listed in § 223.102(a)(1) through (a)(10), and (a)(12) through (a)(22).

(2) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102 (a)(5) through (a)(10), and (a)(12) through (a)(19) do not apply to activities specified in an application for a permit for scientific purposes or to enhance the conservation or survival of the species, provided that the application has been received by the Assistant Administrator for Fisheries, NOAA (AA), no later than October 10, 2000. The prohibitions of paragraph (a) of this section apply to these activities upon the AA's rejection of the application as insufficient, upon issuance or denial of a permit, or March 7, 2001, whichever occurs earliest.

(3) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102 (a)(4) through (a)(10), and (a)(12) through (a)(19) do not apply to any employee or designee of NMFS, the United States Fish and Wildlife Service, any Federal land management agency, the Idaho Department of Fish and Game (IDFG), Washington Department of Fish and Wildlife (WDFW), the Oregon Department of Fish and Wildlife (ODFW), California Department of Fish and Game (CDFG), or of any other governmental entity that has co-management authority for the listed salmonids, when the employee or designee, acting in the course of his or her official duties, takes a threatened salmonid without a permit if such action is necessary to:

(i) Aid a sick, injured, or stranded salmonid,

(ii) Dispose of a dead salmonid, or

(iii) Salvage a dead salmonid which may be useful for scientific study.

(iv) Each agency acting under this limit on the take prohibitions of paragraph (a) of this section is to report to NMFS the numbers of fish handled and their status, on an annual basis. A designee of the listed entities is any individual the Federal or state fishery agency or other co-manager has authorized in writing to perform the listed functions.

(4) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102 (a)(5) through (a)(10), and (a)(12) through (a)(19) do not apply to fishery harvest activities provided that:

(i) Fisheries are managed in accordance with a NMFS-approved Fishery Management and Evaluation Plan (FMEP) and implemented in accordance with a letter of concurrence from NMFS. NMFS will approve an FMEP only if it clearly defines its intended scope and area of impact and sets forth the management objectives and performance indicators for the plan. The plan must adequately address the following criteria:

(A) Define populations within affected listed ESUs, taking into account spatial and temporal distribution, genetic and phenotypic diversity, and other appropriate identifiable unique biological and life history traits. Populations may be aggregated for management purposes when dictated by information scarcity, if consistent with survival and recovery of the listed ESU. In identifying management units, the plan shall describe the reasons for using such units in lieu of population units, describe how the management units are defined, given biological and life history traits, so as to maximize consideration of the important biological diversity contained within the listed ESU, respond to the scale and complexity of the ESU, and help ensure consistent treatment of listed salmonids across a diverse geographic and jurisdictional range.

(B) Utilize the concepts of "viable" and "critical" salmonid population thresholds, consistent with the concepts contained in the technical document entitled "Viable Salmonid Populations (NMFS, 2000b)." The VSP paper provides a framework for identifying the biological requirements of listed salmonids, assessing the effects of management and conservation actions, and ensuring that such actions provide for the survival and recovery of listed species. Proposed management actions must recognize the significant differences in risk associated with viable and critical population threshold states and respond accordingly to minimize the long-term risks to population persistence. Harvest actions impacting populations that are functioning at or above the viable threshold must be designed to maintain the population or management unit at or above that level. For populations shown with a high degree of confidence to be above critical levels but not yet at viable levels, harvest management must not appreciably slow the population's achievement of viable function. Harvest actions impacting populations that are functioning at or below critical threshold must not be allowed to appreciably increase genetic and demographic risks facing the population and must be designed to permit the population's achievement of viable function, unless the plan demonstrates that the likelihood of

survival and recovery of the entire ESU in the wild would not be appreciably reduced by greater risks to that individual population.

(C) Set escapement objectives or maximum exploitation rates for each management unit or population based on its status and on a harvest program that assures that those rates or objectives are not exceeded. Maximum exploitation rates must not appreciably reduce the likelihood of survival and recovery of the ESU. Management of fisheries where artificially propagated fish predominate must not compromise the management objectives for commingled naturally spawned populations.

(D) Display a biologically based rationale demonstrating that the harvest management strategy will not appreciably reduce the likelihood of survival and recovery of the ESU in the wild, over the entire period of time the proposed harvest management strategy affects the population, including effects reasonably certain to occur after the proposed actions cease.

(E) Include effective monitoring and evaluation programs to assess compliance, effectiveness, and parameter validation. At a minimum, harvest monitoring programs must collect catch and effort data, information on escapements, and information on biological characteristics, such as age, fecundity, size and sex data, and migration timing.

(F) Provide for evaluating monitoring data and making any revisions of assumptions, management strategies, or objectives that data show are needed.

(G) Provide for effective enforcement and education. Coordination among involved jurisdictions is an important element in ensuring regulatory effectiveness and coverage.

(H) Include restrictions on resident and anadromous species fisheries that minimize any take of listed species, including time, size, gear, and area restrictions.

(I) Be consistent with plans and conditions established within any Federal court proceeding with continuing jurisdiction over tribal harvest allocations.

(ii) The state monitors the amount of take of listed salmonids occurring in its fisheries and provides to NMFS on a regular basis, as defined in NMFS' letter of concurrence for the FMEP, a report summarizing this information, as well as the implementation and effectiveness of the FMEP. The state shall provide NMFS with access to all data and reports prepared concerning the implementation and effectiveness of the FMEP.

(iii) The state confers with NMFS on its fishing regulation changes affecting listed ESUs to ensure consistency with the approved FMEP. Prior to approving a new or amended FMEP, NMFS will publish notification in the FEDERAL REGISTER announcing its availability for public review and comment. Such an announcement will provide for a comment period on the draft FMEP of not less than 30 days.

(iv) NMFS provides written concurrence of the FMEP which specifies the implementation and reporting requirements. NMFS' approval of a plan shall be a written approval by NMFS Southwest or Northwest Regional Administrator, as appropriate. On a regular basis, NMFS will evaluate the effectiveness of the program in protecting and achieving a level of salmonid productivity commensurate with conservation of the listed salmonids. If it is not, NMFS will identify ways in which the program needs to be altered or strengthened. If the responsible agency does not make changes to respond adequately to the new information, NMFS will publish notification in the FEDERAL REGISTER announcing its intention to withdraw the limit for activities associated with that FMEP. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to withdraw the limit so that the prohibitions would then apply to those fishery harvest activities. A template for developing FMEPs is available from NMFS Northwest Region's website (www.nwr.noaa.gov).

(v) The prohibitions of paragraph (a) of this section relating to threatened species of steelhead listed in §223.102 (a)(5) through (a)(9), (a)(14), and (a)(15) do not apply to fisheries managed solely by the states of Oregon, Washington, Idaho, and California until January 8, 2001.

(5) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102 (a)(5) through (a)(10), and (a)(12) through (a)(19) do not apply to activity associated with artificial propagation programs provided that:

(i) A state or Federal Hatchery and Genetics Management Plan (HGMP) has been approved by NMFS as meeting the following criteria:

(A) The HGMP has clearly stated goals, performance objectives, and performance indicators that indicate the purpose of the program, its intended results, and measurements of its performance in meeting those results. Goals shall address whether the program is intended to meet conservation objectives, contribute to the ultimate sustainability of natural spawning populations, and/or intended to augment tribal, recreational, or commercial fisheries. Objectives should enumerate the results desired from the program that will be used to measure the program's success or failure.

(B) The HGMP utilizes the concepts of viable and critical salmonid population threshold, consistent with the concepts contained in the technical document entitled "Viable Salmonid Populations" (NMFS, 2000b). Listed salmonids may be purposefully taken for broodstock purposes only if the donor population is currently at or above the viable threshold and the collection will not impair its function; if the donor population is not currently viable but the sole objective of the current collection program is to enhance the propagation or survival of the listed ESU; or if the donor population is shown with a high degree of confidence to be above critical threshold although not yet functioning at viable levels, and the collection will not appreciably slow the attainment of viable status for that population.

