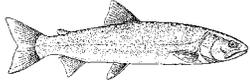


ENDANGERED SPECIES ACT



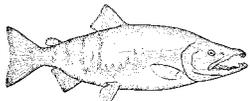
CHINOOK

Proposed Listing as
Threatened for Puget Sound



BULL TROUT

Proposed Listing as
Threatened for Puget Sound



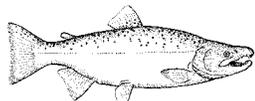
CHUM

Depressed; Proposed Listing
as Threatened for Hood Canal



SEA-RUN CUTTROT

Status Determination
December 1998



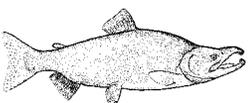
COHO

Status Determination
Mid-1999



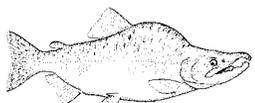
STEELHEAD/RAINBOW

At Risk of Future Listing



SOCKEYE

Depressed; Listing Unlikely



PINK

Some Runs Extinct;
Others Still Healthy

Status descriptions are
for Puget Sound runs.



King County, WA

ENDANGERED SPECIES ACT RESPONSE: 4(D) RULES

Although Habitat Conservation Plans (HCPs) have come to be the most notable means for National Marine Fisheries Service (NMFS) or U.S. Fish and Wildlife Service (USFWS) to afford local entities protection from the legal consequences of incidental take, a “4(d) rule” promulgated by NMFS or USFWS offers somewhat similar protection. This rule is proposed at the time of, or soon after, the final listing decision by the lead federal agency. 4(d) rules have several parameters that make the protections they provide, to species and to regulated entities, distinct from those provided by an HCP.

The Nuts and Bolts of 4(d) Rules

Section 4(d) of the ESA requires the federal agency to put in place protective measures that prevent further damage to a threatened species. The decision to list a species usually indicates that existing protective measures are substantively inadequate or are inadequately implemented. Therefore, we can expect that under a 4(d) rule protections for a species would be more strict and enforcement more consistent than was the case before a species was listed.

Several principles help shape a 4(d) rule-making process:

- a 4(d) rule can be promulgated only for threatened species: endangered species are automatically afforded the full protection of the law without any flexibility in rule-making;
- it addresses the entire range of the listed species (e.g., an Evolutionarily Significant Unit or “ESU”) but can incorporate elements which apply only to discrete areas (e.g., states, counties, cities, watersheds, WRIAs) within that range;
- it is drafted for a single species at a time but could be rolled up as part of a coordinated local plan for multi-species protection;
- it can be changed at any time by the lead federal agency and therefore does not provide the long-term legal assurances which are provided by HCPs;
- it usually does not apply to activities which involve federal funding or a federal permit or which are undertaken under a federal mandate (usually Section 7 is used to address these);
- the rule-making process customarily does not involve the degree of negotiation that is part of the HCP development process – generally, the federal agency drafts the rule, comments are solicited, and a final rule is promulgated;
- citizens can file third-party lawsuits questioning whether in promulgating a 4(d) rule the listing agency properly implemented the ESA.

4(d) rules vary from case to case, but they usually contain one or more of the following elements:

- a restatement of the prohibitions on take which are contained in Section 9 and defined in Section 3 of the ESA and which are regularly applied to endangered species (without this component, a 4(d) rule does not apply take prohibitions on non-federal lands);
- the specification of actions with approved guidelines which essentially reduce take of the species to an incidental level; these actions could be undertaken without the threat of legal sanctions resulting from the take of the species;
- the specification of actions which would result in take and are therefore prohibited.

Examples of 4(d) Rules

Since salmon listings are relatively uncommon to our region and more uncommon to heavily urbanized or urbanizing areas nationwide, there isn't an extensive record we can turn to for insight into local 4(d) rule-making. There are, however, a few informative 4(d) rule-making processes which illustrate the potential of 4(d) rules.

The **Southern Oregon/Northern California Coast ESU of Coho salmon** was listed as threatened on May 6, 1997. (This ESU is just to the south of the ESU in which NMFS was recently forced, by court order, to list coho as threatened.) On July 18, 1997 NMFS proposed an interim 4(d) rule for this ESU, and on August 18, 1997 this rule became effective. In this rule NMFS applied the Section 9 prohibitions on take. The rule specified exceptions for four activities which would result in the incidental take of the species but could continue if undertaken according to guidance provided by the "Oregon Plan". These activities included harvest, research, monitoring, and habitat restoration. The rule further noted a list of eight activities NMFS felt were likely to result in violation of take prohibitions, ranging from land use activities to the introduction of non-native predator species. Though this rule technically is in effect, certain legal assurances elements in it, e.g., the habitat restoration piece, are not available to regulated parties since there is no agreement on the guidelines that govern these elements and protect those who undertake these activities from legal concerns regarding take of the species. This case shows that the protection afforded by 4(d) rules can be fairly narrow and not necessarily reach activities that would be of interest to local entities, e.g., land use regulation.

The **Northern Spotted Owl** was listed as a threatened species in 1990. Through the 4(d) rule that joined the listing decision, USFWS applied Section 9 prohibitions on take throughout the range of the species but did not specify activities that could proceed under specific guidelines designed to minimize take. The result of such a 4(d) rule is that any take of the species not addressed through Section 7 review is illegal. USFWS, noting that federal lands – through the President's Forest Plan – would carry most of the conservation burden for the species, proposed a revised 4(d) rule which would ease restrictions on incidental take on non-federal land. This proposed rule would focus the most strict protective measures in areas closest to known nesting sites of the species and make special accommodations for those who own between 80 and 5000 acres in focus habitat areas. This proposed rule would apply only to areas in Washington and California: Oregon chose to engage USFWS in a discussion about other options for achieving species protection goals. In October, 1998, USFWS published an Environmental Alternatives Analysis for seven variations of this proposed rule, which will be made final after review of these alternatives and coordination with the work of the Timber/Fish/Wildlife process and the 4(d) rule for bull trout. This case illustrates that 4(d) rules are subject to revision, they can be affected by the provisions of plans not directly incorporated into the 4(d) rule, and that they may reflect different conservation strategies for federal vs. non-federal lands.

The **California Gnatcatcher** (a bird) was listed as a threatened species in southern California on March 30, 1993. In the listing decision USFWS applied Section 9 take prohibitions and indicated its intent to issue a special rule under section 4(d). USFWS issued the final 4(d) rule on December 10, 1993 and in it recognized that the effects of land use and development on habitat would be of prominent consideration in any conservation strategy. This rule also recognized the substantial efforts the state of California had shown in implementing provisions of the state's Natural Community Conservation Planning (NCCP) Act of 1991. In implementing these provisions, the state established Conservation Guidelines designed to minimize the impact of activities in coastal sage habitat. The Gnatcatcher 4(d) rule had two primary elements: 1) incidental take resulting from activities undertaken according to the guidelines of a completed Conservation Plan developed under NCCP Conservation Guidelines – essentially to the threshold that would be necessary to get an Incidental Take Permit – would be legal; and 2) incidental take within jurisdictions actively engaged in the preparation of an NCCP Conservation Plan would be legal, provided the activity that resulted in take was undertaken according to NCCP guidelines and that no options for long-term conservation were foreclosed as a result of the activity. This in essence allowed a 5% loss of coastal sage scrub habitat before local communities in the listing area reached the threshold at which future options for long-term conservation were foreclosed. This case illustrates the important role agreed-upon conservation guidelines can play in shaping 4(d) rules and that showing a commitment to achieving an HCP-like threshold for species conservation can increase the flexibility available to local entities through a 4(d) rule.