Answers to Forty Frequently Asked Questions About the Endangered Species Act

A. BACKGROUND & STATUS OF ESA LISTINGS

1. What are the purposes of the Endangered Species Act (ESA) and the objectives of the federal agencies implementing the Act?

The purpose of the ESA is to prevent the extinction of **species**, recover species to stable populations, and protect the ecosystems on which species depend. The specifics of the Act establish a broad framework of tools designed to achieve protection of species that are threatened or endangered with extinction (see Appendix 2 for full text of the ESA).

The definition of "species" requires the National Marine Fisheries Service, U.S. Department of Commerce (NMFS) and the Fish and Wildlife Service, U.S. Department of the Interior (USFWS) to protect species and subspecies throughout all or portions of their range or within distinct geographical areas. An "**endangered species**" is one that "is in danger of extinction." A "**threatened species**" is a species that is "likely to become an endangered species within the foreseeable future."

NMFS and the USFWS share jurisdiction to implement the Act. USFWS is responsible for terrestrial plants and animals, and fish that spend all or the majority of their life history in freshwater. NMFS is responsible for ESA listings of marine (saltwater) species and most anadromous fish (those spawned and reared in freshwater before migrating to the ocean).

In *Tennessee Valley Authority v. Hill*, a seminal case interpreting the Act, the U.S. Supreme Court has described the ESA as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." According to the Supreme Court, "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[1]

Under the Magnuson Fisheries Conservation and Management Act, NMFS has a responsibility to foster and manage healthy, sustainable commercial and recreational fisheries. Similarly, federal, state and tribal fish and wildlife managers are entrusted to provide harvestable numbers of fish. Under the ESA, however, NMFS and USFWS are obligated to protect against the risk of species extinction. According to NMFS, success in restoring coastal salmon populations to meet ESA requirements means:

- increasing abundance of naturally spawned fish in **Evolutionarily Significant Units** (ESU) to self-sustaining levels,

[1] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180, 98 S. Ct. 2279, 2294 (1974)

- ensuring that naturally-spawned fish are distributed broadly, and
- conserving sufficient runs of fish to ensure genetic diversity in a pattern and at levels consistent with natural evolutionary processes, both within and among ESUs.

Sidebar 1

CRITICAL SECTIONS OF THE ESA

Section 2 – Findings, Purpose, and Policy: provides critical context for all local work on ESA response and an indication of the legislative intent behind the Act

Section 4 – Determination of Endangered Species and Threatened Species: provides guidance regarding the promulgation of protective rules (e.g., **4(d) rules**), the steps within the listing determination process, the designation of **critical habitat**, and **recovery plans**.

Section 7 – Interagency Cooperation: provides guidance regarding the **conference** and **consultation** processes that focus on activities involving federal agencies, the issuance of **biological opinions**, and exemptions for federal agency actions.

Section 9 – Prohibited Acts: provides guidance regarding activities determined to result in **take**.

Section 10 – Exceptions: provides guidance regarding the issuance of **incidental take permits** and the development of **habitat conservation plans**.

Section 11 – Citizen Lawsuits: provides guidance regarding **third party lawsuits**, civil and criminal penalties, and enforcement.

2. What is the history of ESA salmon listings of Pacific salmon and trout?

Snake River sockeye salmon were listed as endangered in 1991 and Snake River fall and spring/summer chinook salmon were listed as threatened in 1992. On September 12, 1994, NMFS announced its decision to conduct comprehensive **status reviews** for five pacific coast anadromous fish species, including sea-run cutthroat trout. These were in addition to ongoing status reviews for West Coast coho salmon and steelhead. NMFS completed coastwide status reviews for coho salmon and steelhead on July 25, 1995, and August 9, 1996, respectively. On October 4, 1995, NMFS completed its status review for pink salmon. In March 1998, NMFS completed its status reviews for West Coast sockeye, chum and chinook salmon. The status review for coastal cutthroat trout, published on April

5, 1999, completed NMFS' comprehensive assessment of seven pacific salmon stocks (coho, pink, sockeye, chum, and chinook salmon; and steelhead and cutthroat trout).

The NMFS status reviews set the stage for several additions to the Endangered Species Act list. In October 1996 NMFS listed Central California coho as a threatened species. The following year, NMFS listed Southern Oregon/Northern California coho salmon and South-Central California, Central California and Snake River steelhead as threatened species and Southern California and upper Columbia River steelhead as endangered species. In 1998, NMFS listed Oregon Coast coho and California Central Valley and Lower Columbia River steelhead as threatened species. In March 1999, NMFS listed lower Columbia River, Puget Sound and upper Willamette River chinook salmon, Columbia River and Hood Canal summer run chum salmon, southwest Washington/lower Columbia River cutthroat trout, Ozette Lake sockeye salmon and upper Willamette River steelhead as threatened species and upper Columbia River spring chinook as an endangered species. Finally, NMFS listed Central Valley spring run and coastal California chinook salmon as threatened species in September 1999.

The USFWS also has been active in efforts to protect Pacific coast fish species. Between June, 1998 and November, 1999, the USFWS listed as threatened all populations of bull trout within the coterminous United States. Areas covered by this listing include the Columbia River, Klamath River and Coastal Puget Sound. In April 1999, the USFWS joined NMFS to propose listing Southwestern Washington/Columbia River coastal cutthroat trout as a threatened species. The USFWS assumed sole jurisdiction over the coastal cutthroat trout on November 26, 1999.

There may be more proposed listings in the future. The NMFS currently considers lower Columbia River/southwest Washington and Puget Sound/Straits of Georgia coho salmon as candidate species for listing. On June 21, 1999, NMFS also announced it would conduct status reviews of seven marine species in Puget Sound. These include brown, copper and quillback rockfish, Pacific cod, Pacific hake, Pacific herring and walleye pollock.

3. What is the likelihood that other species of fish in Washington will be listed under the ESA?

NMFS currently considers Puget Sound/Strait of Georgia coho and Lower Columbia/southwest Washington **stocks** of coho as "**candidate species**" for listing. NMFS also has considered listing petitions for Pink salmon, Olympic Peninsula, Puget Sound/Strait of Georgia and Pacific Coast chum salmon, Baker Lake, Lake Quinault and Pleasant Lake sockeye salmon, Southwest Washington, Olympic Peninsula and Puget Sound steelhead, and Puget Sound and Olympic Peninsula coastal cutthroat trout. NMFS has determined listings for these **species** are not warranted, but petitions could be refiled if any of the species declines below current levels.

NMFS is also considering ESA status for non-**salmonid** marine species. On June 21, 1999, NMFS announced it would conduct status reviews of seven marine species in Puget Sound. These include brown, copper and quillback rockfish, Pacific cod, Pacific hake, Pacific herring and walleye pollock.

4. What does the term Evolutionarily Significant Unit (ESU) mean?

The ESA states that agencies may list species, sub-species, or **distinct population segments** of a **species** as either threatened or endangered. The Northwest Regional Office of NMFS has identified distinct population segments, called "**Evolutionarily Significant Units**," based on pacific salmon genetics. To qualify as an ESU, a salmon population must: (1) be substantially reproductively isolated; and (2) represent an important component in the evolutionary legacy of the species. The Puget Sound chinook ESU includes all of Puget Sound's inside waters to the Canadian border and extends west through the Strait of Juan de Fuca to include the Elwha River. The related term "**Distinct Population Segment (DPS)"** is a used by **USFWS** for inland salmonid populations and means a portion of the overall population of a species that is both a discrete and significant part of that population.

5. What does "take" of an ESA-listed species mean?

Section 9 of the ESA makes it illegal to **take** an **endangered species** of fish or wildlife. The definition of ''take'' is to ''harass, **harm**, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.''[2] The Services have nearly identical regulatory definitions of "harm." **NMFS** defines harm as an act that "actually kills or injures fish or wildlife. Such an act may include significant **habitat** modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering."[3] Under both definitions, there must be a causal link between the habitat modification and the injury or death of listed species. The **USFWS**' definition of ''harm'' was upheld by the Supreme Court as a reasonable interpretation of the term and supported by the broad purpose of the ESA to conserve endangered and threatened species.[4]

[2] 16 U.S.C. 1532(19)
[3] 50 CFR §222.102 (see 50 CFR §17.3 for USFWS' definition)
[4] See *Babbitt* v. *Sweet Home Chapter of Communities for a Greater Orego*n, 115 S. Ct. 2407, 2418 (1995)

Activities That May Constitute a Take

The following list includes several examples provided by NMFS of habitat-modifying activities that may constitute a "**take**" of salmonids when the activities actually kill or injure fish.[5] This list is not exhaustive:

(1) Constructing or maintaining barriers that eliminate or impede a listed species' access to habitat essential for its survival or recovery;

(2) Removing, poisoning, or contaminating plants, fish, wildlife, or other biota required by the listed species for feeding, sheltering, or other essential functions;

(3) Discharging pollutants into a listed species' habitat;

(4) Removing or altering rocks, soil, gravel, vegetation, or other physical structures that are essential to the integrity and function of a listed species' habitat;

(5) Removing water or otherwise altering streamflow when it is likely to impair spawning, migration, or other essential functions;

(6) Releasing non-indigenous or artificially propagated individuals into a listed species' habitat;

(7) Constructing or operating inadequate fish screens or fish passage facilities at dams or water diversion structures in a listed species' habitat;

(8) Constructing or using inadequate bridges, roads, or trails on stream banks or unstable hill slopes adjacent or above a listed species' habitat;

(9) Constructing or using inadequate pipes, tanks, or storage devices containing toxic substances, where the release of such a substance is likely to significantly modify or degrade listed species' habitat;

(10) Conducting timber harvest, grazing, mining or other land use activities that increase sediment loading to streams;

(11) Disturbing streambeds so as to trample eggs or trap adult fish preparing to spawn;

(12) Altering lands or waters in a manner that promotes unusual concentrations of predators;

(13) Shoreline and riparian disturbances that retard or prevent the development of habitat conditions upon which listed species depend; or

(14) Filling or isolating side channels, ponds and intermittent waters upon which listed species depend for refuge during high flows.