(C) Taking into account health, abundances, and trends in the donor population, broodstock collection programs reflect appropriate priorities. The primary purpose of broodstock collection programs of listed species is to reestablish indigenous salmonid populations for conservation purposes. Such programs include restoration of similar, at-risk populations within the same ESU, and reintroduction of at-risk populations to underseeded habitat. After the species' conservation needs are met and when consistent with survival and recovery of the ESU, broodstock collection programs may be authorized by NMFS such for secondary purposes, as to sustain tribal, recreational, and commercial fisheries.

(D) The HGMP includes protocols to address fish health, broodstock collection, broodstock spawning, rearing and release of juveniles, deposition of hatchery adults, and catastrophic risk management.

(E) The HGMP evaluates, minimizes, and accounts for the propagation program's genetic and ecological effects on natural populations, including disease transfer, competition, predation, and genetic introgression caused by the straying of hatchery fish.

(F) The HGMP describes interrelationships and interdependencies with fisheries management. The combination of artificial propagation programs and harvest management must be designed to provide as many benefits and as few biological risks as possible for the listed species. For programs whose purpose is to sustain fisheries, HGMPs must not compromise the ability of FMEPs or other management plans to conserve listed salmonids.

(G) Adequate artificial propagation facilities exist to properly rear progeny of naturally spawned broodstock, to maintain population health and diversity, and to avoid hatchery-influenced selection or domestication.

(H) Adequate monitoring and evaluation exist to detect and evaluate the success of the hatchery program and any risks potentially impairing the recovery of the listed ESU.

(I) The HGMP provides for evaluating monitoring data and making any revisions of assumptions, management strategies, or objectives that data show are needed;

(J) NMFS provides written concurrence of the HGMP which specifies the implementation and reporting requirements. For Federally operated or funded hatcheries, the ESA section 7 consultation will achieve this purpose.

(K) The HGMP is consistent with plans and conditions set within any Federal court proceeding with continuing jurisdiction over tribal harvest allocations.

(ii) The state monitors the amount of take of listed salmonids occurring in its hatchery program and provides to NMFS on a regular basis a report summarizing this information, and the implementation and effectiveness of the HGMP as defined in NMFS' letter of concurrence. The state shall provide NMFS with access to all data and reports prepared concerning the implementation and effectiveness of the HGMP.

(iii) The state confers with NMFS on a regular basis regarding intended collections of listed broodstock to ensure congruity with the approved HGMP.

(iv) Prior to final approval of an HGMP, NMFS will publish notification in the FEDERAL REGISTER announcing its availability for public review and comment for a period of at least 30 days.

(v) NMFS' approval of a plan shall be a written approval by NMFS Southwest or Northwest Regional Administrator, as appropriate.

(vi) On a regular basis, NMFS will evaluate the effectiveness of the HGMP in protecting and achieving a level of salmonid productivity commensurate with the conservation of the listed salmonids. If the HGMP is not effective, the NMFS will identify to the jurisdiction ways in which the program needs to be altered or strengthened. If the responsible agency does not make changes to respond adequately to the new information, NMFS will publish notification in the FEDERAL REGISTER announcing its intention to withdraw the limit on activities associated with that program. Such an announcement will provide for a comment period of no less than 30 days, after which NMFS will make a final determination whether to withdraw the limit so that take prohibitions, like all other activity not within a limit, would then apply to that program. A template for developing HGMPs is available from NMFS Northwest Region's website (www.nwr.noaa.gov).

(6) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102 (a)(7), (a)(8), (a)(10), and (a)(12) through (a)(19) do not apply to actions undertaken in compliance with a resource management plan developed jointly by the States of Washington, Oregon and/or Idaho and the Tribes (joint plan) within the continuing jurisdiction of *United States v. Washington* or *United States v. Oregon*, the on-going Federal court proceedings to enforce and implement reserved treaty fishing rights, provided that:

(i) The Secretary has determined pursuant to 50 CFR 223.209 and the government-to-government processes therein that implementing and enforcing the joint tribal/state plan will not appreciably reduce the likelihood of survival and recovery of affected threatened ESUs.

(ii) The joint plan will be implemented and enforced within the parameters set forth in *United States v. Washington* or *United States v. Oregon*.

(iii) In making that determination for a joint plan, the Secretary has taken comment on how any fishery management plan addresses the criteria in §223.203(b)(4), or on how any hatchery and genetic management plan addresses the criteria in §223.203(b)(5).

(iv) The Secretary shall publish notice in the FEDERAL REGISTER of any determination whether or not a joint plan, will appreciably reduce the likelihood of survival and recovery of affected threatened ESUs, together with a discussion of the biological analysis underlying that determination.

(v) On a regular basis, NMFS will evaluate the effectiveness of the joint plan in protecting and achieving a level of salmonid productivity commensurate with conservation of the listed salmonids. If the plan is not effective, then NMFS will identify to the jurisdiction ways in which the joint plan needs to be altered or strengthened. If the responsible agency does not make changes to respond adequately to the new information, NMFS will publish notification in the FEDERAL REGISTER announcing its

intention to withdraw the limit on activities associated with that joint plan. Such an announcement will provide for a comment period of no less than 30 days, after which NMFS will make a final determination whether to withdraw the limit so that take prohibitions would then apply to that joint plan as to all other activity not within a limit.

(7) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102(a)(5) through (a)(10), and (a)(12) through (a)(19) do not apply to scientific research activities provided that:

(i) Scientific research activities involving purposeful take is conducted by employees or contractors of the ODFW, WDFW (Agencies), IDFG, or CDFG (Agencies), or as a part of a monitoring and research program overseen by or coordinated with that Agency.

(ii) The Agencies provide for NMFS' review and approval a list of all scientific research activities involving direct take planned for the coming year, including an estimate of the total direct take that is anticipated, a description of the study design, including a justification for taking the species and a description of the techniques to be used, and a point of contact.

(iii) The Agencies annually provide to NMFS the results of scientific research activities directed at threatened salmonids, including a report of the direct take resulting from the studies and a summary of the results of such studies.

(iv) Scientific research activities that may incidentally take threatened salmonids are either conducted by agency personnel, or are in accord with a permit issued by the Agency.

(v) The Agencies provide NMFS annually, for its review and approval, a report listing all scientific research activities it conducts or permits that may incidentally take threatened salmonids during the coming year. Such reports shall also contain the amount of incidental take of threatened salmonids occurring in the previous year's scientific research activities and a summary of the results of such research.

(vi) Electrofishing in any body of water known or suspected to contain threatened salmonids is conducted in accordance with NMFS "Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act" (NMFS, 2000a).

(vii) NMFS' approval of a research program shall be a written approval by NMFS Northwest or Southwest Regional Administrator.

(8) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102(a)(5) through (a)(10), and (a)(12), through (a)(19) do not apply to habitat restoration activities, as defined in paragraph (b)(8)(iv) of this section, provided that the activity is part of a watershed conservation plan, and:

(i) The watershed conservation plan has been certified by the State of Washington, Oregon, Idaho, or California (State) to be consistent with the state's watershed conservation plan guidelines.

(ii) The State's watershed conservation plan guidelines have been found by NMFS to provide for plans that:

(A) Take into account the potential severity of direct, indirect, and cumulative impacts of proposed activities in light of the status of affected species and populations.

(B) Will not reduce the likelihood of either survival or recovery of listed species in the wild.

(C) Ensure that any taking will be incidental.

(D) Minimize and mitigate any adverse impacts.

(E) Provide for effective monitoring and adaptive management.

