

# **City of Corvallis Salmon Response Plan**

## **Chapter 2. ESA and the 4(d) Rule**

Prepared for:

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## DISCLAIMER

The authors have attempted to replace all references to Squaw Creek with the creek's new name, Dunawi Creek. This includes replacing the creek's full name as well as changing Squaw Creek Reach reference labels to indicate Dunawi Creek.

## TABLE OF CONTENTS

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<b>CHAPTER 2. ESA AND THE 4(D) RULE.....</b>	<b>9</b>
<b>Introduction .....</b>	<b>9</b>
<b>A Brief History of the ESA .....</b>	<b>9</b>
<i>Threatened and Endangered: Important Distinctions .....</i>	<i>9</i>
<i>Chinook Salmon Listing History .....</i>	<i>11</i>
<i>Section 4(d) Rules.....</i>	<i>12</i>
<i>Description of the 13 Limits.....</i>	<i>13</i>

## CHAPTER 2. ESA AND THE 4(D) RULE

### INTRODUCTION

Since the project is driven by the ESA, it is important that the reader have a basic understanding of the ESA and how it applies to the Salmon Response Plan. The following sections briefly describe the ESA including its purpose, the listing process, enforcement, and the compliance options available to local agencies, which can impact listed species within their jurisdictions. This chapter concludes with a more detailed discussion of the 4(d) Rule and the guidance it provides for listed salmonids.

### A BRIEF HISTORY OF THE ESA

Since its passage in 1973, the ESA has become the most important environmental legislation for the protection and conservation of plant and animal species. The ESA is a federal action that is designed to prevent the extinction of wildlife, fish and plants. The ESA covers the listing and delisting process, prohibited activities; enforcement and penalties for violators, exceptions to the ESA, and importantly for Corvallis, guidelines for protecting and conserving threatened species.

The primary motivation for the Act's passage was the recognition that economic growth and development was responsible, in part, for species extinction. The Act's findings stated that previous species extinction was the "consequence of economic growth and development untempered by adequate concern and conservation." The Act's findings further stated that fish, wildlife, and plants were of "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation [and international community] and its people." To conserve species and prevent future extinctions, the United States Congress passed the ESA with sweeping powers to, "provide a program for the conservation of such endangered species and threatened species..." and that all "...Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."

### Threatened and Endangered: Important Distinctions

There are two important designations under the ESA, endangered and threatened, each having different prohibitions and restrictions. An endangered species is defined as, "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary [of Commerce] to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man." A species that is listed as threatened, on the other hand, is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

The two designations differ significantly with respect to the prohibited activities. While both are subject to the “take”<sup>1</sup> prohibitions (Section 9 Prohibited Acts), those for endangered species are significantly more restrictive because of the potential for extinction. Essentially, any human-related activity that could result in extinction of the species outside of self-protection (an act of self-defense by humans) from an endangered species is considered unlawful. Included in these prohibitions are the sale and trafficking (importing, exporting), possessing, and violation of any regulation pertaining to the endangered species.

There are exceptions to these prohibitions. Incidental take of an endangered species may be permitted as long as it does not create jeopardy. That is, the take of the endangered species does not result in the species’ extinction. Therefore, ESA Sections 7 (Interagency Cooperation) and 10 (Exceptions) allow the “take” of species listed as threatened or endangered, as long as there is no possibility that it will become extinct.

Prohibited activities under the threatened species designation are subject to the same ESA sections, though they are somewhat less restrictive. Like endangered species, there are incidental take prohibitions, but there are also exceptions. The exceptions are significantly more flexible than those for endangered species. Incidental take can happen only if it does not result in jeopardy. That is, that the take will not result in a threatened species becoming endangered.

What differs between the two designations is the application of Section 4(d) Protective Regulations. Section 4(d) only applies to threatened species. It gives the Secretary of Commerce sweeping authority to prepare any regulations necessary to conserve (save) a listed threatened species including, under certain circumstances, allowing exemptions from prohibited activities in other sections of the ESA such as Section 9(a)(1). Section 9(a)(1) lists prohibited activities for listed threatened species including importing/exporting, transporting, selling, damaging/destroying, or violating any regulation related to a threatened species promulgated by the Secretary of Commerce.

