




UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
West Coast Region  
650 Capitol Mall, Suite 5-100  
SACRAMENTO, CALIFORNIA 95814

March 17, 2023

**MEMORANDUM FOR:** Scott M. Rumsey, Ph.D.  
Acting Regional Administrator

**FROM:** Ryan Wulff   
Assistant Regional Administrator  
Sustainable Fisheries Division

**SUBJECT:** Fisheries Resource Management Plan submitted by the Sauk-Suiattle Tribe, the Swinomish Indian Tribal Community, the Upper Skagit Indian Tribe, and the Washington Department of Fish and Wildlife Affecting Puget Sound Steelhead Distinct Population Segment Under Limit 6 of the Endangered Species Act 4(d) Rule (50 CFR 223.203) - **DECISION MEMORANDUM**

**NATIONAL MARINE FISHERIES SERVICE TRACKING NUMBER:** WCR-2021-03137

#### **PURPOSE**

The Sauk-Suiattle Tribe, the Swinomish Indian Tribal Community, the Upper Skagit Indian Tribe, the Skagit River System Cooperative, and the Washington Department of Fish and Wildlife (co-managers), submitted the 2021 Skagit River Steelhead Fishery Resource Management Plan (RMP) (2021 Skagit RMP) for review and determination by NOAA's National Marine Fisheries Service (NMFS) under Limit 6 of the Endangered Species Act (ESA) salmon and steelhead 4(d) Rule (50 CFR 223.203). The 2021 Skagit RMP proposes a fishery harvest management framework for natural-origin steelhead returning to the Skagit River terminal (marine and freshwater) management area (Sauk-Suiattle et al. 2021). The 2021 Skagit RMP proposes a ten-year term for these fisheries. The fisheries described in the Skagit RMP will affect the threatened Puget Sound steelhead Distinct Population Segment (DPS).

#### **RECOMMENDATION**

The NMFS Sustainable Fisheries Division (SFD) evaluated the 2021 Skagit RMP and finds that it adequately addresses the criteria established in Limit 6 of the ESA salmon and steelhead 4(d) Rule and does not appreciably reduce the likelihood of survival and recovery of the Puget Sound steelhead DPS. I recommend that you concur with my approval of the 2021 Skagit RMP, with the result that ESA Section 9(a)(1) take prohibitions on Puget Sound steelhead would not apply to fisheries implemented in accordance with the approved 2021 Skagit RMP and NMFS' 4(d) letter of concurrence.



## **BACKGROUND**

On July 10, 2000, NMFS issued a final rule pursuant to ESA section 4(d) (65 FR 42422) to protect 14 Evolutionarily Significant Units (ESUs) of salmon and steelhead listed as “threatened” under the ESA. While NMFS issued separate proposed 4(d) rules for salmon and steelhead in December 1999 and January 2000, respectively, the final rule combines the two proposed rules into one final rule. The Puget Sound Steelhead DPS was listed as threatened under the ESA on May 11, 2007 (72 FR 26722). NMFS conducted the required 5-year status reviews in 2010 and 2015 and confirmed the threatened status of the Puget Sound DPS on April 14, 2014 (79 FR 20802). NMFS applied the 4(d) protective regulations to Puget Sound steelhead in 2008 (73 Fed. Reg. 55451, September 25, 2008).

The 4(d) Rule applies the take prohibitions in section 9(a)(1) of the ESA to salmon and steelhead listed as threatened and sets forth specific circumstances when the take prohibitions would not apply, known as 4(d) limits. A central goal of the 4(d) rule is to encourage tribes, state, and local governments to step forward and assume leadership roles in saving these species by providing the means for NMFS to approve these efforts and to limit liability under the ESA. Limit 6 of the 4(d) Rule is used for joint Tribal/State plans developed under *U.S. v Washington* and *U.S. v Oregon* settlement processes. For fishery RMPs submitted by the co-managers under Limit 6, NMFS considers the criteria under Limit 4 to assess the plan’s adequacy. Limit 4 is the “fisheries harvest activities” limit of the 4(d) Rule and provides that the take prohibitions of ESA section 9(a)(1) do not apply to fisheries harvest activities that adequately address the criteria of limit 4 and have been approved by NMFS. Under Limit 6 of the 4(d) Rule, NMFS evaluates the plan in a Preliminary Evaluation and Pending Determination (PEPD) and releases it for public review and comment prior to making a final determination (87 FR 78944).