- (F) Use the best available science and technology, including watershed analysis.
 - (G) Provide for public and scientific review and input.
 - (H) Include any measures that NMFS determines are necessary or appropriate.
 - (I) Include provisions that clearly identify those activities that are part of plan implementation.
 - (J) Control risk to listed species by ensuring funding and implementation of the above plan components.
- (iii) NMFS will periodically review state certifications of Watershed Conservation Plans to ensure adherence to approved watershed conservation plan guidelines.
- (iv) "Habitat restoration activity" is defined as an activity whose primary purpose is to restore natural aquatic or riparian habitat conditions or processes. "Primary purpose" means the activity would not be undertaken but for its restoration purpose.
- (v) Prior to approving watershed conservation plan guidelines under paragraph (b)(8)(ii) of this section, NMFS will publish notification in the FEDERAL REGISTER announcing the availability of the proposed guidelines for public review and comment. Such an announcement will provide for a comment period on the draft guidelines of no less than 30 days.
- (9) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102(a)(5) through (a)(10), and (a)(12) through (a)(19) do not apply to the physical diversion of water from a stream or lake, provided that:
- (i) NMFS' engineering staff or any resource agency or tribe NMFS designates (authorized officer) has agreed in writing that the diversion facility is screened, maintained, and operated in compliance with Juvenile Fish Screen Criteria, National Marine Fisheries Service, Northwest Region, Revised February 16, 1995, with Addendum of May 9, 1996, or in California with NMFS' Southwest Region "Fish Screening Criteria for Anadromous Salmonids, January 1997" or with any subsequent revision.
 - (ii) The owner or manager of the diversion allows any NMFS engineer or authorized officer access to the diversion facility for purposes of inspection and determination of continued compliance with the criteria.
 - (iii) On a case by case basis, NMFS or an Authorized Officer will review and approve a juvenile fish screen design and construction plan and schedule that the water diverter proposes for screen installation. The plan and schedule will describe interim operation measures to avoid take of threatened salmonids. NMFS may require a commitment of compensatory mitigation if implementation of the plan and schedule is terminated prior to completion. If the plan and schedule are not met, or if a schedule modification is made that is not approved by NMFS or Authorized Officer, or if the screen installation deviates from the approved design, the water diversion will be subject to take prohibitions and mitigation.
 - (iv) This limit on the prohibitions of paragraph (a) of this section does not encompass any impacts of reduced flows resulting from the diversion or impacts caused during installation of the diversion device. These impacts are subject to the prohibition on take of listed salmonids.
- (10) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102 (a)(5) through (a)(10), and (a)(12) through (a)(19) do not apply to routine road maintenance activities provided that:
- (i) The activity results from routine road maintenance activity conducted by ODOT employees or agents that complies with ODOT's Transportation Maintenance Management System Water Quality and Habitat Guide (July, 1999); or by employees or agents of a state, county, city or port that complies with a program substantially similar to that contained in the ODOT Guide that is determined to meet or exceed the protections provided by the ODOT Guide; or by employees or agents of a state, county, city or port that complies with a routine road maintenance program that meets proper functioning habitat conditions as described

further in subparagraph (ii) following. NMFS' approval of state, city, county, or port programs that are equivalent to the ODOT program, or of any amendments, shall be a written approval by NMFS Northwest or Southwest Regional Administrator, whichever is appropriate. Any jurisdiction desiring its routine road maintenance activities to be within this limit must first commit in writing to apply management practices that result in protections equivalent to or better than those provided by the ODOT Guide, detailing how it will assure adequate training, tracking, and reporting, and describing in detail any dust abatement practices it requests to be covered.

(ii) NMFS finds the routine road maintenance activities of any state, city, county, or port to be consistent with the conservation of listed salmonids' habitat when it contributes, as does the ODOT Guide, to the attainment and maintenance of properly functioning condition (PFC). NMFS defines PFC as the sustained presence of natural habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. Actions that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward PFC. Periodically, NMFS will evaluate an approved program for its effectiveness in maintaining and achieving habitat function that provides for conservation of the listed salmonids. Whenever warranted, NMFS will identify to the jurisdiction ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions, or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the ESU. If any jurisdiction within the limit does not make changes to respond adequately to the new information in the shortest amount of time feasible, but not longer than one year, NMFS will publish notification in the FEDERAL REGISTER announcing its intention to withdraw the limit so that take prohibitions would then apply to the program as to all other activity not within a limit. Such an announcement will provide for a comment period of no less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) prohibitions.

(iii) Prior to implementing any changes to a program within this limit the jurisdiction provides NMFS a copy of the proposed change for review and approval as within this limit.

(iv) Prior to approving any state, city, county, or port program as within this limit, or approving any substantive change in a program within this limit, NMFS will publish notification in the FEDERAL REGISTER announcing the availability of the program or the draft changes for public review and comment. Such an announcement will provide for a comment period of not less than 30 days.

(v) Pesticide and herbicide spraying is not included within this limit, even if in accord with the ODOT guidance.

(11) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102 (a)(5) through (a)(10), and (a)(12) through (a)(19) do not apply to activities within the City of Portland, Oregon Parks and Recreation Department's (PP&R) Pest Management Program (March 1997), including its Waterways Pest Management Policy updated December 1, 1999, provided that:

(i) Use of only the following chemicals is included within this limit on the take prohibitions: Round Up, Rodeo, Garlon 3A, Surfactant LI-700, Napropamide, Cutrine Plus, and Aquashade.

(ii) Any chemical use is initiated in accord with the priorities and decision processes of the Department's Pest Management Policy, including the Waterways Pest Management Policy, updated December 1, 1999.

(iii) Any chemical use within a 25 ft. (7.5 m) buffer complies with the buffer application constraints contained in PP&R's Waterways Pest Management Policy (update December 1, 1999).

(iv) Prior to implementing any changes to this limit, the PP&R provides NMFS with a copy of the proposed change for review and approval as within this limit.

(v) Prior to approving any substantive change in a program within this limit, NMFS will publish notification in the FEDERAL

REGISTER announcing the availability of the program or the draft changes for public review and comment. Such an announcement will provide for a comment period of no less than 30 days.

(vi) NMFS' approval of amendments shall be a written approval by NMFS Northwest Regional Administrator.

(vii) NMFS finds the PP&R Pest Management Program activities to be consistent with the conservation of listed salmonids' habitat by contributing to the attainment and maintenance of properly functioning condition (PFC). NMFS defines PFC as the sustained presence of a watershed's natural habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. Actions that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward PFC. Periodically, NMFS will evaluate the effectiveness of an approved program in maintaining and achieving habitat function that provides for conservation of the listed salmonids. Whenever warranted, NMFS will identify to the jurisdiction ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions, or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the ESU. If any jurisdiction within the limit does not make changes to respond adequately to the new information in the shortest amount of time feasible, but not longer than 1 year, NMFS will publish notification in the FEDERAL REGISTER announcing its intention to withdraw the limit so that take prohibitions would then apply to the program as to all other activity not within a limit. Such an announcement will provide for a comment period of no less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) prohibitions.

(12) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102 (a)(5) through (a)(10), and (a)(12) through (a)(19) do not apply to municipal, residential, commercial, and industrial (MRCI) development (including redevelopment) activities provided that:

(i) Such development occurs pursuant to city, county, or regional government ordinances or plans that NMFS has determined are adequately protective of listed species; or within the jurisdiction of the Metro regional government in Oregon and pursuant to ordinances that Metro has found comply with its Urban Growth Management Functional Plan (Functional Plan) following a determination by NMFS that the Functional Plan is adequately protective. NMFS approval or determinations about any MRCI development ordinances or plans, including the Functional Plan, shall be a written approval by NMFS Northwest or Southwest Regional Administrator, whichever is appropriate. NMFS will apply the following 12 evaluation considerations when reviewing MRCI development ordinances or plans to assess whether they adequately conserve listed salmonids by maintaining and restoring properly functioning habitat conditions:

(A) MRCI development ordinance or plan ensures that development will avoid inappropriate areas such as unstable slopes, wetlands, areas of high habitat value, and similarly constrained sites.

(B) MRCI development ordinance or plan adequately avoids stormwater discharge impacts to water quality and quantity or to the hydrograph of the watershed, including peak and base flows of perennial streams.

(C) MRCI development ordinance or plan provides adequately protective riparian area management requirements to attain or maintain PFC around all rivers, estuaries, streams, lakes, deepwater habitats, and intermittent streams. Compensatory mitigation is provided, where necessary, to offset unavoidable damage to PFC due to MRCI development impacts to riparian management areas.

