

MEMORANDUM

SEATTLE – KING COUNTY, TACOMA – PIERCE COUNTY, AND CAMANO – SNOHOMISH COUNTY: PROPOSED ENDANGERED SPECIES ACT 4(d) RULE

June 21, 2000

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SUMMARY OF REQUEST

The National Association of Realtors[®] (NAR) has requested review and comment on the proposed Endangered Species Act § 4(d) Rule that will limit the prohibition on “take” of chinook salmon when development is permitted and conducted in accordance with local ordinances that have been approved as consistent with specifically enumerated 4(d) rule guidelines. In particular, the Seattle – King County, Tacoma – Pierce County, and Camano – Snohomish County Associations of Realtors[®] (hereinafter Tri-County Realtors[®]) have asked for review of the specific riparian setback requirements proposed by the rule for development adjacent to tri-county area streams populated by chinook salmon. In addition, the Tri-County Realtors[®] request analysis of the potential liability for local governments in the event that a development permit is issued under which a permittee subsequently effects a taking. We have based our analysis on materials received through NAR, including copies of the proposed 4(d) rule and proposed development regulations for the tri-county area, along with the results of our independent research.

EXECUTIVE SUMMARY

Based on the nature of the request, we have concentrated our analysis on comparisons between the riparian setbacks proposed in the 4(d) rule at issue, setbacks implemented in other rules, and the setbacks proposed by the tri-county area governments in their draft regulations. Our analysis indicates that arguably the proposed Tri-County Plan includes some riparian buffer parameters that are more restrictive than necessary to adequately protect chinook salmon. In particular, although the 150-foot inner riparian buffer defined in the Tri-County Plan appears generally consistent with similarly defined protected riparian areas, the 150-foot outer riparian buffer in the Plan does not appear to have similar precedent. It is unclear whether the development restrictions imposed in the 150-foot outer zone under the Tri-County Plan would be deemed necessary to protect salmon under the federal Endangered Species Act (“ESA”). Consequently, we recommend that the Tri-County Plan be revised to delete those restrictions, unless or until such time as it is determined that the Plan will not otherwise receive approval for an ESA take limitation. In addition, we recommend that the Tri-County Plan be revised to delete the requirement that development proposals under the fixed regulation alternative demonstrate that “no practical alternative” exists and revised to clarify the measuring criteria for inner riparian zones.

We also analyzed the potential for liability under the ESA for area governments that issue development permits under which a permittee, although in full compliance with the permit, nevertheless takes an endangered or threatened species. Based on our review of the regulatory framework and the limited caselaw available, it appears unlikely that an area government would be held liable for the actions of a permittee, where the permit was granted pursuant to a local ordinance approved for a take limitation under the ESA.

We caution that we are not Washington attorneys and our analysis is not legal advice as to the interpretation and effect of Washington law. We encourage you to consult with local counsel to the extent that you require a legal opinion on any of the issues discussed in this memorandum.

ANALYSIS

Species Listed as Threatened Under the Endangered Species Act May Be Subject to the Take Prohibition

The federal Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 to 1544, provides “a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, . . . [and] provide[s] a program for the conservation of such endangered and threatened species. . . .” 16 U.S.C. § 1531 (ESA § 2). In addition, the ESA requires compliance with international treaties dealing with the protection and conservation of certain protected species. *Id.*

An “endangered species” is one that is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532 (ESA § 3). 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.” *Id.* The ESA prohibits the “taking” of any species that has been placed on the list of endangered species. 16 U.S.C. § 1538 (a)(1) (ESA § 9). Under the act, the term “take” is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532 (ESA § 3). Although the absolute prohibition on take is limited to species listed as endangered, “threatened species” are protected by regulations “deem[ed] necessary and advisable” by either the Secretary of the Interior or the Secretary of Commerce, as appropriate. 16 U.S.C. § 1533(d) (ESA § 4(d)). Under the ESA § 4(d) rule, at the Secretary’s discretion, regulations to protect threatened species may include a take prohibition, like that applied to endangered species through ESA § 9. *Id.*

Limitations on Take Prohibitions Are Authorized Under Endangered Species Act § 4(d)

The discretion to impose regulations deemed necessary and advisable, including applying the ESA § 9 take prohibition to threatened species under ESA § 4(d), also provides the basis for regulations that provide *limitations* on the take prohibition in certain situations. The ESA § 4(d) rulemaking at issue here proposes to do just that. *See* 65 Fed. Reg. 170 (Jan. 3, 2000). In this case, the Department of Commerce agency responsible for the proposed rule is the National Marine Fisheries Service (“NMFS”), which finds that with respect to threatened chinook salmon it is generally “necessary and advisable” to apply the ESA section 9 take prohibitions. *Id.* NMFS, however, proposes to exempt from the take prohibition those activities that are conducted in accordance with the requirements of thirteen programs detailed in the proposed rule. *Id.* at 171.