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[5] 64 Fed. Reg. 60727 at 60730 (November 8, 1999); 65 Fed. Reg. 42422 at 42472-473 (July 10, 2000)

B. APPLICABILITY

6. To whom does the ESA apply?

The ESA's prohibitions against **take** of a listed **species** apply broadly to "any person" subject to the jurisdiction of the United States. This includes individuals, businesses, and federal, state, and local governments. Both a person whose actions harm or harass a protected species and a governmental entity that authorizes that person's actions can violate the ESA's "take" prohibition. Specific provisions of the ESA (e.g. section 7's requirement that federal agencies avoid jeopardy) apply only when federal permits, funds, or other actions are involved.

7. Does the ESA apply to privately owned lands?

The ESA applies to both public and private lands and activities. Congress added the **Incidental Take Permit** in 1982 to provide a mechanism for private and public parties to conduct activities without violating the ESA. Although the government's actions under the ESA are subject to the constitutional limits against taking property without compensation, it is extremely rare for private property owners to be compensated for ESA impacts.

8. How does the ESA affect private lands and projects?

The ESA prohibits a wide array of conduct, described as the "**take**" of an **endangered species** of fish and wildlife. The Act also provides NMFS and the USFWS with authority to prohibit the taking of **threatened species**. Take can include degradation of **habitat** as well as hunting, fishing or capturing threatened or endangered species. Adverse impacts to habitat, including both riparian areas and uplands, can constitute a take of a listed species under the definition of "harm." Consequently, the development of any property that includes habitat for a listed species may be restricted. Project proponents may be compelled to add **conservation** measures or even substantially restructure their projects in order to obtain the required approvals. Any federal permits needed for a project, such as wetlands permits, must go through ESA section 7 consultation before being issued and may be conditioned upon the adoption of "reasonable and prudent measures" to minimize **incidental take**. As discussed under question 10, the ESA similarly affects local governments when they are acting in their proprietary capacity to develop infrastructure, public buildings, or other construction projects.

9. Are vested development rights protected against ESA regulations?

Washington law allows a landowner to freeze the local laws that apply to certain land use decisions to those that are in effect when the owner submits a complete application. The right to have the application considered under the laws in effect

at the time of application is called a "vested right." The "vested right" is a property right that is entitled to certain constitutional protections.

Case law evaluating the extent of this protection, however, is limited. The one case discussing the interplay of vested rights and the ESA concluded that "the presence or absence of a vested right in a given development scheme is not determinative of a takings claim," i.e., a claim for compensation.[6] In this case the Court cited *Corn v. City of Lauderdale Lakes* in which the Eleventh Circuit Court of Appeals held that while a vested right under state law may not be restricted without due process, such a restriction does not automatically constitute a taking that requires paying compensation.[7] The Ninth Circuit Court of Appeals, which covers Washington State, has not ruled on this question. The State Supreme Court has likewise not yet addressed the issue. Local governments revising their codes will need to carefully evaluate their potential impacts on property rights.

10. How does the ESA apply to local governments?

The nature and extent of state and local government duties under the ESA is a hotly debated legal question. It is clear under the ESA that local governments must undergo Section 7 consultations on any local projects that require federal action, such as a permit or funding approval.

It is also clear that state and local governments – like any other person or entity -- can be held liable for **take** of a listed species for their own direct actions. Thus, local government activities such as road construction and maintenance and the operation of wastewater treatment plants are subject to the ESA's take prohibition.

A second, related question is whether a state or local government can be held liable for a takings violation where it allows private parties to use public property. In *United States v. Town of Plymouth*, a federal district court answered yes.[8] Consequently, the court issued an injunction prohibiting the Town of Plymouth from allowing off-road vehicles to drive on a municipal beach unless precautions were taken to protect endangered shore birds.

A third question is whether a state or local agency can be held liable for authorizing an activity that otherwise is lawful under state or local ordinance if the effect is a taking under ESA. In *Strahan v. Coxe*, the First Circuit Court of Appeals issued an injunction against the State of Massachusetts to prevent the State from licensing gillnet and lobster pot fishing that caused injury to endangered northern right whales.[9] In a similar case, the Eighth Circuit Court of Appeals held that the **EPA** violated the ESA by continuing to register strychnine

[6] *Good v, United* States, 39 Fed. Cl. 81, 98 (Ct. Cl. 1997); affirmed 189 F.3d 1355(Fed. Cir. 1999)
[7] *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1073 (11th Cir. 1996)
[8] *United States v. Town of Plymouth*, 6 F. Supp. 2d 81 (D. Mass. 1998)
[9] *Strahan v. Coxe*, 127 F. 3d 155 (1st Cir. 1997)

for use to kill non-endangered rodents where the pesticide also resulted in the poisoning of endangered black-footed ferrets.[10] Finally, in *Loggerhead Turtle v. Volusia County*, the Eleventh Circuit Court of Appeals ruled that a county ordinance that regulated artificial beach lighting could be the basis for an ESA violation.[11] In all three cases, the Circuit courts held that the regulatory acts of a government entity could cause a taking of an **endangered species**. In *Volusia County*, the Court explained that all three cases involved a regulatory entity that exerts exclusive control over an activity that allegedly takes protected species, and purports to make lawful an activity that allegedly violates the ESA. The National Marine Fisheries Service has taken the position that local governments may be liable for taking under such circumstances. The Attorney General has issued a similar conclusion regarding state agencies.

Finally, there is the question of whether state and local governments have an affirmative obligation to regulate activities that otherwise are not prohibited. The courts have not yet addressed this issue directly, but at least one court, the First Circuit Court of Appeals in *Strahan*, has taken great care to distinguish the case before it from one where a State is forced to use its regulatory scheme to implement the ESA's taking prohibition. In this respect, the *Strahan* court's ruling is consistent with the U.S. Supreme Court's ruling in *New York v. United States*, 505 U.S. 144 (1992), a case in which the Supreme Court ruled that Congress could not constitutionally compel a State to enforce a federal law.

In nearly all the cases addressing the issue of local government's potential liability for their regulatory activities, the courts reach their decisions by examining the question of causation. Clearly, a person or entity – including a state or local government can "indirectly" cause a violation of the ESA. But the question probably will be decided based on whether the taking could occur without some act or failure to act of the state or local government, and whether the taking is the foreseeable result of that action. In addition, the party alleging a violation will have the burden of proving that the activity constitutes a take as described in question 5.

11. Does the ESA apply to Indian tribes?

The ESA does not expressly exempt Indian tribes or tribal members. What is clear under the Act is that the section 7 consultation process is required for tribal actions that involve federal agency activities, funding or permits.

Application of the ESA's **take** prohibition to Indian tribes or tribal members is less clear. In *United States v. Dion*, the Eighth Circuit Court held that the ESA did not abrogate or otherwise restrict Yankton Sioux treaty hunting rights.[12] The U.S. Supreme Court reversed the Eighth Circuit's decision on other grounds. In

[10] *Defenders of Wildlife v. Environmental Protection Agency*, 882 F. 2d 1294 (8th Cir. 1989)
[11] *Loggerhead Turtle v. Volusia County*, 148 F. 3d 1231 (1998)
[12] *United States v. Dion*, 752 F. 2d 1261 (8th Cir. 1985)

United States v. Billie, 667 F. Supp., the U.S. District Court reached the opposite conclusion regarding the ESA's application to tribal members, and allowed the prosecution of a Seminole Indian for violating the ESA by hunting an **endangered species** on the Seminole Indian Reservation.[13] The *Billie* court noted that the Supreme Court in the *Dion* case expressly left unresolved the question of whether the ESA abrogates Indian treaty rights. The *Billie* court also noted that the Eighth Circuit's *Dion* decision wasn't binding on federal courts in other circuits.

A Joint Order issued by the Secretaries of Commerce and Interior avoids some of the uncertainty created by the *Dion* and *Billie* cases.[14] The Order attempts to harmonize the agencies' obligations under the ESA with their trust responsibilities to Indian tribes and with tribes' treaty rights and sovereignty. Under this Order, tribal activities affecting listed species will be regulated only if the **conservation** purpose of the regulation cannot be achieved by the reasonable regulation of non-tribal activities. Recently issued **4(d) rules** for bull trout and **salmonids** both reflect the Order's directive by exempting from the take prohibition activities conducted under certain tribal resource management programs.

Local governments should be aware that tribes may have different perspectives from one another on their obligations under the ESA.

C. THE LISTING PROCESS

12. How are Endangered Species Act listings initiated?

The process to list a species under the ESA can begin in any of three ways. First, any person can file a petition with **NMFS** or **USFWS**, depending on the **species**, requesting that a species be listed. Second, either NMFS or USFWS may initiate a status review of a species and decide to list the species as the result of the status review. Finally, NMFS or USFWS may issue an emergency designation under the ESA.[15]. The decision whether to list a species depends on a number of factors, including species utilization, the loss of habitat and the adequacy of existing protections. The ESA imposes strict time limits within which NMFS and USFWS must make listing decisions. Typically, the agency conducts a year-long status review after it receives a listing petition, although a the Services may conduct status reviews and list species without a petition.

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[13] *United States v. Billie*, 667 F. Supp. 1485 (S.D. Fla. 1987)
[14] Secretarial Order of the Departments of Interior and Commerce No. 3206, June 5, 1997
[15] 16 U.S.C. § 1533(b)

13. Why are some Endangered Species Act listings proposed by the Fish and Wildlife Service, U.S. Department of the Interior (USFWS), while others are done by the National Marine Fisheries Service, U.S. Department of Commerce (NMFS)?