(D) MRCI development ordinance or plan avoids stream crossings by roads, utilities, and other linear development wherever possible, and, where crossings must be provided, minimize impacts through choice of mode, sizing, and placement.

(E) MRCI development ordinance or plan adequately protects historical stream meander patterns and channel migration zones and avoids hardening of stream banks and shorelines.

- (F) MRCI development ordinance or plan adequately protects wetlands and wetland functions, including isolated wetlands.
- (G) MRCI development ordinance or plan adequately preserves the hydrologic capacity of permanent and intermittent streams to pass peak flows.
- (H) MRCI development ordinance or plan includes adequate provisions for landscaping with native vegetation to reduce need for watering and application of herbicides, pesticides, and fertilizer.
- (I) MRCI development ordinance or plan includes adequate provisions to prevent erosion and sediment run-off during construction.
- (J) MRCI development ordinance or plan ensures that water supply demands can be met without impacting flows needed for threatened salmonids either directly or through groundwater withdrawals and that any new water diversions are positioned and screened in a way that prevents injury or death of salmonids.
- (K) MRCI development ordinance or plan provides necessary enforcement, funding, reporting, and implementation mechanisms and formal plan evaluations at intervals that do not exceed 5 years.
- (L) MRCI development ordinance and plan complies with all other state and Federal environmental and natural resource laws and permits.
- (ii) The city, county or regional government provides NMFS with annual reports regarding implementation and effectiveness of the ordinances, including: any water quality monitoring information the jurisdiction has available; aerial photography (or some other graphic display) of each MRCI development or MRCI expansion area at sufficient detail to demonstrate the width and vegetation condition of riparian set-backs; information to demonstrate the success of stormwater management and other conservation measures; and a summary of any flood damage, maintenance problems, or other issues.
- (iii) NMFS finds the MRCI development activity to be consistent with the conservation of listed salmonids' habitat when it contributes to the attainment and maintenance of PFC. NMFS defines PFC as the sustained presence of a watershed's habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. Actions that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward PFC. Periodically, NMFS will evaluate an approved program for its effectiveness in maintaining and achieving habitat function that provides for conservation of the listed salmonids. Whenever warranted, NMFS will identify to the jurisdiction ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions, or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the ESU. If any jurisdiction within the limit does not make changes to respond adequately to the new information in the shortest amount of time feasible, but not longer than 1 year, NMFS will publish notification in the FEDERAL REGISTER announcing its intention to withdraw the limit so that take prohibitions would then apply to the program as to all other activity not within a limit. Such an announcement will provide for a comment period of no less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) prohibitions.
- (iv) Prior to approving any city, county, or regional government ordinances or plans as within this limit, or approving any substantive change in an ordinance or plan within this limit, NMFS will publish notification in the FEDERAL REGISTER announcing the availability of the ordinance or plan or the draft changes for public review and comment. Such an announcement will provide for a comment period of no less than 30 days.
- (13) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in §223.102 (a)(12), (a)(13), (a)(16), (a)(17), and (a) (19) do not apply to non-Federal forest management activities conducted in the State of Washington provided that:

(i) The action is in compliance with forest practice regulations adopted and implemented by the Washington Forest Practices Board that NMFS has found are at least as protective of habitat functions as are the regulatory elements of the Forests and Fish Report dated April 29, 1999, and submitted to the Forest Practices Board by a consortium of landowners, tribes, and state and Federal agencies.

(ii) All non-regulatory elements of the Forests and Fish Report are being implemented.

(iii) Actions involving use of herbicides, pesticides, or fungicides are not included within this limit.

(iv) Actions taken under alternative plans are included in this limit provided that the Washington Department of Natural Resources (WDNR) finds that the alternate plans protect physical and biological processes at least as well as the state forest practices rules and provided that NMFS, or any resource agency or tribe NMFS designates, has the opportunity to review the plan at every stage of the development and implementation. A plan may be excluded from this limit if, after such review, WDNR determines that the plan is not likely to adequately protect listed salmon.

(v) Prior to determining that regulations adopted by the Forest Practice Board are at least as protective as the elements of the Forests and Fish Report, NMFS will publish notification in the FEDERAL REGISTER announcing the availability of the Report and regulations for public review and comment.

(vi) NMFS finds the activities to be consistent with the conservation of listed salmonids' habitat by contributing to the attainment and maintenance of PFC. NMFS defines PFC as the sustained presence of a watershed's natural habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. Actions that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward PFC. Programs must meet this biological standard in order for NMFS to find they qualify for a habitat-related limit. NMFS uses the best available science to make these determinations. NMFS may review and revise previous findings as new scientific information becomes available. NMFS will evaluate the effectiveness of the program in maintaining and achieving habitat function that provides for conservation of the listed salmonids. If the program is not adequate, NMFS will identify to the jurisdiction ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the ESU. If Washington does not make changes to respond adequately to the new information, NMFS will publish notification in the FEDERAL REGISTER announcing its intention to withdraw the limit on activities associated with the program. Such an announcement will provide for a comment period of no less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) take prohibitions.

(vii) NMFS approval of regulations shall be a written approval by NMFS Northwest Regional Administrator.

(14) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(20) through (a)(22) do not apply to activities specified in an application for a permit for scientific purposes or to enhance the conservation or survival of the species, provided that the application has been received by the Assistant Administrator for Fisheries, NOAA (AA), no later than April 9, 2002. The prohibitions of paragraph (a) of this section apply to these activities upon the AA's rejection of the application as insufficient, upon issuance or denial of a permit, or September 9, 2002, whichever occurs earliest.

(15) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3), and (a)(20) through (a)(22) do not apply to any employee or designee of NMFS, the United States Fish and Wildlife Service, any Federal land management agency, the California Department of Fish and Game (CDFG), or of any other governmental entity that has co-management authority for the listed salmonids, when the employee or designee, acting in the course of his or her official duties, takes a threatened salmonid without a permit if such action is necessary to:

(i) Aid a sick, injured, or stranded salmonid,

(ii) Dispose of a dead salmonid, or

(iii) Salvage a dead salmonid which may be useful for scientific study.

(iv) Each agency acting under this limit on the take prohibitions of paragraph (a) of this section is to report to NMFS the numbers of fish handled and their status, on an annual basis. A designee of the listed entities is any individual the Federal or state fishery agency or other co-manager has authorized in writing to perform the listed functions.

(16) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3), and (a)(20) through (a)(22) do not apply to fishery harvest activities provided that:

(i) Fisheries are managed in accordance with a NMFS-approved Fishery Management and Evaluation Plan (FMEP) and implemented in accordance with a letter of concurrence from NMFS. NMFS will approve an FMEP only if it clearly defines its intended scope and area of impact and sets forth the management objectives and performance indicators for the plan. The plan must adequately address the following criteria:

(A) Define populations within affected listed ESUs, taking into account spatial and temporal distribution, genetic and phenotypic diversity, and other appropriate identifiably unique biological and life history traits. Populations may be aggregated for management purposes when dictated by information scarcity, if consistent with survival and recovery of the listed ESU. In identifying management units, the plan shall describe the reasons for using such units in lieu of population units, describe how the management units are defined, given biological and life history traits, so as to maximize consideration of the important biological diversity contained within the listed ESU, respond to the scale and complexity of the ESU, and help ensure consistent treatment of listed salmonids across a diverse geographic and jurisdictional range.

(B) Utilize the concepts of "viable" and "critical" salmonid population thresholds, consistent with the concepts contained in NMFS's technical report entitled "Viable Salmonid Populations and the Recovery of ESUs" (NMFS, 2000b). This report provides a framework for identifying the biological requirements of listed salmonids, assessing the effects of management and conservation actions, and ensuring that such actions provide for the survival and recovery of listed species. Proposed management actions must recognize the significant differences in risk associated with viable and critical population threshold states and respond accordingly to minimize the long-term risks to population persistence. Harvest actions impacting populations that are functioning at or above the viable threshold must be designed to maintain the population or management unit at or above that level. For populations shown with a high degree of confidence to be above critical levels but not yet at viable levels, harvest management must not appreciably slow the population's achievement of viable function. Harvest actions impacting populations that are functioning at or below critical threshold must not be allowed to appreciably increase genetic and demographic risks facing the population and must be designed to permit the population's achievement of viable function, unless the plan demonstrates that the likelihood of survival and recovery of the entire ESU in the wild would not be appreciably reduced by greater risks to that individual population.

