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By Email, Fax and First-Class Mail

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Re: Draft 4(d) EA

Dear Chief:

Thank you for the opportunity to comment on the draft Environmental Assessment (EA) for NOAA Fisheries' proposed amendments to the 4(d) protective regulations for Pacific threatened salmon and steelhead ESUs. We have reviewed the draft EA, and we wish to raise several concerns regarding the proposed amendments and the environmental assessment of those amendments. We object to NOAA Fisheries' continued reliance upon *Alsea Valley Alliance v. Evans*, 161 F.Supp.2d 1154 (D. Or. 2001) as a basis for making sweeping changes to its policies and rules, resulting in diminished protection for wild salmonids and improper consideration of hatchery fish in wild salmonid Endangered Species Act (ESA) listing determinations. The proposed 4(d) limit for adipose-fin-clipped hatchery fish and for resident *Oncorhynchus mykiss* represents the continuation of NOAA Fisheries' policy and regulatory changes that are unnecessary, irrational, and not based upon the best available science, and that undermine the ESA. Furthermore, NOAA Fisheries fails to provide any substantive analysis regarding its decision to exclude hatchery fish and resident *O. mykiss* from section 9(a) take prohibitions.

NOAA Fisheries is inappropriately relying upon the Alsea Valley Alliance decision as an excuse to reduce ESA protections for wild salmonids

NOAA Fisheries has characterized its proposed hatchery policy, proposed listing determinations for 27 salmonid ESUs, and proposed 4(d) rules, collectively, as a response to *Alsea Valley Alliance v. Evans*. E.g. Draft EA at 1-5, NOAA Fisheries' Response to the *Alsea Valley Alliance v. Evans* U.S. District Court Ruling at <http://www.nwr.noaa.gov/AlseaResponse/20040528/index.html>. The *Alsea Valley Alliance* decision was a single district court decision, decided upon a technicality, relating to a single ESU. Nevertheless,

NOAA Fisheries has misrepresented this decision as requiring a major overhaul of its policies and regulations. NOAA Fisheries has used this decision to avoid acknowledging that it is making a political decision to severely retreat from providing necessary ESA protection for wild salmonids.

In *Alsea Valley Alliance*, Judge Hogan determined that NOAA Fisheries improperly subdivided an ESU when making a listing determination. That is the sole holding of the opinion: NOAA Fisheries may not list only a portion of a distinct population segment. Nevertheless, NOAA Fisheries relies upon this case to justify a series of illogical decisions that fail to meet the purposes of the ESA and that fail to use the best available science. In reality, the *Alsea Valley Alliance* decision does not require any of the revised policies and regulations that NOAA Fisheries has proposed. First of all, NOAA Fisheries chose not to appeal the decision but instead to extend its expansive interpretation of the court's ruling to all 27 salmonid ESUs covered in its June 14, 2004, listing proposal (69 Fed. Reg. 33101). NOAA Fisheries' failure to defend needed protection indicates that the agency allowed politics to trump science.

Furthermore, the holding of *Alsea Valley Alliance* does not bind NOAA Fisheries to follow the untenable position that it has created. A more tenable solution to the *Alsea Valley Alliance* would have been to define hatchery fish and wild fish as separate distinct population segments; such a decision would have avoided the illogical proposal to list hatchery fish under the ESA but then deny them ESA protections. NOAA Fisheries has sufficient discretion under the ESA to define hatchery fish and wild fish as separate distinct population segments. NOAA Fisheries could, for example, have defined hatchery fish and wild fish as separate ESUs. If NOAA Fisheries interpreted its own ESU policy such that hatchery fish and wild fish could not be separate ESUs, then it could have revised its ESU policy. Instead, it has chosen to stubbornly hold fast to its ESU policy, and to the untenable premise that hatchery and wild fish are genetically identical. NOAA Fisheries' decision to stubbornly insist upon its ESU policy and a scientifically unsupportable premise is purely a political decision; *Alsea Valley Alliance* simply does not require that NOAA Fisheries conclude that hatchery and wild fish are genetically identical or that these fish are members of the same distinct population segments. This finding would be contrary to the letter and intent of the ESA.