Specifically, with respect to urban land development, “NMFS will not apply take prohibitions to new developments governed by and conducted in accord with adequate city or county ordinances that NMFS has determined are adequate to help conserve anadromous salmonid.” *Id.* at 184. According to the proposed rule, “[b]oth potential developers and the jurisdictions controlling new development would benefit by assurance that their approvals and development actions conserve listed salmonids” and are “consistent with ESA requirements.” *Id.* Although the current draft of the proposed rule mentions only “urban” land development, the responsible NMFS contact, Garth Griffin, stated that the rule is meant to apply to land development in general and that the final rule will make that point clear.¹ The Tri-Counties are developing

¹ Telephone conversation with Garth Griffin, NMFS (May 15, 2000).

proposed conservation measures that they plan to submit to NMFS for approval in order to obtain a take limitation that will apply to development activities.

Under the Proposed Chinook Salmon 4(d) Rule, Riparian Buffer Zones Are Factors for Evaluating the Availability of a Take Limitation for Proposed Local Development Regulations

Under the proposed rule, NMFS describes twelve “issues” that must be satisfactorily addressed before a local land development ordinance will receive NMFS approval for a limitation on the salmonid take prohibition. *Id.* Among these twelve “issues” is a requirement that city or county development ordinances provide for “adequate riparian buffers along all perennial and intermittent streams . . . [because] [w]ithout adequately vegetated riparian set-backs, properly functioning conditions including temperature control, bank stability, stream complexity and pollutant filtering cannot be achieved.” *Id.* In particular, with respect to development set-backs, the proposed rule provides that:

To the extent allowed by ownership patterns, the development set-back should be equivalent to greater than one site potential tree height (approximately 200 ft or at least to the break in slope for steep slopes) from the outer edge of the channel migration zone on either side of all perennial and intermittent streams, in order to protect off-channel high flow rearing habitat and allow full stream function. Within that set-back the first 50 ft (15 m) should be protected from any mechanical entry or disturbance, structures, or utility installations . . . [and] should also be protected from high-impact recreational use and any trails should be of permeable, natural materials. . . . The outer 100-plus ft (30.5 m) of the set-back should be entirely in native vegetation (not in maintained lawn) with a mix of conifer, deciduous trees, understory and groundcovers. Disturbances should be minimized.

Id. Based on this provision it would appear that, in order to receive approval from NMFS for a limitation on the salmonid take prohibition, local governments would need to prepare development regulations that, among other things, meet the level of set-back protection described above. However, in a recent article, NMFS Northwest Regional Administrator, William Steele, Jr., stated that this rule indicates only that the “general range for urban development ordinances of adequate stream-side protection is about 200 feet.”² The Administrator further stated:

That does not mean it is illegal if you don’t have a 200-foot buffer. Only that if you want a blanket ESA stamp of approval, you must manage stream-wide areas to provide adequate protection for the stream. Let me repeat: we are *not* requiring a 200-foot stream-side buffer in this proposal. There is no requirement for any size

² National Oceanic and Atmospheric Administration, NMFS, Northwest Region, “Op-Ed Submission That Appeared in a Number of NW Newspapers,” www.nwr.noaa.gov.

buffer at all; not for agricultural lands, not for urban lands, not for any lands. No buffer requirement, period.

It appears, therefore, that local development regulations need not necessarily require a 200-foot buffer zone for stream-side development. Nevertheless, it is unclear just what will be required by NMFS in order to receive ESA § 4(d) approval of development regulations in order to secure a take limitation.