(C) Set escapement objectives or maximum exploitation rates for each management unit or population based on its status and on a harvest program that assures that those rates or objectives are not exceeded. Maximum exploitation rates must not appreciably reduce the likelihood of survival and recovery of the ESU. Management of fisheries where artificially propagated fish predominate must not compromise the management objectives for commingled naturally spawned populations.

(D) Display a biologically based rationale demonstrating that the harvest management strategy will not appreciably reduce the likelihood of survival and recovery of the ESU in the wild, over the entire period of time the proposed harvest management strategy affects the population, including effects reasonably certain to occur after the proposed actions cease.

(E) Include effective monitoring and evaluation programs to assess compliance, effectiveness, and parameter validation. At a minimum, harvest monitoring programs must collect catch and effort data, information on escapements, and information on biological characteristics, such as age, fecundity, size and sex data, and migration timing.

(F) Provide for evaluating monitoring data and making any revisions of assumptions, management strategies, or objectives that data show are needed.

(G) Provide for effective enforcement and education. Coordination among involved jurisdictions is an important element in ensuring regulatory effectiveness and coverage.

(H) Include restrictions on resident and anadromous species fisheries that minimize any take of listed species, including time, size, gear, and area restrictions.

(I) Be consistent with plans and conditions established within any Federal court proceeding with continuing jurisdiction over tribal harvest allocations.

(ii) The state monitors the amount of take of listed salmonids occurring in its fisheries and provides to NMFS on a regular basis, as defined in NMFS' letter of concurrence for the FMEP, a report summarizing this information, as well as the implementation and effectiveness of the FMEP. The state shall provide NMFS with access to all data and reports prepared concerning the implementation and effectiveness of the FMEP.

(iii) The state confers with NMFS on its fishing regulation changes affecting listed ESUs to ensure consistency with the approved FMEP. Prior to approving a new or amended FMEP, NMFS will publish notification in the FEDERAL REGISTER announcing its availability for public review and comment. Such an announcement will provide for a comment period on the draft FMEP of not less than 30 days.

(iv) NMFS provides written concurrence of the FMEP which specifies the implementation and reporting requirements. NMFS' approval of a plan shall be a written approval by the NMFS' Southwest Regional Administrator. On a regular basis, NMFS will evaluate the effectiveness of the program in protecting and achieving a level of salmonid productivity commensurate with conservation of the listed salmonids. If the program is deficient, NMFS will identify ways in which the program needs to be altered or strengthened. If the responsible agency does not make changes to respond adequately to the new information, NMFS will publish notification in the FEDERAL REGISTER announcing its intention to withdraw the limit for activities associated with that FMEP. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to withdraw the limit so that the prohibitions would then apply to those fishery harvest activities. A template for developing FMEPs is available from NMFS' Southwest Region web site (<http://swr.nmfs.noaa.gov>).

(v) The prohibitions of paragraph (a) of this section relating to threatened species listed in § 223.102 (a)(20) do not apply to fishery harvest activities managed solely by the State of California until July 8, 2002.

(17) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3) and (a)(20) through (a)(22) do not apply to activity associated with artificial propagation programs provided that:

(i) A state or Federal Hatchery and Genetics Management Plan (HGMP) has been approved by NMFS as meeting the following criteria:

(A) The HGMP has clearly stated goals, performance objectives, and performance indicators that indicate the purpose of the program, its intended results, and measurements of its performance in meeting those results. Goals shall address whether the program is intended to meet conservation objectives, contribute to the ultimate sustainability of natural spawning populations, and/or is intended to augment tribal, recreational, or commercial fisheries. Objectives should enumerate the results desired from the program that will be used to measure the program's success or failure.

(B) The HGMP utilizes the concepts of viable and critical salmonid population threshold, consistent with the concepts contained in NMFS' technical report entitled: "Viable Salmonid Populations and Recovery of ESUs" (NMFS, 2000b). Listed salmonids may be purposefully taken for broodstock purposes only if the donor population is currently at or above the viable threshold and the collection will not impair its function; if the donor population is not currently viable but the sole objective of the current

collection program is to enhance the propagation or survival of the listed ESU; or if the donor population is shown with a high degree of confidence to be above critical threshold although not yet functioning at viable levels, and the collection will not appreciably slow the attainment of viable status for that population.

(C) Broodstock collection programs reflect appropriate priorities taking into account health, abundances, and trends in the donor population. The primary purpose of broodstock collection programs of listed species is to re-establish indigenous salmonid populations for conservation purposes. Such programs include restoration of similar, at-risk populations within the same ESU, and reintroduction of at-risk populations to underseeded habitat. After the species' conservation needs are met and when consistent with survival and recovery of the ESU, broodstock collection programs may be authorized by NMFS for secondary purposes such as to sustain tribal, recreational, and commercial fisheries.

(D) The HGMP includes protocols to address fish health, broodstock collection, broodstock spawning, rearing and release of juveniles, deposition of hatchery adults, and catastrophic risk management.

(E) The HGMP evaluates, minimizes, and accounts for the propagation program's genetic and ecological effects on natural populations, including disease transfer, competition, predation, and genetic introgression caused by the straying of hatchery fish.

(F) The HGMP describes interrelationships and interdependencies with fisheries management. The combination of artificial propagation programs and harvest management must be designed to provide as many benefits and as few biological risks as possible for the listed species. For those programs of which the purpose is to sustain fisheries, HGMPs must not compromise the ability of FMEPs or other management plans to conserve listed salmonids.

(G) The HGMP provides for adequate artificial propagation facilities to properly rear progeny of naturally spawned broodstock, to maintain population health and diversity, and to avoid hatchery-influenced selection or domestication.

(H) The HGMP provides for adequate monitoring and evaluation to detect and evaluate the success of the hatchery program and any risks potentially impairing the recovery of the listed ESU.

(I) The HGMP provides for evaluating monitoring data and making any revisions of assumptions, management strategies, or objectives that data show are needed;

(J) NMFS provides written concurrence of the HGMP which specifies the implementation and reporting requirements. For federally operated or funded hatcheries, the ESA section 7 consultation will achieve this purpose.

(ii) The state monitors the amount of take of listed salmonids occurring in its hatchery program and provides to NMFS on a regular basis a report summarizing this information, and the implementation and effectiveness of the HGMP as defined in NMFS' letter of concurrence. The state shall provide NMFS with access to all data and reports prepared concerning the implementation and effectiveness of the HGMP.

(iii) The state confers with NMFS on a regular basis regarding intended collections of listed broodstock to ensure consistency with the approved HGMP.

(iv) Prior to final approval of an HGMP, NMFS will publish notification in the FEDERAL REGISTER announcing its availability for public review and comment for a period of at least 30 days.

(v) NMFS' approval of an HGMP shall be a written approval by NMFS' Southwest Regional Administrator.

(vi) On a regular basis, NMFS will evaluate the effectiveness of the HGMP in protecting and achieving a level of salmonid productivity commensurate with the conservation of the listed salmonids. If the HGMP is not effective, NMFS will identify to the responsible agency ways in which the program needs to be altered or strengthened. If the responsible agency does not make changes to respond adequately to the new information, NMFS will publish notification in the FEDERAL REGISTER

announcing its intention to withdraw the limit on activities associated with that program. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to withdraw the limit so that take prohibitions would then apply to that program. A template for developing HGMPs is available from NMFS Northwest Region's web site (www.nwr.noaa.gov).

(vii) The prohibitions of paragraph (a) of this section relating to threatened species listed in § 223.102 (a)(20) do not apply to artificial propagation programs managed solely by the State of California until July 8, 2002.