The Fish and Wildlife Service, U.S. Department of Interior, is responsible for terrestrial plants and animals, and freshwater fish. The National Marine Fisheries Service, U.S. Department of Commerce, is responsible for ESA listings of marine (saltwater) **species** and most anadromous fish (those spawned and reared in freshwater before migrating to the ocean). Thus, the listing of bull trout, a predominately freshwater species, was undertaken by the USFWS while salmon and steelhead listings are NMFS' responsibility.

14. How must the USFWS or NMFS respond to listing petitions?

The agency has 90 days to decide if a listing petition presents enough data to warrant a further investigation. If grounds exist for a further investigation, **NMFS** or **USFWS** has up to 12 months to complete a status review for the species. Upon completion of the status review, the agency may either: (1) reject the listing petition, (2) propose the ESA listing of the species; or (3) delay the listing decision for up to a year.[16]

Based on the status review, the agency must decide whether the species should be proposed for listing at all, and, if so, whether it should be proposed for listing as a "threatened" or an "endangered" species. The agency must publish a notice in the Federal Register announcing its intention to list the species. The agency may propose to designate critical habitat at the same time. NMFS or the USFWS is required to make a final listing decision within one year from the date of publication of a proposed listing rule.

15. What are the criteria used by NMFS or USFWS to make a listing determination?

An ESA listing of threatened or endangered may be made for any of the following reasons:

(1) Actual or potential loss or destruction of **habitat**;

(2) Overutilization for commercial, recreational, scientific, or educational purposes;

(3) Disease or predation;

(4) The inadequacy of existing regulatory mechanisms; or

[16] 16 U.S.C. § 1533(b)

(5) Any other natural or human factors affecting the continued existence of the **species**.[17]

The agency must decide whether the stocks are endangered or threatened solely on the basis of the best available science. Economic consequences are not evaluated when determining whether or not to list a species, however, they are evaluated in Critical Habitat designations.

16. What is the distinction between "threatened" and "endangered" species?

An **endangered species** is "any species which is in danger of extinction throughout all or a significant portion of its range."[18] A threatened species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[19] Once a species is listed as "endangered," the "**take**" prohibition of section 9 automatically applies. Under section 4(d), the agencies are authorized, but not required, to extend the same restrictions to "threatened" species. **USFWS** and **NMFS** are taking different approaches to applying the take prohibitions. USFWS automatically applies the take prohibition after adopting a final rule listing the species. NMFS does not automatically impose the take prohibitions. In addition, NMFS has recently begun trying to include "limits" or "exemptions" to the take prohibitions for activities that it believes are being conducted in a manner that promotes **conservation** of the threatened species. NMFS' recently published **salmonid 4(d) rule** uses this approach (see Appendix 3).

D. SPECIES PROTECTION

17. What actions are required once a species has been listed either as threatened or endangered?

The listing of a **species** triggers a number of actions. The service responsible for listing must consider designating critical habitat for the listed species within one year of listing.[20] The agency may also develop recovery plans for a listed species unless the agency decides a recovery plan won't contribute to species **conservation**.[21] In addition, under section 4(d) of the ESA, the listing agency shall issue regulations required for the conservation of the species.[22] All agencies

[17] 16 U.S.C. § 1533(a)
[18] 16 U.S.C. § 1532(6)
[19] 16 U.S.C. § 1532(20)
[20] 16 U.S.C. § 1533(a)(3)
[21] 16 U.S.C. § 1533(f)
[22] 16 U.S.C. § 1533(4)(d)

taking federal actions that may affect listed species must undergo consultations with the service before taking action.[23]

Sidebar 2:
NATIONAL MARINE FISHERIES SERVICE 4(d) WORKSHOPS

The National Marine Fisheries Service, Northwest Region, has developed workshops designed to educate Federal, state, regional, and local governments, watershed councils, community groups and private citizens about the implementation of the 4(d) rule at the local level. Section 4(d) of the Endangered Species Act (ESA) offers limits on the section 9 take prohibitions for activities conducted under the auspices of Federally-approved local plans, *i.e.*, parties conducting activities that result in the "take" of a threatened salmon or steelhead will not be legally liable if their activity is being performed in accordance with one of the 4(d) rule "limits."

The materials developed for the workshops can be viewed and downloaded from http://www.nwr.noaa.gov/1salmon/salmesa/4ddocs/4dwsmain.html.

Materials described on the website and in the workshops include:
- Recognize the different tools for saving salmon and complying with the ESA.
- Understand which ESA tools may best fit your programs or land uses and how they work.
- Learn about 4(d) limits and how they work.
- Standards for ESA compliance.
- Tools for assessing your programs and authorities, and evaluating the potential for "take."
- Criteria that programs must meet to comply with 4(d) limits.
- Criteria and submittal process for local programs and jurisdictions to obtain ESA coverage.

18. What is the significance of an ESA section 4(d) rule?

Section 4(d) is the vehicle through which the Services may apply to **threatened species** one of the major protections afforded to **endangered species** – the "**take**" prohibition. Section 4(d) of the ESA requires listing agencies to issue regulations deemed "necessary and advisable to provide for the conservation of [threatened] species."[24] Section 4(d) specifically authorizes – but doesn't require -- the agencies to prohibit with respect to threatened species any act that is prohibited with respect to endangered species. A **4(d) rule** can also effectively provide incidental take protection for specified activities so long as the rule as a whole provides for the **conservation** of the species (see 4(d) sidebar on page 18).

Section 4(d) is one of the most frequently discussed, yet largely misunderstood, parts of the ESA. This misunderstanding is compounded by differences in approach taken by the listing agencies themselves. Under **USFWS** regulations, the ESA's prohibition against the take of a threatened species is automatically effective upon final listing unless a special 4(d) rule provides otherwise.

[23] 16 U.S.C. § 1536(a)(2)
[24] 16 U.S.C. § 1533(d)

In contrast, there is no take prohibition for threatened species under **NMFS**' regulations until a final 4(d) rule is issued.

Furthermore, section 4(d) regulations adopted by NMFS usually are more complicated than those adopted by the USFWS. However, USFWS' notice of proposed rulemaking for bull trout indicates that it is considering a more detailed 4(d) rule than the simple take prohibition that is currently in place. Generally, a simple 4(d) rule that merely prohibits take of a species provides less guidance and flexibility than a complex, descriptive 4(d) rule that outlines how activities (i.e., road construction, land use, storm water programs) must function in order to be exempt from ESA take liability.

NMFS actively encourages state and local governments and Indian tribes to initiate conservation programs that can be incorporated into or recognized through 4(d) rules. NMFS' recently-published salmonid 4(d) rule identifies several existing state, local and tribal conservation programs as exceptions to the take prohibition (see Appendix 3). These include certain habitat restoration programs, the Oregon Department of Transportation's routine road maintenance program and the Portland Parks and Recreation Department's pest management program. NMFS' salmonid 4(d) rule also establishes criteria for evaluating potential additional conservation programs that could be identified in the rule as exemptions from the take prohibition.

A 4(d) rule may also authorize activities conducted in compliance with certain approved regulatory programs that provide adequate protection for listed species. Examples in NMFS' salmonid 4(d) rule include certain federal, state and tribal fisheries management regulatory programs and Washington forest practices regulations under the 1999 Forests and Fish Report. Again, the rule provides criteria for approving additional regulatory programs, including municipal ordinances or plans governing residential, commercial and industrial development (see 4(d) side bar).

Through the 4(d) rule process, the Services also typically provide non-regulatory guidance regarding activities likely to constitute the take of a listed species. The Federal Register notice accompanying NMFS' recently published salmonid 4(d) rule contains such guidance. USFWS provided such guidance in the Federal Register notice accompanying the final listing of bull trout[25]

[25] 64 Fed. Reg. 58910 at 58928-929 (November 1, 1999)

Sidebar 3

In a Nutshell: NMFS' Salmonid 4(d) Rule[26]

Take Prohibition

- "Take" of threatened salmonid species is prohibited[27] as of September 8, 2000 for steelhead and January 8, 2001 for all salmon stocks listed as threatened or endangered coastwide from Puget Sound to Los Angeles.
- "Take" includes killing and harming[28]
- "Harm" is actually killing or injuring fish, and may include "significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including, breeding, spawning, rearing, migrating, feeding or sheltering"[29]
- Enforceable through agency civil and criminal actions, and through citizen suits[30]

Take Guidance

The NMFS 4(d) rule provides non-regulatory guidance on activities most likely to result in a take, including:[31]

- constructing or maintaining barriers to passage
- discharging pollutants
- removing or destroying plants or animals needed for food or shelter
- physically altering habitat
- withdrawing water or otherwise impairing spawning, migration or feeding by changing streamflow
- releasing non-indigenous species
- providing inadequate or non-existent fish screens or passage facilities
- working on stream banks or unstable slopes above habitat
- increasing sediment loading to habitat

[26] Please note that litigation has commenced on this 4(d) rule and the outcomeis uncertain. Please consult www.nwr.noaa.gov for the current status of this rule.
[27] 50 CFR 223.203(a).
[28] 16 USC 1532(19).
[29] 50 CFR 222.102.
[30] 16 USC 1540(a), (b) and (g).
[31] 65 Fed. Reg. 42422 at 42472, July 10, 2000; *see also* "A Citizen's Guide to the 4(d) Rule for Threatened Salmon and Steelhead on the West Coast," NMFS, June 20, 2000 at 4-6.

Determining whether any specific activity constitutes a take requires case-by-case analysis.

Exceptions

The NMFS 4(d) rule provides 13 precisely defined "limitations" or exceptions from the take prohibition (see Appendix 3).[32] Exceptions cover such activities as scientific research, harvest, hatcheries, and forest practices.