“Adjacent Riparian Zones,” Similar to Buffer Zones, Have Been Defined In Other ESA Rules

Although we found no other ESA § 4(d) take limitations that describe riparian set-backs,³ “adjacent riparian zones” have been defined in the context of identifying “critical habitats” of endangered and threatened species. Under ESA § 4(a)(3)(A), the Secretary must, “concurrently with making a determination . . . that a species is an endangered or threatened species, designate any habitat of such species which is then considered to be critical habitat” 16 U.S.C. § 1533(a)(3)(A). According to NMFS, designating critical habitat does not impose any burdens on private lands that are in addition to those imposed as a result of species listing. 65 Fed. Reg. 7766.⁴ NMFS states that:

A private landowner continues to be free to manage his property as he sees fit, using care that his land management does not result in the take of a listed species. The critical habitat designation simply clarifies the geographic areas within which one’s activities may impact listed salmon and steelhead. A critical habitat designation affects private land only when a Federal action (e.g., obtaining a Federal permit) triggers a section 7 consultation.

Id. Under ESA § 7, federal agencies are required to consult with the Secretary on “any agency action which is likely to jeopardize the continued existence of any species proposed to be listed . . . or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.” 16 U.S.C. § 1536(a)(4). The designation of adjacent riparian zones to be included within identified critical habitats provides a means of alerting federal agencies that actions taken within those areas *may* adversely affect a listed species. 65 Fed. Reg. 7770. Thus, adjacent riparian zones identified in critical habitat rules serve a somewhat different purpose than those defined under ESA § 4(d) take limitation rules. However, since there appear to have been few ESA § 4(d) rules, it is helpful to review how NMFS has defined adjacent riparian zones in critical habitat rules.

³ According to William Stelle, Jr., Regional Administrator Northwest Region, National Marine Fisheries Service, applying 4(d) take limitations to locally developed programs that are shown to provide sufficient protection to an endangered or threatened species is a novel approach. Stelle has stated that, “[t]his approach will give people a greater voice in how we save salmon. And, frankly, it’s a totally new way of putting the Endangered Species Act to work, protecting not just salmon but the interests of people as well.” Op-Ed Submission That Appeared in a Number of NW Newspapers at www.nwr.noaa.gov.

⁴ Critical habitat rulemaking for Lower Columbia River Chinook salmon, among other species.

Definitions of “Adjacent Riparian Zones” Under NMFS Critical Habitat Rules Indicate That Appropriate Buffer Width Can Be Site-Dependant

In 1998, NMFS designated critical habitat for the Umpqua River cutthroat trout. 63 Fed. Reg. 1388 (Jan. 9, 1998). In that rulemaking, NMFS included “adjacent riparian zone” within the critical habitat designation. NMFS defined “adjacent riparian zone” to include “those areas within a slope distance of 300 ft. (91.4 m) from the normal line of high water of a stream channel or from the shoreline of a standing body of water.” *Id.* at 1391. NMFS, however, stated that this definition was to be used only as a “benchmark” and that “actual delineation of riparian zones at the site of a proposed action can be more accurately identified through section 7 consultations.” *Id.* The 300-foot distance cited in this rule, therefore, is not absolute, as the rule indicates that adequately protective buffer zones may be determined on a site-by-site basis.

In the February 16, 2000 critical habitat rulemaking for chinook salmon, NMFS defined adjacent riparian zone more loosely. 65 Fed. Reg. 7764. In that rule, NMFS noted that its past critical habitat designations included adjacent riparian zone definitions that varied from “those areas within a horizontal distance of 300 feet (91.4 m) from the normal high water line” to “those areas that provide cover and shade.” *Id.* at 7768. It was further noted that a Forest Ecosystem Management Assessment Team (“FEMAT”) recommended that adjacent riparian zones be defined as “the 300-foot (91.4 m) slope distance, a distance equivalent to two site-potential tree heights, the outer edges of riparian vegetation, the 100-year flood plain, or the area between the edge of the active stream channel to the top of the inner gorge, whichever is greatest.” *Id.* The latter set of criteria has been adopted by the U. S. Forest Service and the U. S. Bureau of Land Management as part of a strategy aimed at conserving stream elements in the northwest. *Id.*

NMFS further noted that recent literature, on the subject of the effectiveness of various riparian widths for preserving riparian function, indicated that widths in the range of 98 feet (30 m) are the minimum needed to preserve biological elements in streams. *Id.* at 7769. Other recent studies conclude that a distance from the stream channel equal to the height of one site-potential tree would generally be adequate. *Id.* According to a 1996 study, “fully protected riparian management zones of one site-potential tree would adequately maintain 90 to 100 percent of most key riparian functions of Pacific Northwest forests.” *Id.* As a result of these studies, NMFS chose to define adjacent riparian areas for chinook salmon as “the area adjacent to a stream that provides the following functions: shade, sediment transport, nutrient or chemical regulation, streambank stability, and input of large woody debris or organic matter.” *Id.*

Observation: By choosing this definition, it appears that NMFS is acknowledging that riparian areas critical to stream and habitat conservation may appropriately be determined on a site-by-site basis.