(18) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102(a)(3) and (a)(20) through (a)(22) do not apply to scientific research activities provided that:

(i) Scientific research activities involving purposeful take are conducted by employees or contractors of CDFG or as a part of a monitoring and research program overseen by or coordinated with CDFG.

(ii) CDFG provides for NMFS' review and approval a list of all scientific research activities involving direct take planned for the coming year, including an estimate of the total direct take that is anticipated, a description of the study design, including a justification for taking the species and a description of the techniques to be used, and a point of contact.

(iii) CDFG annually provides to NMFS the results of scientific research activities directed at threatened salmonids, including a report of the direct take resulting from the studies and a summary of the results of such studies.

(iv) Scientific research activities that may incidentally take threatened salmonids are either conducted by CDFG personnel, or are in accord with a permit issued by the CDFG.

(v) CDFG provides NMFS annually, for its review and approval, a report listing all scientific research activities it conducts or permits that may incidentally take threatened salmonids during the coming year. Such reports shall also contain the amount of incidental take of threatened salmonids occurring in the previous year's scientific research activities and a summary of the results of such research.

(vi) Electrofishing in any body of water known or suspected to contain threatened salmonids is conducted in accordance with NMFS' Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act (NMFS 2000a).

(vii) NMFS' approval of a research program shall be a written approval by NMFS' Southwest Regional Administrator.

(19) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102(a)(3) and (a)(20) through (a)(22) do not apply to habitat restoration activities, as defined in paragraph (b)(19)(iv), provided that the activity is part of a watershed conservation plan, and:

(i) The watershed conservation plan has been certified by the State of California to be consistent with the state's watershed conservation plan guidelines.

(ii) The State's watershed conservation plan guidelines have been found by NMFS to provide for plans that:

(A) Take into account the potential severity of direct, indirect, and cumulative impacts of proposed activities in light of the status of affected species that are listed as threatened.

(B) Will not reduce the likelihood of either survival or recovery of listed species in the wild.

(C) Ensure that any taking will be incidental.

(D) Minimize and mitigate any adverse impacts.

- (E) Provide for effective monitoring and adaptive management.
 - (F) Use the best available science and technology, including watershed analysis.
 - (G) Provide for public and scientific review and input.
 - (H) Include any measures that NMFS determines are necessary or appropriate.
 - (I) Include provisions that clearly identify those activities that are part of plan implementation.
 - (J) Control risk to listed species by ensuring funding and implementation of the above plan components.
- (iii) NMFS will periodically review state certifications of watershed conservation plans to ensure adherence to approved watershed conservation plan guidelines.
- (iv) "Habitat restoration activity" is defined as an activity whose primary purpose is to restore natural aquatic or riparian habitat conditions or processes. "Primary purpose" means the activity would not be undertaken but for its restoration purpose.
- (v) Prior to approving state watershed conservation plan guidelines under paragraph (b)(19)(ii) of this section, NMFS will publish notification in the FEDERAL REGISTER announcing the availability of the proposed guidelines for public review and comment. Such an announcement will provide for a comment period on the draft guidelines of not less than 30 days.
- (20) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102(a)(3) and (a)(20) through (a)(22) do not apply to the physical diversion of water from a stream or lake, provided that:
- (i) NMFS' engineering staff or any resource agency or tribe NMFS designates (authorized officer) has agreed in writing that the diversion facility is screened, maintained, and operated in compliance with NMFS' Southwest Region "Fish Screening Criteria for Anadromous Salmonids, January 1997" or with any subsequent revision.
 - (ii) The owner or manager of the diversion allows any NMFS engineer or authorized officer access to the diversion facility for purposes of inspection and determination of continued compliance with the criteria.
 - (iii) On a case-by-case basis, NMFS or an Authorized Officer will review and may approve a juvenile fish screen design and construction plan and schedule that the water diverter proposes for screen installation. The plan and schedule will describe interim operation measures to avoid take of threatened salmonids. NMFS may require a commitment of compensatory mitigation if implementation of the plan and schedule is terminated prior to completion. If the plan and schedule are not met, or if a schedule modification is made that is not approved by NMFS or the Authorized Officer, or if the screen installation deviates from the approved design, the water diversion will be subject to take prohibitions and mitigation.
 - (iv) This limit on the prohibitions of paragraph (a) of this section does not include any impacts or take caused by reduced flows resulting from the diversion or impacts caused during installation of the diversion device. These impacts are subject to the prohibition on take of listed salmonids.
- (21) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3) and (a)(20) through (a)(22) do not apply to routine road maintenance activities provided that:
- (i) The activity results from routine road maintenance conducted by employees or agents of the State of California, or any county, city or port in California, that complies with a program substantially similar to that contained in the Oregon Department of Transportation's (ODOT) Transportation Maintenance Management System Water Quality and Habitat Guide (July, 1999) or that is determined to meet or exceed the protections provided by the ODOT Guide; or by employees or agents of the State of

California or any county, city or port in California that complies with a routine road maintenance program that meets proper functioning habitat conditions as described further in paragraph (a)(21)(ii) of this section. NMFS' approval of state, city, county, or port programs that are equivalent to the ODOT program, or of any amendments, shall be a written approval by NMFS' Southwest Regional Administrator. Any jurisdiction desiring its routine road maintenance activities to be considered within this limit must first commit in writing to apply management practices that result in protections equivalent to or better than those provided by the ODOT Guide, detailing how it will assure adequate training, tracking, and reporting, and describing in detail any dust abatement practices it requests to be covered.

(ii) NMFS finds the routine road maintenance activities of the State of California, or any city, county, or port, to be consistent with the conservation of threatened salmonids' habitat when it contributes to the attainment and maintenance of properly functioning condition (PFC). NMFS defines PFC as the sustained presence of natural habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. Actions that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward PFC. Periodically, NMFS will evaluate an approved program for its effectiveness in maintaining and achieving habitat function that provides for conservation of the listed salmonids. Whenever warranted, NMFS will identify ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions, or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the threatened ESUs. If any jurisdiction within the limit does not make changes to respond adequately to the new information in the shortest amount of time feasible, but not longer than 1 year, NMFS will publish notification in the FEDERAL REGISTER announcing its intention to withdraw the limit so that take prohibitions would then apply to the program. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) prohibitions.

(iii) Prior to implementing any changes to a program within this limit the jurisdiction provides NMFS a copy of the proposed change for review and approval as to being within this limit.

(iv) Prior to approving any State of California, city, county, or port program as being within this limit, or approving any substantive change in a program as being within this limit, NMFS will publish notification in the FEDERAL REGISTER announcing the availability of the program or the draft changes for public review and comment. Such an announcement will provide for a comment period of not less than 30 days.

(v) Pesticide and herbicide spraying is not included within this limit, even if in accord with the ODOT guidance.

(22) The prohibitions of paragraph (a) of this section relating to threatened species of salmonids listed in § 223.102 (a)(3) and (a)(20) through (a)(22) do not apply to municipal, residential, commercial, and industrial (MRCI) development (including redevelopment) activities provided that:

(i) Such development occurs pursuant to city, county, or regional government ordinances or plans that NMFS has determined are adequately protective of threatened species by maintaining or restoring properly functioning habitat conditions. NMFS approval or determinations about any MRCI development ordinances or plans shall be a written approval by the NMFS Southwest Regional Administrator. NMFS will apply the following 12 evaluation considerations when reviewing MRCI development ordinances or plans to assess whether they adequately conserve threatened salmonids by maintaining and restoring properly functioning habitat conditions:

(A) The MRCI development ordinance or plan ensures that development will avoid inappropriate areas such as unstable slopes, wetlands, areas of high habitat value, and similarly constrained sites.

(B) The MRCI development ordinance or plan adequately avoids stormwater discharge impacts to water quality and quantity or to the hydrograph of the watershed, including peak and base flows of perennial streams.