## **ESA Listing Process**

Listing of species under the ESA is a three-step process (ESA Section 4). In the first step, a species review is triggered by a petition to the Secretary of Commerce claiming other laws and regulations have not sufficiently protected the species, and ESA protection is warranted. The petition must present the scientific evidence leading to that conclusion. A biological review team (BRT) is formed and a “status review” conducted. This review has at least five possible outcomes. The BRT may conclude that there is insufficient cause for listing and reject the petition, that the petition has presented insufficient evidence for listing and reject the petition, or that the evidence is insufficient for listing but the species should

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<sup>1</sup> The term “take” in the ESA means to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

be designated as “candidate” and re-examined in five years. Should the BRT find that listing is warranted, it may either decide that, while listing is warranted, other species have greater urgency and so the species in question will not be listed at this time, or that listing is necessary.

In the second step, there is additional scientific review and public comment for the proposed listing of the species. At this time other governmental agencies are “obligated” by Section 7 of the ESA to consult with the regulatory agency (e.g., NOAA Fisheries, U.S. Fish and Wildlife Service) on any projects involving federal actions (including funding) to protect the proposed species and its habitat. Federal regulations, however, do not yet apply to state and local authorities because the species has not been formerly listed.

In the third step, the ESA lists the species when scientific review and public comment in the second step warrant further protections. At this point state, local and private citizens along with federal government agencies are all required by Section 7 of the ESA to consult with the federal regulatory agencies on any federal actions that may impact the listed species. The Section 7 consultation process ensures, for a specific project, that the listed threatened species is not in jeopardy of becoming endangered and the listed endangered species is not in jeopardy of becoming extinct. Through the consultation process a proposed project may be modified, altered, or even prevented depending on the federal agency’s determination of impact on the listed species.

### **Chinook Salmon Listing History**

The ESU for Upper Willamette Spring Chinook Salmon was listed as threatened on March 24, 1999. The final determination to list these salmon as threatened came after a year of scientific analysis and public comment. During that time NOAA Fisheries reviewed the potential listing of eight chinook salmon stocks along the west coast of the United States. In March 1999, three other chinook stocks also were listed under the ESA, two as threatened and one as endangered (Federal Register March 24, 1999). Decisions on the remaining chinook stocks were postponed for six months in order to extend the review period.

At the time of the listing NOAA Fisheries also was required to designate critical habitat for Upper Willamette Spring Chinook Salmon (ESA Section 4(a)(3)(A)). Critical habitat as defined in the ESA is “(i) the specific areas within the geographical area occupied by the species...on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species...upon a determination by the Secretary [of Commerce] that such areas are essential for the conservation of the species.” (ESA Section 3(5)(A)).

NOAA Fisheries postponed designation of critical habitat in March 1999 because of the number of comments received regarding critical habitat area. Critical habitat was finally designated on February 16, 2000 (Federal Register Vol. 65, No. 32). The critical habitat designation for Upper Willamette Spring Chinook Salmon, as well as for 18 other salmon stocks, were then voluntarily vacated April 30, 2002 in response to litigation challenging the process by which critical habitat was established.

To date, the critical habitat designation is still vacated pending the review of the critical habitat designation process by NOAA Fisheries. Upper Willamette Spring Chinook Salmon remains listed as threatened under the ESA and jurisdictions must still demonstrate that they are conserving habitat under other federal legislative mandates (i.e., Magnuson-Stevens Act of 1996).

### **Section 4(d) Rules**

As was noted in a previous section of this chapter, the federal government has flexibility to issue regulations that allow exceptions to the take prohibition. There are three Sections of the ESA that guide the type of exceptions that may be allowed for a listed threatened species designation. Section 4(d) is one of the ESA sections that provides regulatory flexibility when the Secretary of Commerce deems it is “necessary and advisable to provide for the conservation of such [as listed threatened] species.” NOAA Fisheries has used this section to develop specific rules for listed anadromous fish, including Upper Willamette Spring Chinook Salmon, to provide guidance to jurisdictions on how to demonstrate conservation of these listed species’ habitat.