Exceptions most relevant to municipalities include:

- ESA permits (e.g., Incidental Take Permits issued under Section 10 Habitat Conservation Plans or incidental take Statements issued through Section 7 consultations)
- Habitat restoration activities that are part of an approved watershed conservation plan
- physical diversion of water through NMFS - approved screens (n.b., this exception does not cover any impacts to streamflow associated with diversions)
- Routine road maintenance activities that comply with Oregon Department of Transportation's water quality and habitat protection program or substantially similar programs
- Municipal, residential, commercial and industrial (MRCI) development activities permitted under NMFS - approved city, county or regional ordinances or plans (see below)

Municipal Development Exception

The municipal development exception lays out process for obtaining NMFS' approval of development ordinances and plans, and specific criteria against which proposed programs will be evaluated[33]

Process:

- NMFS publishes notice in Federal Register that it is evaluating specific program
- 30 day public comment period
- if program meets criteria, NMFS provides written approval

Criteria:

Rule states criteria that are designed to maintain and restore "Properly Functioning Habitat Conditions" (PFC). They are:

- avoid development in inappropriate areas (e.g., steep slopes, wetlands)

[32] 50 CFR 223.203(b)(1) through (13).
[33] 50 CFR 223.203(b)(12).

- avoid adverse stormwater quality or quantity impacts to streams
- protect riparian areas / require adequate compensatory mitigation
- avoid stream crossings or minimize impact
- protect historical stream meander
- protect wetlands and wetland functions
- preserve hydrologic capacity of streams
- provide for native landscaping to reduce watering and chemical application
- prevent erosion and sediment loading during construction
- ensure development's water supply demands will not adversely impact stream flows
- provide enforcement, funding, reporting and implementation mechanisms
- comply with all other state and federal environmental and natural resource management laws

Jurisdictions operating under NMFS - approved program must submit detailed annual reports on development occurring under the program. NMFS will periodically review effectiveness of programs and where warranted, NMFS will notify jurisdictions of necessary program improvements – jurisdictions must then implement within 1 year.

E. RECOVERY PLANS

19. How are recovery plans developed and implemented?

Section 4 (f) of the ESA directs the listing agencies to develop and implement **recovery plans** for the "**conservation** and survival" of listed **species** unless the Secretary of Interior or Commerce "finds that such a plan will not promote the conservation of the species." The goal of recovery plans is to return the listed species to a point at which protection under the ESA is no longer required. A species may be removed from the list on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer **endangered** or **threatened**.

The ESA identifies three main components of a recovery plan:

(1) a description of site-specific management actions necessary to achieve the goal of conservation and survival;

(2) objective, measurable criteria to determine whether the species can be removed from the list; and

(3) 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 towards that goal.

The contents of a recovery plan are used for guiding recovery efforts, section 7 consultations, and determining whether a **take** has occurred. Agencies must provide an opportunity for public comment before a new or revised recovery plan is adopted.

The ESA does not place any time limits on the Services for developing or implementing a recovery plan. However, a progress report must be given to Congress every two years on the status of efforts to develop and implement recovery plans and the progress of all species that have recovery plans.

Actions identified in a recovery plan are not easily enforced as mandatory for the agencies because a court may characterize the implementation of the plan as discretionary. For example, in a suit challenging the National Park Service's decision to leave open a campground identified in the recovery plan as a threat to the grizzly bear, the court held that the Secretary of Interior had a duty to implement the plan only if "he reasonably believes that it would promote conservation."[34] The Court of Appeals for the Eleventh Circuit held in *Fund for Animals, Inc. v. Rice* that section 4(f) "makes it plain that recovery plans are for guidance purposes only."[35]

NMFS and USFWS use similar mechanisms to develop recovery plans with slightly different terminology. Both use a two-tier process, with local experts forming the teams responsible for the technical analysis and a regional oversight body to coordinate the local teams and provide guidance.

NMFS Recovery Planning

The NFMS recovery planning efforts include the following species: chinook, coho, sockeye, chum, and pink salmon, and steelhead. Recovery plans will address all salmonid species within a discrete geographical area or "domain." The Puget Sound and the Olympic Peninsula have tentatively been defined as a "domain" containing the following **Evolutionary Significant Units** (**ESU**s): 1) Puget Sound chinook, 2) Hood Canal summer chum, and 3) Lake Ozette sockeye.

NMFS will appoint a local Technical Recovery Team (TRT) for each domain to carry out the technical analysis involved in assessing **factors for decline** and identifying **recovery** goals. The TRT for Puget Sound was appointed in April 2000 and will serve a two-year term. A regional Recovery Science Review Panel was appointed in May 2000 for a three-year term to guide the recovery planning process and oversee the TRTs throughout the four-state area. NMFS will also work with state, local, regional, tribal and private entities throughout the recovery

[34] See *National Wildlife Fed'n v. National Park Serv.*, 669 F. Supp. 384, 389 (D. Wyo. 1987).
[35] *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996)

planning process and build on the efforts already underway. Visit www.nwr.noaa.gov for materials on NMFS recovery planning.

USFWS Recovery Planning

USFWS has jurisdiction over Bull Trout. The Coastal-Puget Sound **Distinct Population Segment** (**DPS**) of Bull Trout was listed as threatened on November 1, 1999. The Bull Trout Recovery Team consists of two layers: 1)local Recovery Unit Teams; and 2) a regional Recovery Oversight Team. The Recovery Unit Teams will be comprised of local representatives (tribes, counties, utilities, conservation groups, local governments, etc) with the technical and scientific expertise to determine what recovery is achievable. A member of the Recovery Oversight Team will also participate in the Recovery Unit Teams, to provide guidance and consistency.

The Coastal-Puget Sound population segment will likely be split into two recovery units, the Puget Sound Recovery Unit and the Olympic Peninsula Recovery Unit. The USFWS hopes to have these Recovery Unit Teams assembled by fall of 2000.

The Bull Trout Recovery Oversight Team is currently comprised of representatives from the following areas:

(1) State Representatives from Montana, Idaho, Oregon and Washington,[36]

(2) USFWS Representatives from each regional office,

(3) Two USFWS Representatives from Coastal Puget Sound with scientific expertise, and

(4) Two Tribal Representatives.

State and Local Planning

The ESA does not require State or local governments to participate in **recovery planning**. However, concerns for the **recovery** of salmon populations and potential **take** liability are important to the people of Washington. The Governor's Salmon Recovery Office was established in 1998 to support the Joint National Resources Cabinet in their efforts to create a coordinated statewide strategy to recover salmon. The current state efforts are represented in the following three documents: 1) *Extinction is Not an Option: A Statewide Strategy to Recover Salmon* ("Statewide Strategy"), 2) *State Agencies' Action Plan*, and 3) *Salmon Recovery Scorecard.* The goal of the Statewide Strategy is to "restore salmon, steelhead, and trout populations to healthy and harvestable levels and improve the **habitats** on which fish rely." This goal goes beyond the ESA's goal of delisting a species. The State Agencies' Action Plan outlines the priority

[36] Nevada is not currently participating. The representatives are usually from the State Fish & Game Office or State Fish & Wildlife Office.

actions needed to implement the Statewide Strategy in the 1999-2001 biennium. The Salmon Recovery Scorecard was released in May 2000 and represents the state's business plan to manage salmon recovery.

Watershed planning efforts that began before the ESA listings are becoming a focal point of local recovery efforts. Examples include the Skagit and Dungeness Watershed Councils. The "Tri-county" effort launched by King, Pierce, and Snohomish counties has integrated Watershed Resource Inventory Area (WRIA) based recovery planning into its 4(d) rule proposal to NMFS. Habitat protection and restoration projects and actions within a local WRIA or watershed are also being developed and prioritized through local planning and decisions authorized by the Watershed Management Act, E.S.H.B. 2514, 55th Leg. (1998), the 1998 Salmon Recovery Planning Act, E.S.H.B. 2496, 55th Leg. (1998), and the Salmon Recovery Funding Act, Second E.S.S.B. 5595, 56th Leg., 1st Spec. Sess. (1999).. Local estuaries and nearshore marine areas will be included in the planning processes for WRIAs that discharge to saltwater to protect marine habitat. (For more information see sidebar on Current Efforts below).

Sidebar 4

Current Puget Sound and Coastal Salmon Recovery Efforts

Navigating the restrictions put in place by the ESA will be important in the coming years, but recovering wild salmon will take more that this. By working in partnership with local watershed councils and regional efforts, local governments can provide much needed regulatory and professional assistance. In addition to the recovery planning efforts underway by NMFS and USFWS, there are several efforts currently underway that local governments should be aware of and if possible, take advantage of:

Shared Strategy for Puget Sound:

In the fall of 1999, over 150 private sector and local, state, federal and tribal leaders gathered to discuss the salmon crisis at Port Ludlow on Hood Canal. Participants discussed common goals for restoring Puget Sound salmon and the means to achieve those goals. They concluded that, although there are many excellent efforts occurring across Puget Sound to help salmon, without a shared strategy these efforts are inefficient at best: "A shared strategy is a collaborative, regional approach to recover salmon in Puget Sound. It builds on work already occurring in watersheds and in local, state, federal and tribal governments, and links these efforts to ensure efficiency and common direction. Existing efforts may be effective in a particular part of the Puget Sound, but without a shared strategy we have no assurance that our individual efforts will add up to recovery[37]." A core group of leaders continues to work on developing this shared strategy for Puget Sound salmon. For more information on the Shared Strategy, visit www.sharedsalmonstrategy.org or call Gail Gatton 206-447-1805 or Jim Kramer 206-706-7289.

[37] A Shared Strategy for Recovery of Salmon in Puget Sound. Draft. September, 2000.

Watershed Planning Act

The State of Washington is divided into 62 geographic areas called WRIAs (Water Resource Inventory Areas), defined on the basis of surface water resources and codified in WAC 173-500-040. WRIAs were originally established by the administrative code that implemented the Water Resources Act of 1971. WRIA boundaries are now used as a basis for developing watershed plans under the Watershed Planning Act, RCW 90.82. Those areas that form WRIA planning groups must designate a "lead agency" as the prime coordinator of the planning process. They must prepare plans for water quantity distribution. The WRIA planning groups can also address water quality, instream flow and habitat for salmon as optional elements in their plans. For salmon recovery work the WRIA planning groups must rely on any plans for their area that are developed through the processes set up by the Salmon Recovery Act described below. For additional information about the Watershed Planning Act, visit www.ecy.wa.gov/watershed/index.html.