(C) The MRCI development ordinance or plan provides adequately protective riparian area management requirements to attain or maintain PFC around all rivers, estuaries, streams, lakes, deepwater habitats, and intermittent streams. Compensatory mitigation is provided, where necessary, to offset unavoidable damage to properly functioning habitat conditions caused by MRCI development impacts to riparian management areas.

(D) The MRCI development ordinance or plan avoids stream crossings by roads, utilities, and other linear development wherever possible, and, where crossings must be provided, minimizes impacts through choice of mode, sizing, and placement.

(E) The MRCI development ordinance or plan adequately protects historical stream meander patterns and channel migration zones and avoids hardening of stream banks and shorelines.

(F) The MRCI development ordinance or plan adequately protects wetlands and wetland functions, including isolated wetlands.

(G) The MRCI development ordinance or plan adequately preserves the hydrologic capacity of permanent and intermittent streams to pass peak flows.

(H) The MRCI development ordinance or plan includes adequate provisions for landscaping with native vegetation to reduce need for watering and application of herbicides, pesticides, and fertilizer.

(I) The MRCI development ordinance or plan includes adequate provisions to prevent erosion and sediment run-off during construction.

(J) The MRCI development ordinance or plan ensures that water supply demands can be met without impacting flows needed for threatened salmonids either directly or through groundwater withdrawals and that any new water diversions are positioned and screened in a way that prevents injury or death of salmonids.

(K) The MRCI development ordinance or plan provides necessary enforcement, funding, reporting, and implementation mechanisms and formal plan evaluations at intervals that do not exceed 5 years.

(L) The MRCI development ordinance and plan complies with all other state and Federal environmental and natural resource laws and permits.

(ii) The city, county or regional government provides NMFS with annual reports regarding implementation and effectiveness of the ordinances, including: any water quality monitoring information the jurisdiction has available; aerial photography (or some other graphic display) of each MRCI development or MRCI expansion area at sufficient detail to demonstrate the width and vegetation condition of riparian set-backs; information to demonstrate the success of stormwater management and other conservation measures; and a summary of any flood damage, maintenance problems, or other issues.

(iii) NMFS finds the MRCI development activity to be consistent with the conservation of threatened salmonids' habitat when it contributes to the attainment and maintenance of properly functioning habitat conditions. For this purpose, NMFS defines properly functioning habitat conditions as the sustained presence of a watershed's habitat-forming processes that are necessary for the long-term survival of salmonids through the full range of environmental variation. To contribute to the attainment and maintenance of properly functioning habitat conditions, activities that affect salmonid habitat must not impair properly functioning habitat, appreciably reduce the functioning of already impaired habitat, or retard the long-term progress of impaired habitat toward achieving properly functioning habitat conditions. Periodically, NMFS will evaluate an approved program for its effectiveness in maintaining and achieving habitat function that provides for conservation of the listed salmonids. Whenever warranted, NMFS will identify to the jurisdiction ways in which the program needs to be altered or strengthened. Changes may be identified if the program is not protecting desired habitat functions, or where even with the habitat characteristics and functions originally targeted, habitat is not supporting population productivity levels needed to conserve the threatened species. If any jurisdiction within the limit does not make changes to respond adequately to the new information in the shortest amount of time feasible, but not longer than 1 year, NMFS will publish notification in the FEDERAL REGISTER announcing its

intention to withdraw the limit so that take prohibitions would then apply to the program. Such an announcement will provide for a comment period of not less than 30 days, after which NMFS will make a final determination whether to subject the activities to the ESA section 9(a)(1) prohibitions.

(iv) Prior to approving any city, county, or regional government ordinances or plans as being within this limit, or approving any substantive change in an ordinance or plan as being within this limit, NMFS will publish notification in the FEDERAL REGISTER announcing the availability of the ordinance or plan or the draft changes for public review and comment. Such an announcement will provide for a comment period of not less than 30 days.

(c) *Affirmative Defense.* In connection with any action alleging a violation of the prohibitions of paragraph (a) of this section with respect to the threatened species of salmonids listed in § 223.102 (a)(3), (a)(5) through (a)(10) and (a)(12) through (a)(22), any person claiming the benefit of any limit listed in paragraph (b) of this section or § 223.209(a) shall have a defense where the person can demonstrate that the limit is applicable and was in force, and that the person fully complied with the limit at the time of the alleged violation. This defense is an affirmative defense that must be raised, pleaded, and proven by the proponent. If proven, this defense will be an absolute defense to liability under section 9(a)(1)(G) of the ESA with respect to the alleged violation.

(d) *Severability.* The provisions of this section and the various applications thereof are distinct and severable from one another. If any provision or the application thereof to any person or circumstances is stayed or determined to be invalid, such stay or invalidity shall not affect other provisions, or the application of such provisions to other persons or circumstances, which can be given effect without the stayed or invalid provision or application.

Appendix A to §223.203 -- List of Guidance Documents

The following is a list of documents cited in the regulatory text. Copies of these documents may be obtained upon request from the Northwest or Southwest Regional Administrators (see Table 1 in § 600.502 of this title).

1. Oregon Department of Transportation (ODOT) Maintenance Management System Water Quality and Habitat Guide (July, 1999).
2. Guidelines for Electrofishing Waters Containing Salmonids Listed Under the Endangered Species Act.
3. Fish Screening Criteria for Anadromous Salmonids, National Marine Fisheries Service, Southwest Region, 1997.
4. Viable Salmonid Populations and the Recovery of Evolutionarily Significant Units. (June 2000).

[65 FR 42475, July 10, 2000, as amended at 67 FR 1129, Jan. 9, 2002; 67 FR 68725, Nov. 12, 2002]

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§223.204 Exceptions to prohibitions relating to anadromous fish.

(a) The following exceptions to the prohibitions of §223.203(a) of this part apply to the Southern Oregon/Northern California Coast (SONCC) coho salmon.

(1) Take of SONCC coho salmon within 3 miles (approximately 5 km) of the coast, and in the bay, estuarine or freshwater fisheries regulated under the sole authority of the State of Oregon is not prohibited, if the take results from a fisheries harvest program conducted in accordance with the Oregon Coastal Salmon Restoration Initiative of March 1997 (OCSRI). NMFS must have issued a written concurrence that the fisheries regulations are consistent with the OCSRI, using information provided through the April 1997 Memorandum of Agreement (MOA) between the State of Oregon and NMFS.

THIS DATA CURRENT AS OF THE FEDERAL REGISTER DATED JANUARY 23, 2003

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§ 223.209 Tribal plans.

(a) *Limits on the prohibitions.* The prohibitions of § 223.203(a) of this subpart relating to threatened species of salmonids listed in § 223.102 do not apply to any activity undertaken by a tribe, tribal member, tribal permittee, tribal employee, or tribal agent in compliance with a Tribal resource management plan (Tribal Plan), provided that the Secretary determines that implementation of such Tribal Plan will not appreciably reduce the likelihood of survival and recovery of the listed salmonids. In making that determination the Secretary shall use the best available biological data (including any tribal data and analysis) to determine the Tribal Plan's impact on the biological requirements of the species, and will assess the effect of the Tribal Plan on survival and recovery, consistent with legally enforceable tribal rights and with the Secretary's trust responsibilities to tribes.

(b) *Consideration of a Tribal Plan.* (1) A Tribal Plan may include but is not limited to plans that address fishery harvest, artificial production, research, or water or land management, and may be developed by one tribe or jointly with other tribes. The Secretary will consult on a government-to-government basis with any tribe that so requests and will provide to the maximum extent practicable technical assistance in examining impacts on listed salmonids and other salmonids as tribes develop Tribal resource management plans that meet the management responsibilities and needs of the tribes. A Tribal Plan must specify the procedures by which the tribe will enforce its provisions.

(2) Where there exists a Federal court proceeding with continuing jurisdiction over the subject matter of a Tribal Plan, the plan may be developed and implemented within the ongoing Federal Court proceeding. In such circumstances, compliance with the Tribal Plan's terms shall be determined within that Federal Court proceeding.