## **DISCUSSION**

### *Controversial Issues*

The proposed fisheries in the 2021 Skagit RMP are potentially controversial as ESA-listed, threatened natural-origin steelhead will be directly and incidentally taken in Tribal commercial, ceremonial, and subsistence harvest, and for catch-and-release recreational fisheries. NMFS received comments on the proposed fishery from the public during the formal 30-day public comment period on the PEPD. All of the substantive public comments are addressed in the final Evaluation and Recommended Determination (ERD) document (Attachment 1).

There is no known litigation associated with this RMP.

### *Public Review and Comment*

NMFS published a notice in the Federal Register of the availability of the PEPD for a 30-day public review and comment (December 23, 2022, 87 FR 78944). The comment period closed on January 23, 2023. No requests for extension of the comment period were received.

During the public comment period 28 comments were received, all by email. These came in the form of: individual comments (24) and comments and/or letters from fishing groups and

conservation organizations (4). Most (19) of the 24 individual comments received were fully supportive of the proposed 2021 Skagit RMP, with several of these commenters noting that the 2021 Skagit RMP is well supported by the science and that the past 5-year term (RMP from 2018-2022), under the same management framework, had worked well. Only one of the individual commenters was not supportive of the proposed 2021 Skagit RMP and was concerned about any level of fishing on ESA-listed fish. Five of the 24 individual comments received were not as clear about their support or non-support of NMFS' review. These comments typically spoke to concerns with one or more aspect of the management of the fishery—gear, location, user groups, or, in one case, concerns about the effect of the increase in traffic and parking on their property. A smaller number (4) of the 28 total comments received were from organized fishing and conservation groups. Two of the organizations (The Conservation Angler and Trout Unlimited) were not supportive of approving the proposed RMP. These commenters stated that the plan does not adequately address all of the criteria under the ESA 4(d) Rule, Limit 6, and that there should be revisions made to the plan to address these concerns, including an expanded public review process to develop a more suitable plan. These commenters also pointed to deficiencies in the information and analysis in the RMP and PEPD and supported their comments by referencing scientific work supporting their concerns. A third organization (Wild Steelhead Coalition) provided a web article that they had produced for their website, reviewing the main attributes of the plan, some of the shortcomings, and their general support for the plan as submitted. The fourth group (Evergreen Fly-Fishing Club) was fully supportive of the fishery.

NMFS thoroughly reviewed and considered all of the substantive comments received from the public and the additional literature and studies referenced. This review of new information and data informed NMFS' analysis, in its final ERD and biological opinion, but did not lead to any changes to the Skagit RMP, as submitted by the co-managers, or to NMFS' determination that the plan adequately addresses the 4(d), Limit 6 criteria. A section summarizing and responding to the substantive comments received during the public comment period on the PEPD is included as part of the final ERD document (Attachment 1).

#### *Evaluation of the RMP under the ESA 4(d) Rule*

Attachment 1 is SFD's evaluation (ERD) of whether or not the RMP adequately addresses all of the criteria established under Limit 6 of the ESA salmon and steelhead 4(d) Rule for the Puget Sound steelhead DPS. The SFD has determined that the 2021 Skagit RMP submitted by the co-managers adequately addresses all of these criteria and will not appreciably reduce the likelihood of survival and recovery of the Puget Sound steelhead DPS.

#### *Evaluation of Federal Actions under the ESA Section 7 and the Magnuson-Stevens Act Essential Fish Habitat*

NMFS' determination of whether or not the 2021 Skagit RMP meets the ESA 4(d) criteria, and thus qualifies for exemption from section 9 take prohibitions, is the Federal action which triggers review under both the ESA and the Magnuson-Stevens Act (MSA). The SFD prepared an ESA section 7 biological opinion to evaluate the effects of the proposed 2021 Skagit RMP on the listed Puget Sound steelhead DPS (Attachment 2). As described in SFD's biological opinion, including the assessment of monitoring and reporting actions included in the RMP, the approval

of the RMP is not likely to jeopardize the continued existence of the Puget Sound steelhead DPS or adversely modify critical habitat.