NOAA Fisheries formally adopted the Section 4(d) Rules on July 10, 2000 (Federal Register Vol. 65, No. 132). The Rules identified activities that NOAA Fisheries believed might constitute a “take” of listed species. The Rules also identified activities that “conserve” listed species; that is, activities conducted pursuant to NOAA Fisheries-approved land use regulations. The Rules identified 13 activities or programs that NOAA Fisheries believed limited impacts on salmonid species, so that additional protection through application of ESA Section 9 would be unnecessary.

NOAA Fisheries intended to use the 4(d) Rule process as a way to encourage governments to review their regulations and make changes to ensure activities conducted pursuant to such regulations did not cause a “take.” NOAA Fisheries actively encouraged and was “interested in working with local jurisdictions to develop programs that protect endangered and threatened species and their habitats and to recognize such programs through 4(d) Rules exceptions or other mechanisms.” (*ESA and Local Governments: Information on 4(d) Rules*, NOAA Fisheries, 2000).

The 4(d) Rules set forth an administrative process whereby governmental entities could exempt their land use and water quality regulations from ESA restrictions. In practical language, NOAA Fisheries recognized that implications of the listed species were for the first time mainly on urban rather than rural areas. Therefore, certain activities such as

urban development, the delivery of urban services (e.g., public infrastructure, operations and maintenance, etc.) and citizen behavior as well as the history of urban development and activities were very complex and would likely violate Section 9 take prohibitions. In order to both comply with the ESA, but still allow for the continued activities that were primarily urban in nature, there had to be some guidance for local jurisdictions to demonstrate compliance. The Section 4(d) Rules provided that guidance.

Further, NOAA Fisheries recognized that the 4(d) Rules “did not require states, local governments, or private parties to change their practices to conform to any of the take limits described in the final rule. However, the limits provided one way to be sure an activity or program did not risk violating the take prohibitions. Simply because a program was not within a limit *does not* mean that it automatically violated the ESA, but that a program or jurisdiction would risk ESA penalties if the activity in question took a listed fish. By qualifying for a limit, governments and individuals received assurance that their activities, when implemented in accordance with the criteria in the 4(d) Rules, did not violate the take prohibitions and would not be subject to enforcement actions.” In other words, NOAA Fisheries could not charge a jurisdiction or individual with violating the take prohibitions if they were complying with an approved 4(d) Rule plan.

### **Description of the 13 Limits**

The 13 limits cover a broad number of categories where take may occur, including:

- Scientific research conducted or supervised by, or coordinated with, state fishery agencies
- Fish harvest activities
- Artificial propagation programs
- Habitat restoration based on watershed plans
- Properly screened water diversions
- Routine road maintenance
- Municipal, residential, commercial, and industrial development and redevelopment
- Forest management practices in the State of Washington

To help guide local jurisdictions through the 4(d) Rule compliance process, NOAA Fisheries has also issued the *Implementation Binder for Threatened Salmon and Steelhead on the West Coast* (September 22, 2000). The Binder outlines the steps for evaluating the need for a limit, the limit to be submitted, the contents of the limit documentation and the submittal process (See Appendix 1 for a copy of the revised Binder)

The following briefly addresses each of the 13 limits under the ESA Section 4(d) Rules (descriptions are from the *4(d) Rule Implementation Binder for Threatened Salmon and Steelhead on the West Coast*, September 22, 2000). Not all apply to the City of Corvallis

and their ESA program. The City is in the process of submitting an application for Limit 9 (Water Diversion Screen for the Taylor Water Treatment Plant Intake Pump Station), will submit an application for Limit 12 (Municipal, Residential, Commercial, and Industrial Development Program) following the Land Development Code Phase III Update process, and is considering an application for a Limit 10 (Routine Road Maintenance).

#### *Limit 1 – ESA Permits*

This limit recognizes that those holding permits under Section 10 of the ESA (or receiving other exemptions under the ESA) are not prohibited from take that is in accordance with the permit or applicable law. A Section 10 permit (e.g., Habitat Conservation Plan) allows a jurisdiction to take listed fish based on the plan and not be in violation of the ESA.