(3) The Secretary shall seek comment from the public on the Secretary's pending determination whether

or not implementation of a Tribal Plan will appreciably reduce the likelihood of survival and recovery of the listed salmonids.

(4) The Secretary shall publish notification in the Federal Register of any determination regarding a Tribal Plan and the basis for that determination.

[65 FR 42485, July 10, 2000]

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Sec. 1533. Determination of endangered species and threatened species

- (a) Generally
 - (1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:
 - (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
 - (B) overutilization for commercial, recreational, scientific, or educational purposes;
 - (C) disease or predation;
 - (D) the inadequacy of existing regulatory mechanisms; or
 - (E) other natural or manmade factors affecting its continued existence.
 - (2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970 -
 - (A) in any case in which the Secretary of Commerce determines that such species should -
 - (i) be listed as an endangered species or a threatened species, or
 - (ii) be changed in status from a threatened species to an endangered species, he shall so inform the Secretary of the Interior; who shall list such species in accordance with this section;
 - (B) in any case in which the Secretary of Commerce determines that such species should -
 - (i) be removed from any list published pursuant to subsection (c) of this section, or
 - (ii) be changed in status from an endangered species to a threatened species, he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and
 - (C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.
 - (3) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable -
 - (A) shall, concurrently with making a determination under

paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
 (B) may, from time-to-time thereafter as appropriate, revise such designation.

- (b) Basis for determinations
- (1)
 - (A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.
 - (B) In carrying out this section, the Secretary shall give consideration to species which have been -
 - (i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or
 - (ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.
- (2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.
- (3)
 - (A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section [553](#)(e) of title 5, to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the

status of the species concerned. The Secretary shall promptly publish each finding made under this subparagraph in the Federal Register.

- (B) Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:
 - (i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.
 - (ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).
 - (iii) The petitioned action is warranted, but that -
- (I) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and
- (II) expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary, in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.
- (C)
 - (i) A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.
 - (ii) Any negative finding described in subparagraph (A) and any finding described in subparagraph (B)(i) or (iii) shall be subject to judicial review.
 - (iii) The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7 [11](#) to prevent a significant risk to the well being of any such species.
- (D)
 - (i) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under section [553](#)(e) of title 5, to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.
 - (ii) Within 12 months after receiving a petition that is found under clause (i) to

present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

- (4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section [553](#) of title 5 (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.
- (5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall -
 - (A) not less than 90 days before the effective date of the regulation -
 - (i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and
 - (ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county, or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;
 - (B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;
 - (C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;
 - (D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and
 - (E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.
- (6)
 - (A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register -
 - (i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either -
 - (I) a final regulation to implement such determination,

- (II) a final regulation to implement such revision or a finding that such revision should not be made,
- (III) notice that such one-year period is being extended under subparagraph (B)(i), or
- (IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or
 - (ii) subject to subparagraph (C), if a designation of critical habitat is involved, either -
- (I) a final regulation to implement such designation, or
- (II) notice that such one-year period is being extended under such subparagraph.
- (B)
 - (i) If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.
 - (ii) If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.
 - (iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.
- (C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that -
 - (i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or
 - (ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one

additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

- (7) Neither paragraph (4), (5), or (6) of this subsection nor section [553](#) of title 5 shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if -
 - (A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and
 - (B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur. Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.
- (8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.
- (c) Lists
 - (1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.
 - (2) The Secretary shall -

- (A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and
- (B) determine on the basis of such review whether any such species should -
 - (i) be removed from such list;
 - (ii) be changed in status from an endangered species to a threatened species; or
 - (iii) be changed in status from a threatened species to an endangered species. Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

- (d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section [1538\(a\)\(1\)](#) of this title, in the case of fish or wildlife, or section [1538\(a\)\(2\)](#) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section [1535\(c\)](#) of this title only to the extent that such regulations have also been adopted by such State.

- (e) Similarity of appearance cases

The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that -

- (A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;
- (B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and
- (C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

- (f) Recovery plans

- (1) The Secretary shall develop and implement plans (hereinafter in this subsection

referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable -

- (A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;
 - (B) incorporate in each plan -
 - (i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;
 - (ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and
 - (iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.
 - (2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.
 - (3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.
 - (4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.
 - (5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).
- (g) Monitoring
 - (1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this chapter are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c) of this section.
 - (2) The Secretary shall make prompt use of the authority under paragraph 7 [\[2\]](#) of subsection (b) of this section to prevent a significant risk to the well being of any such

recovered species.

- (h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments
The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to -
 - (1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;
 - (2) criteria for making the findings required under such subsection with respect to petitions;
 - (3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and
 - (4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section. The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

- (i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition
If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3) of this section, the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

Footnotes

[1] So in original. Probably should be paragraph "(7)".

[2] So in original. Probably should be paragraph "(7)".

Affected Public: State, local or Tribal Government and not-for-profit organizations.

Frequency: One time for preapplication and application, and on occasion for the Civil Rights Guidelines for post-approval and monitoring compliance.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395-7340.

Copies of the above information collection proposal can be obtained by calling or writing Diana Hynek, Departmental Paperwork Clearance Officer, (202) 482-0266, U.S. Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230, or via Internet at dhynek@doc.gov.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: October 7, 2002.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 02-25916 Filed 10-10-02; 8:45 am]

BILLING CODE 3510-34-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 100702B]

Proposed Information Collection; Comment Request; Limits of Application of Take Prohibitions

AGENCY: National Oceanic and Atmospheric Administration (NOAA).

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506 (c)(2)(A)).

DATES: Written comments must be submitted on or before December 10, 2002.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6086,

14th and Constitution Avenue NW, Washington DC 20230 (or via Internet at dHynek@doc.gov).

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the information collection instrument and instructions should be directed to Lamont Jackson at (301) 713-1401 or Steve Stone at (503) 231-2317, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226.

SUPPLEMENTARY INFORMATION:

I. Abstract

Section 4(d) of the Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et. seq.*) requires the National Marine Fisheries Service (NMFS) to adopt such regulations as it "deems necessary and advisable to provide for the conservation of" threatened species. Those regulations may include any or all of the prohibitions provided in section 9(a)(1) of the ESA, which specifically prohibits "take" of any endangered species ("take" includes actions that harass, harm, pursue, kill, or capture). The first salmonid species listed by NMFS as threatened were protected by virtually blanket application of the section 9 take prohibitions. There are now 20 separate Evolutionarily Significant Units (ESUs) of west coast salmonids listed as threatened, covering a large percentage of the land base in California, Oregon, Washington and Idaho. NMFS is obligated to enact necessary and advisable protective regulations.

NMFS makes section 9 prohibitions generally applicable to many of those threatened ESUs, but also seeks to respond to requests from states and others to both provide more guidance on how to protect threatened salmonids and avoid take, and to limit the application of take prohibitions wherever warranted. The regulations describe programs or circumstances that contribute to the conservation of, or are being conducted in a way that adequately limits impacts on, listed salmonids. The regulations do not apply the take prohibitions to those programs and circumstances. Some of these limits on the take prohibitions entail voluntary submission of a plan to NMFS and/or annual or occasional reports by entities wishing to take advantage of these limits, or continue within them.

II. Method of Collection

Submissions may be in paper or electronic format.

III. Data

OMB Number: 0648-0399.

Form Number: None.

Type of Review: Regular submission.
Affected Public: State, Local, or Tribal Government; business or other for-profit organizations; and farms.

Estimated Number of Respondents: 201.

Estimated Time Per Response: 20 hours for a road maintenance agreement; 5 hours for a diversion screening limit project; 30 hours for an urban development package; 10 hours for an urban development report; 20 hours for a tribal plan; and 5 hours for a report of aided, salvaged, or disposed of salmonids.

Estimated Total Annual Burden Hours: 500.

Estimated Total Annual Cost to Public: \$843.

IV. Request for Comments

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: October 2, 2002.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 02-26015 Filed 10-10-02; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

[I.D. 100702C]

Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Oceanic and Atmospheric Administration (NOAA).

Title: Applications and Reports for Registration as a Tanner or Agent.