The Tri-County Take Limitation Proposal Defines Both Inner and Outer Buffer Zones in Which Development Restrictions Apply Under the Fixed Regulation Option

According to the proposed ESA § 4(d) rule applicable to Chinook salmon in the tri-county area, local ordinances must be deemed “sufficient to assure that plans and development complying with them will result in development patterns and actions that conserve listed salmonids.” 65 Fed. Reg. 184. Under the tri-county proposal, parties applying for development permits may

choose between two regulatory options: fixed regulations or site-specific regulation.⁵ Draft Tri-County Regulatory Measures to Protect Salmonid Habitat in the Puget Sound Region from Adverse Impacts of New and Ongoing Development in Aquatic and Riparian Environments (“Tri-County Plan”) at 5. The fixed regulations are the “default” approach to permitting. Permits will not be issued under this option unless the proposed development strictly conforms to the regulations. The site-specific option enables developers to acquire a “tailored” variance from the fixed regulations, when it is shown that the site-specific plan, prepared at the applicant’s expense, is at least as protective of salmon habitat as the fixed regulations option. *Id.* The site-specific option provides flexibility that would be consistent with maximizing development potential, while still ensuring that salmonid habitat would be properly protected. It is likely, however, to involve considerable expense and delay.⁶ Therefore, from a developer’s perspective, this option may not provide any significant advantage to seeking individual, federally granted, incidental take permits.

The fixed regulations, if approved by NMFS, would offer assurance to both the permittee and the permit-granting authority that any development done in compliance therewith would be consistent with ESA requirements. According to the Tri-County Plan, “[d]evelopment consistent with [the fixed regulations] . . . shall be assumed to adequately protect salmonid habitat.” Tri-County Plan at 8. The Plan further provides, however, that “[a]ny development activity allowed under these [fixed] regulations shall require a demonstration that there is no practical alternative.” Tri-County Plan at 9. It is unclear what is meant by this latter provision. We find no further explanation of this clause in the Tri-County Plan. Is the Plan requiring developers to demonstrate that their proposals cannot be constructed anywhere but in or adjacent to riparian environments? What is the standard for determining whether an alternative is “practical?” In the context of permits issued pursuant to an ordinance approved as a 4(d) rule take limitation, we find no evidence that the ESA requires a developer to demonstrate that there are no alternative sites for a proposed development.⁷ In this situation, the ESA only requires developers to implement their proposals in a way that is sufficiently protective of listed species, i.e. that will not result in a taking.

Recommendation: The “no practical alternative” requirement should be deleted from the Tri-County Plan or, at a minimum, given clear definition.

Under the fixed regulations, no disturbance would be allowed within the “inner riparian zone” adjacent to a fish-bearing stream, which is defined as the greater of the following distances:

- (1) 150 feet from the ordinary high water mark or the mean high water mark and including associated wetlands;

⁵ The Tri-County Proposal also includes a “programmatic regulations option,” that allows jurisdictions to develop regulations specific to particular areas or types of development. Tri-County Plan at 5.

⁶ Under the site-specific option, permit applicants would be required to prepare a “salmonid habitat evaluation” (“SHE”). Tri-County Plan at 12. According to the Tri-County Plan, the SHE “can be complex, time-consuming, and expensive, depending on site conditions [and] [t]he field work for it may require substantial time (perhaps a year or more) . . . and data analysis and report writing will take time beyond that.” *Id.*

⁷ The ESA *does* require consideration of alternatives in connection with incidental take permits, however. 16 U.S.C. § 1539(a)(2)(A)(iii).

- (2) The top of associated steep slopes plus 25 feet; or
- (3) 150 feet beyond the edge of the channel migration zone.⁸

Tri-County Plan at 2 and 10. The non-disturbance, inner riparian zone for non-fish-bearing streams is set at 100 feet. Tri-County Plan at 2. The Plan defines the outer riparian zone as “an additional 150-foot-wide area landward of the inner zone,” in which clearing must be “limited to no more than 35% of total canopy cover.” Tri-County Plan at 2 and 10.

Recommendation: The Plan does not make clear whether the 150-foot measurement from high water mark for the inner riparian zone on fish-bearing-streams must be *extended* to include any adjacent wetlands; this should be clarified. The Plan should also clarify how the inner riparian zone for non-fish-bearing streams is to be measured, i.e. from either of the high water marks or the edge of the channel migration zone.