Salmon Recovery Act & the Salmon Recovery Funding Board

The 1999 Washington Legislature passed the Salmon Recovery Act, RCW 77.85. That act authorized local governments to come together to define a geographic area, create a "lead entity" for that area and to develop lists of projects that help salmon in that area. Lead entity activities are funded by the Washington Department of Fish & Wildlife. The act also created the Salmon Recovery Funding Board (SRFB) to allocate state and federal funds to those projects on lead entity project lists that most promote salmon recovery. Lead entities develop their lists of projects through a combination of scientific information and citizen input. Sponsors that propose projects can be local governments, private landowners, conservation districts, Native American tribes, non-profit organizations, special purpose districts, and state agencies. The lead entity for the area facilitates the development of the project list and submits it to the SRFB for funding. After the SRFB makes its funding decisions, they contract directly with the project sponsor to accomplish the intended work. For additional information about the Salmon Recovery Funding Board (SRFB) visit www.wa.gov/iac/salmonmain.html or call (360) 902-2636.

Watershed Recovery Efforts

In anticipation of the recent salmonid listings, LLTK has participated in local-level salmon recovery planning efforts for several years. In our experience the following three efforts serve as excellent models for developing locally based responses to the ESA listings while developing regional efforts toward recovery:

The Skagit Watershed Council is a coalition of farmers, tribal members, conservation groups, timber companies, small landowners, and local, state, and federal government representatives. With LLTK's assistance as elected chair, this council of 36 organizations and governments has been successful at overcoming obstacles to collaboration, and working together toward salmon recovery. The Council was the first watershed-based organization to produce a science-based strategy for prioritizing habitat recovery projects throughout the basin and is only non-governmental organization in the

state to be named "lead entity" under Washington states watershed planning legislation for such activities. Visit www.skagitwatershed.org for more information.

The Tri-County (Snohomish, King, Pierce) **Salmon Recovery Process** was created in response to the Puget Sound chinook and bull trout listings. LLTK is a member of the

Executive Committee of the Tri-county effort serving alongside mayors, council members, tribal, federal and state agency representatives, and other private sector interests. While there are 12 counties in the Puget Sound watershed, these three are working together to develop a coordinated recovery plan that addresses the needs of densely populated, heavily urbanized and industrialized areas that are charged with recovering dwindling wild salmon runs. Visit www.salmoninfo.org for more information on the Tri-county process (see sidebar 5 on page 28 for information on the Tri-county 4(d) model).

The Hood Canal Coordinating Council (HCCC) is a watershed-based council of governments including Jefferson, Kitsap and Mason Counties; the Port Gamble S'Klallam and Skokomish Tribes; and several state and federal agencies. The Council was established in 1985 in response to concerns about water quality and related natural resource issues in the Hood Canal watershed. The Council also has cooperating partners who work with it on various projects and programs (volunteer groups, regional fisheries enhancement groups, conservation districts, land trusts, etc.) The HCCC is an excellent model for how local governments can work together to share information on compliance and recovery efforts. With funding from the USFWS, LLTK has worked with the Council for several years, providing staff assistance for conferences and meetings, and technical support for specific projects. Visit www.hccc.cog.wa.us for more information on the Coordinating Council.

In addition, there are several other long term watershed efforts that serve as excellent local level models in Puget Sound including Puyallup, Nisqually, and Dungeness watershed councils.

F. LOCAL GOVERNMENT ROLES & RESPONSIBILITIES

20. What is the role of state and local government programs in a 4(d) rule or a recovery plan for a listed species?

The nature and extent of state and local government duties under the ESA is a hotly-debated legal question. Clearly state and local governments can be held liable for take of a listed species resulting from their own direct actions (e.g., road building). Federal courts have also imposed liability for state and local government permit decisions that result in a taking by the permitee. The National Marine Fisheries Service has taken the position that local governments may be liable for taking under such circumstances. The Attorney General has issued a similar conclusion regarding state agencies.

The ESA encourages cooperation between the federal listing agency and the affected state(s) in preparing **4(d) rules** and **recovery plans**. The listing agency may issue 4(d) rules or recovery plans based on state and local regulatory or recovery programs if the federal agency deems them sufficient for the **conservation** of listed **species**. For example, the 4(d) rule for Puget Sound chinook includes the so-called "Forests & Fish" bill negotiated by the forest products industry with **NMFS** and **USFWS** and passed by the Legislature. If the Washington Forest Practices Board adopts regulations at least as stringent as the 1999 Forest and Fish Report, timber harvest activities conducted in compliance with the Forests and Fish plan will be protected from ESA take liability.

While 4(d) rules and recovery plans may be largely based on local and state government programs and actions, the ultimate decisions on content are the responsibility of the federal listing agency. It is possible that local governments will propose recovery strategies that the federal listing agency decides are insufficient for inclusion in a 4(d) rule or recovery plan. The stringent criteria set out in NMFS' **salmonid** 4(d) rule for approval of local development ordinances or plans suggest the difficulty that may be involved in obtaining NMFS' approval for such programs.

21. What tools are available to local governments to respond to an ESA listing?

In considering their response to the ESA listing, local governments have a number of tools at their disposal. It may help local governments to think in terms of the following objectives: protecting salmon and salmon habitat, managing potential liability, and promoting recovery. A local government's response is a highly individual decision based on many factors, including competing budgetary obligations, the extent and nature of salmon habitat within the jurisdiction and local politics. There is no one "correct" response to the ESA listings. In addition to the suggestions below, the Tri-county process has developed a 4(d) model for local jurisdictions (see sidebar 5 on page 28).

Protecting salmon and salmon habitat

Local governments have considerable power through their land use regulations to protect salmon and salmon **habitat**. Over the last ten years, local governments have been strengthening these protections even before the federal government listed **species** under the **ESA**. These regulations include:

(1) critical areas under the Growth Management Act,

(2) storm water regulations,

(3) Shoreline Master Programs and regulations under the Shoreline Management Act,

(4) clearing and grading ordinances, and

(5) regulation of impervious surfaces.

The State Environmental Policy Act (SEPA) also provides a tool that local governments may use to **mitigate** impacts to salmon and salmon habitat. Local governments also may use non-regulatory options such as incentives for water conservation and incentives for conservation easements to help protect salmon. Local governments can continue to use these controls to protect salmon and their habitat. Local governments may modify these controls to provide additional protection, and as discussed below, to manage potential liability.

Managing liability

Local governments are concerned about their potential exposure to liability for taking listed species. Local governments can manage potential liability arising from their regulatory activities by revising the land use ordinances that are listed above to obtain NMFS approval under the salmonid **4(d) rule**. Coordinating this process with USFWS would also help minimize potential liability for bull trout.

Local governments may manage the potential liability arising from their proprietary activities (e.g. waste treatment facility operation, water service provision) by negotiating a **Habitat Conservation Plan** (HCP) and obtaining an **Incidental Take Permit** for these programs. Local projects that involve federal funds, permits, or other actions will be reviewed by the Services under the section 7 consultation program, which may provide protection from **take** liability through issuance of **Incidental Take Statements**.

It is difficult to accurately assess the potential for liability at this stage in the implementation of the ESA. Local governments should base their compliance decisions on pursuing the above strategies on an assessment of their activities and the potential risks for take liability, the costs of developing HCPs or 4(d) compliant measures, potential exposure to liability from property owners, and competing budgetary needs.

Promoting recovery

Local regulations and other programs that protect salmon and salmon **habitat** and help manage liability contain elements that will help **species recovery**. However, these tool are not specifically designed to achieve recovery. Recovery will likely require a shared strategy that involves local governments along with private participants, other levels of government, and tribal governments to define and work towards recovery goals.

22. What funding is available to local governments for ESA response needs?

The state has a number of programs designed to provide funds for local governments to respond to the ESA listings. The state's Watershed Planning Act

(RCW 90.82) created a grant program for local governments and stakeholders to form watershed planning units to deal with water quantity, water quality, and salmon habitat issues. The state has also established the Salmon Recovery Funding Board (see sidebar 4 on page 23) to centralize funding decisions for habitat projects or revisions to land use plans that will benefit salmon. Numerous other grant programs such as the Public Involvement and Education (PIE) Grant program through the Puget Sound Action Team now fund salmon recovery programs.

There are also numerous sources of private funding, including environmental foundations and land trusts. In addition, many local governments use tax and bond revenues for a variety of purposes, from improving stormwater systems to acquiring land for protection as salmon habitat.

23. How can local governments maintain local control during the recovery planning process?

The ESA listings are imposing new requirements and possible obligations on local governments. For example, local governments must participate in section 7 consultations for local projects that involve federal funds, permits, or other federal action. The **take** prohibition also creates new challenges. However, at this time, **NMFS** and **USFWS** do not appear likely to develop detailed **recovery plans** for each local jurisdiction, or even each watershed in the state. Rather, NMFS anticipates that the **4(d) rule**, the existing watershed planning programs, and **HCP**s for large land holdings will be important components of the recovery strategy. The anticipated focus on the use of processes that provide local governments with discretion in the extent and nature of their participation allows local governments to fashion a role in protection and recovery that is consistent with the community's financial capabilities, natural resources, and other needs and constraints.

Sidebar 5

Tri-County 4(d) Model Overview

As the urban core of Puget Sound, Snohomish, King and Pierce counties joined forces in 1998 to develop a cooperative response to the listing of Puget Sound Chinook. The resulting process is referred to as Tri-county. The content of a **4(d) rule** may specify activities which have been determined to be adequately regulated and therefore can be given legal coverage for the **incidental take** of the listed species. In preparation for the 4(d) Rule for West Coast salmonids released by the NMFS in June of 2000 and scheduled to go into effect January of 2001, Tri County representatives are working to complete a 4(d) model for its jurisdictions (See Appendix 3 for June 2000 4(d) rule). This model, if adopted by a jurisdiction and certified by NMFS, would allow Tri-county jurisdictions to earn take limitations. Tri-county will make drafts and the completed model available to other jurisdictions affected by the chinook listing or other **salmonid** listings.