#### *Limit 2 – Ongoing Scientific Research*

NOAA Fisheries allowed a temporary, one-time limit on the ESA take prohibitions to allow scientific activities to continue until March 7, 2001. Authorization under this limit did not remove a researcher's obligation to obtain any additional state, tribal, or federal permits. Nor did this limit remove the need for federal researchers to consult with NOAA Fisheries under Section 7 of the ESA.

#### *Limit 3 – Rescue and Salvage Actions*

This limit relieves certain agency and official personnel (or their designees) from the take prohibitions when they are acting to aid an injured or stranded fish or salvage a dead fish for scientific study.

#### *Limit 4 – Fishery Management*

Allows the take of listed fish in fisheries if a fishery management agency develops a Fisheries Management and Evaluation Plan (FMEP) and NOAA Fisheries approves it. Some benefits of the FMEP approach are long-term management planning, more public involvement, less government paperwork, and more certainty that there will be fishing opportunities in the future.

#### *Limit 5 – Artificial Propagation*

Hatcheries can be managed in a manner that conserves and recovers listed salmon and steelhead. The 4(d) Rules do not prohibit the take of listed fish for a variety of hatchery purposes if a state or federal hatchery management agency develops a Hatchery and Genetics Management Plan (HGMP) and NOAA Fisheries approves it.

*Limit 6 – Limits on the Take Prohibitions for Joint Tribal/State Plans Developed under the United States v. Washington or United States v. Oregon Settlement Processes*

NOAA Fisheries includes this limit on the take prohibitions to accommodate any resource management plan developed jointly by the states and the tribes (joint plan) under the jurisdiction of *United States v. Washington* or *United States v. Oregon*. Such a plan would be developed and reviewed under the government-to-government processes outlined in the final 4(d) Rule for Tribal Resource Management Plans.

*Limit 7 – Scientific Research Activities Permitted or Conducted by The States*

The 4(d) Rule allows take for specific scientific research activities undertaken by states. 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.

*Limit 8 – Habitat Restoration*

The final 4(d) Rule provides that take prohibitions will not apply to habitat restoration activities that are part of a watershed conservation plan that the state of Washington, Oregon, Idaho, or California has certified to be consistent with the state's watershed conservation plan guidelines.

*Limit 9 – Water Diversion Screening*

Water diversions that operate without adequate screens to block fish access are widely known to kill salmon and steelhead. Juveniles may be sucked or attracted into diversion ditches or pipes where they later die from a variety of causes (e.g., stranding, hydropower production, drinking water treatment, etc.). In addition, juveniles are often injured or killed when caught in pumping facilities or forced against screens. Adult and juvenile salmonid migration may also be impaired by diversion structures such as push-up dams.

The 4(d) Rule does not apply take prohibitions provided that NOAA Fisheries engineering staff, or any resource agency or tribal representative NOAA Fisheries designates as an authorized officer, has agreed in writing that the diversion facility is screened, maintained, and operated in compliance with NOAA Fisheries' Juvenile Fish Screening Criteria or, in California, in compliance with NOAA Fisheries' Southwest Region Fish Screening Criteria for Anadromous Salmonids. If a diversion is screened, operated, and maintained in a manner consistent with those criteria, adequate safeguards will be in place and no additional federal protection is necessary or advisable for conserving listed fish.

The City of Corvallis prepared a Limit 9 application for replacement of its Taylor water intake diversion screen on the Willamette River. The water diversion screen was replaced during the summer and fall of 2004.

### *Limit 10 – Routine Road Maintenance*

NOAA Fisheries does not find it necessary or advisable to apply take prohibitions to routine road maintenance activities provided that: (1) the activity constitutes routine road maintenance conducted by Oregon Department of Transportation (ODOT) employees (or their agents) that complies with ODOT's *Transportation Maintenance Management System Water Quality and Habitat Guide* (ODOT Guide, July 1999); (2) it is conducted by the employees or agents of a state, county, city, or port under a program that complies substantially with the ODOT Guide and has been determined to meet or exceed the protections provided by the ODOT Guide; or (3) it is conducted by the employees or agents of a state, county, city, or port in a manner that has been found to contribute to PFC.