The Tri-County Plan’s Proposed Development Buffer Zones May Be More Stringent Than Necessary

Based on the definition of critical habitat that NMFS chose to apply in the chinook salmon critical habitat rule discussed above, the Tri-County Plan’s riparian buffer requirements may be more stringent than necessary. It is not clear whether NMFS would be likely to approve a take limitation based on development regulations that do not contain a clearly quantified setback. NMFS itself, however, used a qualitative definition for chinook salmon critical habitat. The tri-county coalition may be able to pattern its regulations on that definition, requiring that riparian area development be designed not to impede essential stream functions including: shade, sediment transport, nutrient or chemical regulation, streambank stability, and input of large woody debris or organic matter. This approach is most flexible. However, as discussed more fully below, its lack of definiteness may be problematic in that it may not provide as much security against potential ESA liability as would an NMFS approved numeric setback.

Based on the discussion in the Chinook salmon critical habitat rule, it appears that NMFS may react favorably to setting a development setback at one site-potential tree height. According to the Tri-County Plan, one site-potential tree height is generally about 150 feet. Tri-County Plan at 25. It appears, therefore, that requiring a non-disturbance zone equal to 150 feet may be a good choice. It is less clear, however, whether the 150-foot outer riparian zone would be required by NMFS. To some degree the outer zone must be maintained in order to protect the viability of the inner zone. It may not be necessary, however, to limit clearing to no more than 35% of canopy cover.

Recommendation: It would make sense for the tri-county coalition to propose a less stringent clearing limit in the outer riparian zone or, alternatively, to rephrase the requirement in qualitative terms.

⁸ “Channel migration zone” is described as “the swath of land through which the channel does its long-term wandering.” Tri-County Plan at 7.

Liability Unlikely for Local Permit-Granting Authorities Acting In Accord With NMFS Approved Ordinances

Under the ESA, a city or county is not liable for takings that result from the failure of constituents to follow a lawful ordinance. This issue was considered in the case of *Loggerhead Turtle, et al. v. County Council of Volusia County, Florida*,⁹ in which the plaintiffs, representing the turtles, sought to hold the county liable for the ineffectiveness of an ordinance intended to limit artificial beachfront lighting that interferes with the ability of baby sea turtles to reach the ocean after hatching. The court acknowledged that a county could be liable under the ESA for ordinances or actions that actually *cause* the taking of protected species. Under the rule set forth in *Loggerhead Turtle*, if the ordinance itself does not violate the ESA, the county will not be held responsible for any actions of its private citizens, in violation of the ordinance, that result in takings.

NMFS approval of local development regulations under an ESA § 4(d) rule provides local governments with assurance that there will be no ESA liability for any permits issued in accordance with those regulations. The purpose of seeking and receiving such a take limitation is to ensure that activities permitted under those programs are consistent with the ESA. Thus, there should be no liability concern once NMFS approval is obtained, as long as the local implementing agency is acting in compliance with the approved ordinance. Where the limitations and requirements specified in an approved program are quantified, it may facilitate implementation of the program and decrease any risk that a local entity is not acting consistently with the regulations as approved. Put another way, where requirements in a development ordinance are qualitative and potentially subject to multiple interpretations, there may be increased risk that NMFS may view implementation differently from the local permit-granting authority and that the local authority might be deemed to have violated the ESA in the event a taking occurs.

We found no cases discussing the potential for local government liability when a taking occurs as the result of complying with the terms of an otherwise lawful local ordinance, regulation, or permit. The *Loggerhead Turtle* case, however, implies that such liability could result. The court noted that in a predecessor opinion, the U. S. Eleventh Circuit found that the plaintiffs “had shown sufficient causal connection *to seek to hold* the County liable for harmfully inadequate regulation” 92 F. Supp. 2d 1296 (M. D. Fl. 2000) (emphasis in original). The implication is that a county or municipality might be liable if it enacted legislation that actually caused the taking of a listed species. The ESA § 4(d) take limitation provision, however, is intended to provide security that actions taken pursuant to an NMFS approved ordinance will not result in violation of the ESA. It appears, therefore, that local governments are unlikely to incur ESA liability as long as local ordinances are approved by NMFS pursuant to ESA § 4(d) and those ordinances are implemented and enforced in accordance with their terms.

⁹ 92 F. Supp. 2d 1296 (M. D. Fl. 2000).