Negotiations between NMFS and tri-county on the model are expected to be completed by the end of the year with public hearings to follow in 2001.

The Tri County Model encompasses three operational programs and three core programs. The three operational programs are: Road Maintenance BMPs (Best Management Practices), Stormwater and Land Management. The three core programs are: Habitat Funding, WRIA Planning and Adaptive Management. While these six programs provide a comprehensive package, the programs were developed to allow local jurisdictions to make choices about what approaches are most effective for improving salmon habitat conditions in their jurisdiction.

· Road surfaces and rights-of-way owned and maintained by local governments occupy in the range of 8-10% of the landscape. With improved road maintenance practices, the Tri County program is intended to provide significant benefit to both in-stream and upland areas affecting water quality.
· The Stormwater Program will provide habitat protection and improvement by improving hydrologic patterns and water quality that affect salmon habitat across the landscape.
· The Land Management Program provides more focussed improvements to land use practices directly affecting the riparian and near shore areas. These three operational programs work together to provide wide geographic improvements to salmon habitat during the time watershed plans are being developed.

The Tri County proposal also contains a Habitat Funding Program. This program consists of commitments to fund capital projects to protect, enhance, and restore salmonid habitat that may not or cannot be accomplished through regulatory programs or other means. In addition, this program includes a commitment to develop and implement a long-term funding plan to match resources with regional salmon habitat needs as identified in the WRIA plans.

The Tri County proposal depends on development of watershed plans using a multi-stakeholder process referred to as the WRIA Planning Program. Tri County anticipates that it will take 3 to 5 years to develop watershed plans that will improve habitat conditions for salmon, given that each watershed has different baseline salmon habitat conditions, multiple government authorities and a variety of public interests and concerns.

Watershed-specific analyses and solutions may yield additional or better solutions as WRIA based plans are developed. To add to the best available science, each of the above programs includes built-in requirements to monitor compliance of the program and effectiveness of the various actions within the program as well as commitments to change (adaptively manage) the program as needed based on the information collected through monitoring. The information generated in each program will be assimilated into an overall Adaptive Management Program.

The Tri-County Model 4(d) Proposal will be completed and submitted to the National Marine Fisheries Service in the fall of 2000 for Federal Register publication and public comment. NMFS would make a final determination of the adequacy of these programs to conserve listed species and to receive take limitations.

Jurisdictions would have the option to use the Tri-County Model 4(d) proposal in one of three ways:
1) Implement one or more of the regulatory and programmatic components as outlined in the Tri-County Model 4(d) Program and participate in WRIA Planning, Adaptive Management, and the Habitat Funding program. A jurisdiction would obtain take limitations at the time that it

takes appropriate legislative or administrative action to a) adopt necessary regulations and b) commit to a schedule to implement all other programmatic elements. In this case, NMFS would review and approve plans and implementing ordinances to certify that they are consistent with the Tri-County model.

2) Propose to implement a modification to one or more of the of the Tri-County Model 4(d) programs (including WRIA Planning, Adaptive Management, and Habitat Funding) as outlined in 1) above based on the specific circumstances or conditions in that watershed or policy choices of that jurisdiction. Jurisdictions proposing a modification will also need to demonstrate to NMFS that the modified 4(d) program provides equivalent protection. Take limitations would apply once a jurisdiction adopts ordinances or rules (as in 1) above) and NMFS approves them. In this case, NMFS would review the proposal to determine if the modifications were equivalent to the biological outcomes of the model 4(d) program or merited a different outcome because of different conditions or circumstances in that watershed.

3) Use the Tri-County model to guide revisions to existing regulations and programs to achieve greater salmonid conservation protection and thereby reduce risks of take liability or third party actions without applying to NMFS for a formal 4(d) rule take limitations. This would allow a jurisdiction to improve its regulations and programs to reduce risk on a schedule that it determines is achievable given its specific financial or other circumstances. While the jurisdiction would not earn take limits immediately, it could later apply for them once a jurisdiction was ready to fully implement the model programs and formally adopt implementing ordinances or rules as in 1) or 2) above. Take limits would apply only after the local government complies with either 1) or 2) above.

For more information visit www.salmoninfo.org/tricounty.htm or contact Jackie Kirn by phone 206-296-3455 or e-mail jackie.kirn@metrokc.gov

24. How should local governments balance “take” versus “takings” liability?

Both the U.S. and Washington State Constitutions forbid the taking of private property without paying just compensation. While ESA requires local governments and private parties to avoid the “take” of listed species, local governments are often concerned about liability for “takings” of private property. If, in order, to prevent the take of a listed species, a local government deprives a landowner of a constitutionally protected property right, the local government could be liable for an unconstitutional taking of that property. In light of this conflict, local government regulations should have enough flexibility built in to ensure that they do not abridge constitutional rights.

G. INCIDENTAL TAKE PERMITS AND STATEMENTS

25. When is the incidental take of a listed species allowed?

The ESA's prohibition on **take** of a listed **species** is not absolute. The ESA has a number of processes that can authorize citizens, businesses, and local governments to take listed species incidentally. Activities that otherwise are considered a take of a listed species may lawfully occur either through a **4(d) rule**, Section 7 Consultation, or a Section 10 **Habitat Conservation Plan** (HCP). However, the standards and procedures used in each of these options vary.

Section 4(d) rules may identify exemptions from or limits to the prohibition against taking listed species. A local government conducting its activities consistent with the terms and conditions of a 4(d) rule would be protected against take liability for those actions falling under the exemption.

Section 7 consultation over activities with a federal nexus (those with federal involvement or funding) may result in the issuance of an **Incidental Take Statement** (ITS) for actions consistent with the terms of the ITS. These Section 7 Incidental Take Statements may be individual (for a single project or permit) or programmatic (for a series of similar projects or permits).

Section 10 of the ESA allows for **Incidental Take Permits** to be issued based on a Habitat Conservation Plan (HCP). HCPs are negotiated between the applicant and the services, and are comparatively more detailed, time-consuming, and expensive than an Incidental Take Statement issued based on a Section 7 consultation. However, HCPs can be custom tailored for a variety of circumstances and can achieve long-term stability because of the "**No-Surprises**" policy, which provides long term certainty in exchange for actions that conserve the listed species. So far most of the HCPs in the Northwest have covered large private timber holdings. Two large cities have also negotiated HCPs for their water supply activities.

26. What is the difference between individual and programmatic Incidental Take Permits?

An individual permit covers a single entity, such as a local government, permit applicant, or corporation. A general **take** permit would cover a group of people conducting the same or a similar activity in the same geographic area with similar impacts on a **threatened** or **endangered species**. In this case, a representative of a group of potential applicants would apply for a general **incidental take permit**. A single **habitat conservation plan** would be prepared for the activity as a whole. After a programmatic permit is issued, members of the group, as well as other individuals, can obtain coverage under the permit by applying for and receiving a certificate of inclusion from the listing agency. An applicant for a certificate of inclusion must agree to comply with the terms and conditions of the general permit and conservation plan.

27. What are the different standards for incidental take protection in the ESA?

Under Section 4(d) of the ESA, the listing agency "shall issue such regulations as [deemed] necessary and advisable to provide for the **conservation** of such **species**."[38] Thus, a **4(d) rule** can provide Incidental Take protection for certain specified activities so long as those activities are conducted in compliance with the terms and conditions in the 4(d) rule. The services have indicated that the reference to "conservation" in section 4(d) of the Act means that the 4(d) rule as a whole must do more than just avoid take.

Section 7 of the ESA requires every federal agency to consult with the listing agency to insure that any action authorized, funded, or carried out by the agency is not likely to "jeopardize the continued existence of any **endangered species** or **threatened species** or result in the destruction or adverse modification of [**critical habitat**]."[39] At the conclusion of consultation (detailed in Section VIII below), the Service (the same as the listing agency) may issue an **Incidental Take Statement** (ITS) that exempts the action agency and other entities (such as the permit applicant) from take liability so long as reasonable and prudent measures, and the terms and conditions of the ITS are followed. The Section 7 consultation process does not include an "explicit conservation standard."

Section 10 of the ESA allows the listing agency to authorize the taking of listed species if "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[40] Under section 10, an **Incidental Take Permit** (ITP) can be issued after preparation of an agreed **Habitat Conservation Plan** (HCP) if the listing agency determines that the applicant, to the maximum extent practicable, will minimize and mitigate the impacts of the taking, that adequate funding for the plan will be provided, and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.[41]

28. Should local governments use 4(d), Section 7 consultation, and Section 10 HCPs differently?

4(d) exemptions, **HCP**s and section 7 consultations have different benefits and limits (Also see sidebar 6: Compliance Options on page 34). There is also some overlap in potential coverage provided by these tools.

Local governments may use the 4(d) exemption process for protecting from **take** liability their proprietary activities that may take listed **species**, or their regulatory activities that authorize other parties to conduct activities that may take listed species. In contrast, an HCP may make the most sense for local government actions that could directly take listed species. Given the high costs and significant

[38] 16 U.S.C. § 1533(d)
[39] 16 U.S.C. § 1536(a)(2)
[40] 16 U.S.C. § 1539(a)
[41] 16 U.S.C. 1539(a)(2)(B)

time that it takes to negotiate HCPs, they are typically used where the likelihood of take is high. On the positive side, HCPs offer the greatest certainty and durability for local governments and private applicants.