For a state, city, county, or port program that is equivalent to the ODOT program (or any of its amendments) to qualify under Limit 10, it must be approved in writing by the NOAA Fisheries Northwest or Southwest Regional Administrator, whichever is appropriate. Any jurisdiction desiring its routine road maintenance activities to qualify under this limit must have adopted road maintenance guidelines equivalent to or better than the ODOT program and commit in writing to apply these management practices.

The City of Corvallis is considering a submission of a Limit 10 application. The City considers its routine road maintenance program equal to the ODOT Guide and in many cases exceeds ODOT practices. In addition, NOAA Fisheries has encouraged the City to submit a Limit 10 based on the Salmon Response Plan Phase One report, *Baseline Habitat Evaluation and Evaluation of the Impacts of City Activities* (February 2002).

### *Limit 11 – Portland Parks Integrated Pest Management*

After carefully analyzing the City of Portland's Parks and Recreation (PP&R) integrated program for pest management, NOAA Fisheries concludes that it addresses potential impacts and provides adequate protection for listed fish. NOAA Fisheries does not find it necessary or advisable to apply additional federal protections in the form of take prohibitions to PP&R activities conducted under the Pest Management Program.

This limit only covers the City of Portland. The City has worked closely with NOAA Fisheries to develop a program that covers their activities. NOAA Fisheries has not expanded it to allow other jurisdictions adopt their program as they have for Limit 10.

### *Limit 12 – Municipal, Residential, Commercial and Industrial Development and Redevelopment*

The City will submit an application under Limit 12. The Municipal, Residential, Commercial and Industrial (MRCI) limit application is complicated because it covers many of the diverse activities that a city provides. Through the 4(d) Rule, NOAA Fisheries identifies a mechanism whereby cities, counties, and regional governments can ensure that MRCI development and redevelopment authorized within those areas is consistent with ESA requirements. The challenge is to be able to provide adequate protections to prevent

Upper Willamette Spring Chinook Salmon from becoming endangered, which at the same time allows local jurisdictions enough flexibility to continue to conduct their business. The 4 (d) Rules allow this as the take prohibitions do not apply to MRCI development or redevelopment governed by and conducted in accordance with city, county, or regional government ordinances or plans that NOAA Fisheries has found to adequately protect listed species.

NOAA Fisheries has developed 12 criteria by which a Limit 12 application will be evaluated. The following criteria will be applied by NOAA Fisheries when evaluating the MRCI program plans and ordinances:

- Avoid development in inappropriate areas (e.g., steep slopes, wetlands, riparian areas)
- Avoid stormwater discharge impacts to water quality, quantity and the watershed hydrograph
- Provide riparian area management that adequately maintains properly functioning conditions and mitigates unavoidable damage
- Avoid stream crossings by roads, utilities, etc., when possible, and minimize impacts where crossings are unavoidable through choice of mode, sizing, and placement
- Protect historical stream geomorphology and avoid hardening of banks and shorelines
- Protect wetlands and wetland functions
- Preserve hydrologic capacity of all streams, permanent and intermittent, to pass peak flows
- Provide for and encourage use of native vegetation for landscaping to reduce water, pesticide and herbicide use
- Ensure water supply demands can be met without having a negative impact on flows, directly or through influences on groundwater. Any new diversions should be placed and screened in such a way as to prevent injury to and/or death of salmonids
- Provide necessary enforcement, funding, reporting, and implementation mechanisms and formal plan evaluations at no greater than 5 year intervals
- Comply with all other state and federal environmental and natural resource laws
- Provide NOAA Fisheries with annual reports regarding implementation and effectiveness

*Limit 13 – Forest Management in Washington*

NOAA Fisheries has determined that it is not necessary to apply take prohibitions to non-federal forest management activities conducted in the State of Washington provided that: (1) the action complies with adopted forest practice regulations that NOAA Fisheries has found to protect habitat functions at least as well as the regulatory elements of the Forests and Fish Report (FFR); and (2) the activity also implements all non-regulatory elements of the FFR.