The SFD also analyzed the effects of the proposed 2021 Skagit RMP on Essential Fish Habitat (EFH) under the MSA (Attachment 2). The SFD determined that the effects of the proposed action on EFH are not likely to adversely affect Pacific salmon EFH, in this case Chinook, coho, and pink salmon EFH, or any other EFH identified under other Fishery Management Plans. This decision memorandum constitutes NMFS' statutory response requirement regarding its own recommendations on EFH conservation recommendations.

#### *Evaluation of NMFS' Proposed Determination under NEPA*

SFD prepared a Supplemental Environmental Assessment and determined that there are no significant impacts from the proposed action. The document describing this assessment and determination is included as Attachment 3.

#### *RMP Effects on the Likelihood of Puget Sound Steelhead Survival and Recovery*

To be consistent with Limit 6 of the 4(d) Rule, the Secretary of Commerce (Secretary) must determine pursuant to 50 CFR 223.203(b)(4) that the fisheries described in the RMP will not appreciably reduce the likelihood of survival and recovery of the Puget Sound steelhead DPS. Biological analyses supporting a determination that the 2021 Skagit RMP will not appreciably reduce the likelihood of survival and recovery of the listed Puget Sound steelhead are presented in SFD's analysis documents (ERD and Biological Opinion; Attachments 1 and 2, respectively) and summarized here.

#### *RMP Effects*

The goal of the 2021 Skagit RMP is to provide steelhead fisheries opportunities for the Skagit River Treaty Tribes and for recreational fishers, in a manner that is conservative at higher run sizes and increasingly so at lower run sizes. For a period of ten years, the 2021 Skagit RMP would implement annual steelhead fisheries in the Skagit terminal management area consistent with the impact limits, management framework, and monitoring requirements, as described in the RMP. The 2021 Skagit RMP utilizes an abundance-based, stepped harvest regime to apply harvest rates, based on the annual forecasted run size. These stepped rates start at a 4 percent total allowable harvest rate for runs less than 4,000 adult steelhead; increase to a 10 percent total allowable harvest rate for runs between 4,001 and 6,000 adults; increase to a 20 percent total allowable harvest rate for runs between 6,001 and 8,000; and increase to the highest proposed total allowable harvest rate of 25 percent for runs greater than 8,001 adults.

NMFS has analyzed the 2021 Skagit RMP's proposed abundance-based, stepped harvest regime, along with the conservation measures proposed in the plan. We have concluded that the Skagit RMP would provide effective protection to the Skagit River steelhead populations based on viability salmonid population parameters, in terms of overall abundance and productivity, as well as limiting impacts on the diversity and spatial structure of the steelhead within the Skagit River. The 2021 Skagit RMP would provide for the proposed harvest opportunities while not appreciably slowing the population's achievement of viable function.

### *Implementation and Reporting Requirements*

Criterion I(iv) of the 4(d) Rule, Limit 4 requires that NMFS provide written concurrence with the RMP and specify implementation and reporting requirements (if any). NMFS' determination on the 2021 Skagit RMP depends upon implementation of all of the monitoring, evaluation, and reporting tasks or assignments included in the RMP to assess impacts on ESA-listed Puget Sound steelhead, and that such tasks shall be conducted as described in the 2021 Skagit RMP.

The 2021 Skagit RMP details the performance indicators for the subject fish populations and fishery indicators. The fish population indicators and the fishery indicators are described in the attached ERD document (Attachment 1). These will be monitored and evaluated on an annual basis. The co-managers must submit a post-season report to NMFS on or before December 31, annually, and must include biological and fishery information from the previous season and an assessment of how the fisheries performed with respect to the objectives and limits established in the RMP. The Skagit co-managers are also required to coordinate with NMFS, for a pre-season planning update, prior to any steelhead fishery opening but no later than January 15, annually, including the co-managers fisheries proposed for the upcoming season and how the RMP objectives will be met.

The annual post-season report will be submitted to:

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