Section 7 consultations are required for local actions that involve federal actions (permits, funding, etc.). Local governments don't have the option of choosing a section 7 consultation. Because of the delays that have occurred in the first years of implementing ESA, some local governments are hoping to use regulations that they adopt and have approved under NMFS' **4(d) rule** to streamline subsequent review of projects under section 7. For example, the consultation for a US Army Corps of Engineers' section 404 permit might move faster if the project has also received local permits that were authorized under local ordinances that were in turn approved under NMFS' 4(d) rule. Similarly, some local governments are negotiating Habitat Conservation Plans for certain programs with the expectation that activities covered by the HCP that require federal permits will be able to complete the consultation process more quickly.

Sidebar 6
ESA Compliance Options

Section 4(d) Rules

benefits	limitations
· can provide broad shield against "take" liability for certain proprietary municipal activities (e.g., road maintenance, park management, water diversion structures) · can incorporate or approve other regulatory or voluntary programs as measure of compliance · can provide shield for potential indirect municipal liability for regulatory activities (i.e., from permitting) and eliminate the need for individual permits under section 10	· may be difficult to obtain coverage for some activities · only applicable to species listed as threatened · no protection regarding unlisted species

Section 7 Consultation/Conference

benefits	limitations
· can provide liability shield through **Incidental Take Statement** · can be either programmatic or project specific · process provides opportunity for early identification and resolution of issues and for considering alternative actions · federal action agency may provide financial or technical support	· potential serious backlog and delays · formal consultations and Incidental Take Statements only applicable to listed species and designated critical habitat (informal consultations and conferences address proposed species and habitat) · can be re-opened based on new information / changed circumstances · not available for actions without federal nexus · can result in significant changes to project or activity to reduce impacts

Habitat Conservation Plan / Incidental Take Permit

benefits	limitations
· provides liability shield for "take" incidental to otherwise lawful activities through Incidental Take Permit · can provide liability shield for many years · can provide some protection against new information/changed circumstances through "no surprises" assurances · can provide shield for endangered, threatened, listed, proposed, candidate and other unlisted species · can be either programmatic or project specific · more applicant control over scope of coverage and process than in Section 7 consultations	· can be very costly, time-consuming and potentially difficult to obtain · projects with federal nexus (funding, permitting, or on-the-ground involvement) still require Section 7 consultation

H. SECTION 7 CONSULTATION

29. What activities are affected by the consultation requirements of Section 7 of the ESA?

All federal agencies must consult with the listing agency (**NMFS** or **USFWS**) when any activity authorized, funded, or carried out by that agency may affect a listed species or designated critical habitat, or is likely to jeopardize proposed species or destroy or adversely modify proposed **critical habitat**.[42] The key question regarding section 7 of the ESA is whether there is some form of federal involvement, such as permitting or funding that triggers the consultation process. If there is federal agency involvement, then consultation is likely required. The most common activities subject to section 7 consultation include projects requiring federal permits, such as Army Corps of Engineers' dredge and fill permits under section 404 of the Federal Clean Water Act, and projects receiving federal funds, such as road construction and transportation funding. (See question 37 for more information on the ESA and the Clean Water Act.)

30. How is a Section 7 consultation conducted?

Section 7 Consultation applies to listed species. A less intensive process called "**conferencing**" applies to species proposed for listing. Conferencing is a process which involves informal discussions between the Service and the action agency regarding the impact of the action on proposed species or proposed **critical habitat** and recommendations to minimize or avoid adverse effects. If formal consultation is also required for a particular action, then the Service will provide the results of any conference with the biological opinion.

The consultation process begins with the action agency's (the agency issuing the permit or providing the funding) request for information on whether any species listed *or proposed to be listed* are in the area of the proposed action.[43] If listed or proposed species are present, the action agency conducts a **Biological Assessment** (BA) to identify whether those species may be affected by the action. If the action is likely to affect the species, then consultation is required.[44] Consultations under section 7 can be informal or formal depending on the level of the effect on the listed species or its **habitat**.

If the action agency determines that its action will have "no effect" on a listed species or critical habitat, then the consultation process does not proceed. The action agency does not need the Services to concur in a "No Effect" Determination.

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[42] 16 U.S.C. § 1536
[43] 16 U.S.C. § 1536(c)(1)
[44] 16 U.S.C. § 1536(a)(3)

The action agency may, at its option, engage in informal consultation to determine whether a proposed action is likely to adversely affect listed species or critical habitat. The purpose of informal consultation is to determine whether formal consultation or a conference is required. If the action agency determines that the proposed action "may affect but is not likely to adversely affect" listed species or critical habitat, then it is possible to end the consultation without going further. The relevant Service must concur with the action agency's determination that an action is not likely to adversely affect species or habitat. Concurrence is also needed for actions that beneficially affect listed species. Formal consultation is required if a proposed action is likely to adversely affect listed species or critical habitat. After determining that a federal action is likely to adversely affect a listed species or critical habitat, the Service then prepares a **Biological Opinion** (BO) on the effects to the listed species or designated habitat. If the proposed action would jeopardize the continued existence of the species or adversely affect critical habitat, the listing agency must provide reasonable and prudent alternatives to avoid the adverse impacts. If the listing agency issues a no jeopardy opinion, it must still inform the action agency of any reasonable and prudent measures necessary to minimize take and the terms and conditions under which incidental take may occur (see **Incidental Take Statement**).[45] The Biological Opinion is discussed further in Question 32.

The Act prohibits action agencies or permit or license applicants from making any "irreversible or irretrievable" commitment of resources during the consultation process "which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative" to the proposed agency action.[46]

31. What is the purpose of early consultation?

Early consultation, which is strictly optional, occurs *before* any application for a permit or license is filed. The early consultation process is exclusively for the benefit of prospective federal permit or license applicants. It is designed to give prospective applicants a chance to identify and avoid conflicts between proposed actions and listed **species** or **critical habitat** early in the planning stages of a project. If the applicant requests early consultation, the federal permitting agency is required to request the appropriate Service to engage in early consultation.

At the conclusion of early consultation, the Service issues a preliminary **biological opinion**. After the applicant formally applies to the action agency for a permit or license, the preliminary opinion may become the final biological opinion if the Service finds there have been no significant changes in the proposal.

[45] 16 U.S.C. § 1536(b)(4).
[46] 16 U.S.C. § 1536(d)

32. What is the purpose of the Biological Opinion?

As part of the formal consultation process, the Service must issue a written biological opinion determining whether the proposed agency action is likely to jeopardize the continued existence of **species** that are listed or proposed for listing. The biological opinion also is required to assess whether the proposed action is likely to result in destruction or adverse modification of designated or proposed **critical habitat**. The specific types of Biological Opinions are discussed further in question 33.

Concurrent with issuance of a **Biological Opinion**, the Service must issue an **Incidental Take Statement** (ITS) if the Service concludes that an action (or the implementation of any reasonable and prudent alternative) will result in incidental take, but that the incidental take will not jeopardize the continued existence of a listed species. The ITS specifies the impact of such incidental taking on the species, any reasonable and prudent measures considered necessary or appropriate to minimize such impact, and the terms and conditions that must be complied with by the Federal agency or any applicant to implement the reasonable and prudent measures.

33. What is the function of the "jeopardy" opinion?

The Service may reach one of three conclusions in the final **biological opinion**;

· **No Jeopardy -** The proposed action is not likely to jeopardize the continued existence of listed **species** or to result in the destruction or adverse modification of **critical habitat**.

· **Jeopardy with Alternatives -** Alternatively, the Service may issue a jeopardy biological opinion if it finds the proposed action is likely to jeopardize listed species or result in adverse modification of critical habitat. The Service is required identify "reasonable and prudent alternatives" to the proposed action. An alternative is "reasonable and prudent" only if it is consistent with the intended purpose of the action, within the scope of the action agency's legal authority and jurisdiction, economically and technologically feasible, and is believed to avoid jeopardy or adverse modification of critical habitat.

· **Jeopardy without Alternatives -** If there are no reasonable and prudent alternatives, the consulting agency issues a jeopardy opinion, without reasonable and prudent alternatives.

34. How long should a Section 7 consultation last?

Formal consultation must be concluded within 90 days from the date on which it is initiated. The Services have an additional 45 days following the conclusion of the formal consultation to complete and deliver a **biological opinion**. If a permit or license applicant is involved, the consulting and action agencies may extend

the consultation period from 90 to 150 days merely by informing the applicant in writing of the reasons for such extension. Consultation may be extended beyond 150 days only if the applicant agrees. The Service may request additional information as part of a time extension request. If the action agency does not agree to the extension, the Service will issue a biological opinion using the best data available.

Many permit applicants, both public and private, fear that **NMFS** and **USFWS** have nowhere near the capacity to perform all of the Section 7 consultations that will be required in Puget Sound. Consequently, both NMFS and USFWS are attempting to develop methods to streamline Section 7 consultations while permit applicants are being encouraged to develop programmatic Section 7 consultations to avoid duplicative consultation procedures.

The majority of consultations are "informal consultations." There is no time limit specified for an informal consultation. The length of time is a function of staff constraints in the Services and some action agencies. For example, informal consultation may add 6-8 months to a typical US Army Corps of Engineers permit. Some state, regional, and local agencies have provided funding for NMFS staff under Interagency Personnel Agreements. These arrangements have increased the capacity to conduct consultations.

35. How will ESA Section 7 consultation affect local governments?

Many local projects may be subject to ESA Section 7 consultation. These types of projects will occur in many jurisdictions with great frequency over the life of the ESA listings. For instance, local road construction and park maintenance will continue to occur throughout the state. Because of the high degree of similarity, NMFS and the USFWS are encouraging local governments to develop batched or programmatic consultations. Programmatic consultations are based on a single type of activity that will occur numerous times resulting in similar impacts. Programmatic consultations could be used to create a single set of standards that each successive project can meet before proceeding. The Services hope that programmatic consultations will result in a checklist approach, rather than an individual consultation of each project that can be time-consuming and costly.

Programmatic consultations are still an evolving concept and have the following limitations:

(1) Only a limited amount of incidental take can be authorized this way, and it must be quantifiable;

(2) it is often difficult to capture the range of project diversity in a generic project description and further consultation may be necessary when more information is available; and

(3) it still requires project specific information for each project, continued coordination with agencies, and close monitoring.

Section 7 consultations will also affect the permit process for local projects that have federal involvement (sometimes called “a federal nexus”). The exact effect will depend on the type of project, environmental review and approvals required for the project. For example, where a federal Environmental Impact Statement is prepared under **NEPA**, some level of consultation may occur very early in the process before any local permits are applied for or issued (See Figure 1). On a project where the federal permits trigger Section 7, the consultation may begin fairly late in the permit process (See Figure 2). These permitting sequences are just two of many variations that might result. Local governments should carefully map out the permitting sequence for public projects that it is proposing to make sure that the sufficient time is provided to integrate the section 7 consultation.

FIGURE 1 HERE

FIGURE 2 HERE

I. IMPLEMENTATION OF OTHER LAWS AND ESA RECOVERY STRATEGIES

36. How are harvest, hatchery, and hydropower issues being dealt with by NMFS in light of ESA salmon listings?

Many factors affecting salmon survival are outside the control of local governments. The extensive role of federal agencies in managing harvest, hatchery and hydropower activities is reflected in the July 2000 multi-agency Draft Basin-wide Salmon Recovery Strategy for the Columbia River basin ("Conservation of Columbia Basin Fish). **NMFS** Northwest Regional Office in Seattle, and its Protected Resources Office in Portland, have stated that they will try to address all factors affecting salmon survival under NMFS' ESA authority. Consistent with this statement, NMFS's *July 2000 draft Biological Opinion for Operation of the Federal Columbia River Power System* outlines the federal agencies' strategy for minimizing the system's impacts on listed species, measuring that impact against explicit performance criteria, and preserving options for changing the system's configuration, operation or maintenance as needed to ensure conservation of the species. The Services will also consult with the Federal Energy Regulatory Commission (FERC) under section 7 on salmon impacts of dams during relicensing. Finally, many harvest regulations and hatchery operations involve a federal nexus (such as federal funding of hatcheries or harvest approved by NMFS through the Pacific Fisheries Management Council or under the 4(d) rule), and thus must go through section 7 consultation. (See also Hatchery Reform Project described below).

Sidebar 7

Hatchery Reform Project

With several Puget Sound and coastal salmon and steelhead stocks listed or proposed for listing under the ESA, the state and tribal co-managers of Washington's salmon and steelhead resources must ensure that their hatcheries do not present a risk to listed species. Seeking to go beyond merely complying with ESA directives, the co-managers have embarked on the Puget Sound and Coastal Washington Hatchery Reform Project, a scientific and systematic redesign of hatcheries programs to help recover wild salmon and support sustainable fisheries.

In 1999, LLTK was specified by the U.S. Congress as the project's third party facilitator. LLTK's role includes providing facilitation and staff support to the project's independent scientific panel and a co-managers Hatchery Reform Coordinating Committee (of which LLTK is also a member); and helping the co-managers and the scientific panel communicate hatchery reform progress to Congress, state legislators, stakeholder groups and the public.

The Hatchery Scientific Review Group is the independent scientific panel established by Congress to ensure that hatchery reform programs in Puget Sound and coastal

Washington be scientifically founded and evaluated; that independent scientists interact with agency and tribal scientists to provide direction and operational guidelines; and that the system as a whole be evaluated for compliance with scientific recommendations.

For more information on the Hatchery Reform project visit www.lltk.org/hatcheryreform.html or call (206) 382-9555.

37. What is the relationship between ESA and Clean Water Act Compliance?

The Federal Clean Water Act (CWA) has four principle components that may present issues of ESA compliance for local governments:

- Discharges of dredged or fill materials to waters of the United States (404 permits);
- Discharges covered by National Pollutant Discharge Elimination System (NPDES) permits;
- Water quality standards; and
- Total Maximum Daily Loads (TMDLs).

404 Permits

Section 404 of the **CWA** requires a permit to discharge dredged or fill materials to waters of the United States (including wetlands). The U.S. Army Corps of Engineers issues these permits. This federal action is subject to consultation with the Services under section 7. Local governments have experienced significant delays in obtaining approval for projects as a result of the amount of 404 permits going through the consultation process. Local governments should build additional time into their planning to make sure that the section 7 consultation does not change the planned construction schedule for their projects.

NPDES Discharges

The Clean Water Act prohibits discharge of pollutants to waters of the United States without a permit. In Washington State, the federal Environmental Protection Agency has delegated implementation of NPDES permitting program to the Washington Department of Ecology (Ecology). Ecology is responsible for issuing new NPDES permits and revising old NPDES permits. The permits set limits of pollutants that can be discharged from a facility ("effluent limits"). The federal Environmental Protection Agency reviews NPDES permits but does not generally have the authority to approve the permit. Because EPA does not typically approve NPDES permits, EPA and the Services are taking the position that an NPDES permit in Washington is ***not*** a federal action that requires consultation under Section 7. This position has not been tested in litigation so there is some uncertainty. New discharges that require an NPDES permit may involve some other federal action, such as grant funding or an Army Corps of

Engineers permit for the outfall structure. These other federal actions may bring the discharge into the consultation process.

Existing discharges covered by an NPDES permit are not automatically insulated from take liability by statute or regulations. NPDES discharges could become the focus of third party ESA enforcement suits against the local government that is operating under the permit.

Water Quality Standards

Under the CWA, states have the authority to establish water quality standards (WQS). In contrast to the NPDES permit, which focuses on limits to pollutants in a specific discharge, the WQS establish acceptable levels of pollutants in the receiving water. Water quality standards consist of three components:

(1) the designated uses of waters, which can include use for public water supplies, propagation of fish and wildlife, recreational, agricultural, industrial and other uses;

(2) water quality criteria, expressed in numeric or narrative form, reflecting the condition of the water body that is necessary to protect its designated use, and

(3) an antidegradation policy that protects existing uses and provides a mechanism for maintaining high water quality. A discharge must meet both the limits set in the NPDES permit and the WQS of the receiving water.

EPA reviews new **WQS**. In addition, States and tribes are required to review their standards every three years and any revisions or new standards must be submitted to EPA for approval. EPA's approval of a new or revised standard is a federal action that triggers the consultation process. Significantly, the Services do not necessarily accept existing WQS as sufficiently protective of listed species. Therefore, discharges that meet current WQS may still present issues to the Services in some cases.

Total Maximum Daily Loads (TMDLs)

The CWA established the TMDL program as a "last resort" mechanism to attain water quality standards. As noted above, the CWA uses the NPDES program as a primary tool for controlling discharges. If the effluent limitation approach fails to meet water quality standards, then the CWA requires states to identify those waters that do not meet WQS. The list of such water quality impaired bodies – which is known as the "303(d) list" – must include a priority ranking for each water body. Many water bodies in Washington state are on the 303(d) list.

For waters identified in the 303(d) list, the CWA requires states to establish TMDLs that will ensure attainment of water quality standards. A TMDL defines the maximum amount of pollutant that can be discharged (or "loaded") into a water body from all combined sources. When a TMDL and specific waste load

allocations for point sources have been established, any NPDES permit issued to a point source must be consistent with the terms of the TMDL and waste load allocation.

EPA must approve or disapprove a TMDL. EPA's action is a federal action that requires section 7 consultation.

Local governments that discharge to 303(d) listed water bodies are subject to the waste load allocation process. EPA and the Services have discussed ways to better coordinate the TMDL program and ESA activities so that a discharge that meets the CWA would comply with ESA limits on **take**. This coordination, however, has not yet occurred. In December, 1998 EPA, USFWS, and NMFS issued a draft Memorandum of Agreement that describes coordination of these agencies' roles and responsibilities under section 7 of the ESA and the CWA's Water Quality Standards and NPDES programs. The Northwest Regional offices of these agencies also issued a draft guidance document in August, 1999 specifically addressing integration of the Clean Water Act's TMDL process with the ESA's **HCP** process.

J. ESA ENFORCEMENT

38. How do NMFS and USFWS enforce the ESA?

Section 11 of the ESA provides several methods to enforce protective regulations adopted under section 4 and the take prohibition contained in section 9 of the Act. A listing agency may assess a civil penalty up to $25,000 against "any person" who knowingly violates the take prohibition or section 4(d) regulations. Furthermore, any person who knowingly violates the take prohibition or a protective regulation may be subject to criminal penalty which may include imprisonment up to one year or a fine up to $50,000 or both.[47] Criminal and civil penalties and prosecutions by either **NMFS** or **USFWS** for violations of the ESA have been extremely rare. The severity of ESA penalties, however, has served as a strong deterrent to violating the ESA. More commonly, NMFS or USFWS will contact individuals or entities who may be violating the ESA and insist on a certain course of action necessary to avoid ESA penalties.

39. How do ESA citizens suits function?

Any person may file **citizen suits** to compel another person, company, or governmental entity to comply with the ESA.[48] Prior to commencing suit, a third-party ESA plaintiff must give 60 days notice to the defendant. The purpose of

[47] 16 U.S.C. § 1540
[48] 16 U.S.C. § 1540(g)

this 60-day notice period is to give the defendant an opportunity to assess ESA liability and take corrective action, if needed.

40. In an ESA citizen suit, who is responsible for attorney's fees and costs?

Any party may be awarded attorney's fees and costs in an ESA **third party lawsuit**.[49] The federal court hearing the case has considerable discretion in awarding fees and costs to either party. Frequently, courts will look at the respective merits of a party's case when awarding attorney's fees and costs. For example, a defendant given 60 days notice to cure an obvious and egregious ESA violation is much more likely to be held liable for fees and costs than a party defending lawsuit based on a reasonable, good faith interpretation of the ESA. Nonetheless, the **citizen suit** provision and the potential award of fees and costs is a powerful tool placing ESA enforcement in hands of any person.

[49] 16 U.S.C. § 1540(g)(4)