The 4(d) rules allowing for take of adipose-fin-clipped hatchery fish and of resident O. mykiss are poorly conceived and based upon a scientifically untenable premise.

NOAA Fisheries has approached the hatchery policy and listing determinations with the flawed premise that hatchery fish can substitute for wild fish because of their purported genetic similarity. NOAA Fisheries' steadfast reliance upon this premise has backed it into a corner, requiring NOAA Fisheries to create an illogical proposal: list hatchery fish because they allegedly need protection, but then deny them the protections of the ESA through a 4(d) limit. NOAA Fisheries' combination of listing hatchery fish but then denying them take protection is irrational and contradictory. If hatchery fish do not contribute to the conservation of threatened wild salmonids, and therefore do not require protection from take, then NOAA Fisheries did not need to list them in the first place. The combination of NOAA Fisheries regulations granting

threatened status to hatchery fish and creating a limit to except them from take prohibitions is a clear example of cumbersome overregulation. These regulations are nonsensical, poorly conceived regulations created for the political purpose of allowing hatchery fish to substitute for the real solution to reversing salmon and steelhead declines: protection and recovery of wild fish and their habitat.

The NEPA analysis of the 4(d) rules allowing for take of adipose-fin-clipped hatchery fish and of resident O. mykiss is inadequate.

The draft EA explains that NOAA Fisheries adopts 4(d) protective regulations that "the agency deems necessary and advisable for the conservation of species listed as 'threatened.'" EA at i. Nevertheless, the EA fails to provide any substantive analysis indicating how it reached the conclusion that allowing take of hatchery fish would not impede the conservation of listed ESUs. In fact, the EA provides only three sentences regarding the impacts of allowing take of listed hatchery fish upon ESUs. NOAA Fisheries cannot reasonably reach the conclusion that the take of fish it determined warrant listing will have no impact on the environment based upon a three sentence analysis of impacts to listed ESUs.

The proposed hatchery policy (69 Fed. Reg. 31,354 (June 3, 2004)) and the proposed 4(d) rules reach contradictory conclusions regarding the role of hatchery fish, and the EA fails to provide an adequate analysis to explain its dissonant conclusions. The proposed hatchery policy alleges that hatchery fish should be listed because they provide potential benefits to wild salmonid populations. However, as explained in the EA, NOAA Fisheries has determined that hatchery fish do not require protection from take. It follows that the agency must have determined that the protection of hatchery fish is neither necessary nor advisable to conserve listed ESUs. Analysis in the EA fails to adequately explain NOAA Fisheries' contradictory reasoning. If the contribution of hatchery fish is so minimal, then they should not be listed.

Finally, if NOAA Fisheries has determined that migratory declines of *O. mykiss* warrant listing of the ESU, where is substantive analysis showing that take of rainbow trout will not hinder conservation of *O. mykiss* ESUs?

Conclusion

Pacific Rivers Council reiterates that hatchery fish should not be considered in listing determinations, except as threats. Furthermore, hatchery fish should never be used to substitute for wild fish in determining the viability of salmonid populations or assessing the need for further habitat restoration. NOAA Fisheries' improper reliance upon *Alsea Valley Alliance* and alleged genetic similarities between hatchery and wild fish has resulted in a series of misguided policy and regulatory changes, which are contrary to the best available science, and which undermine the purposes of the ESA. The proposed 4(d) rule limits for hatchery fish and resident *O. mykiss* are irrational because they only arose as a result of the illogical determination to list hatchery fish, and are unjustified because no analysis is provided regarding the impacts of taking listed hatchery fish upon the conservation of listed salmonids. These policy changes reflect political, rather than scientific, policy making. If NOAA Fisheries chooses to both list hatchery

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fish and exclude them from take prohibitions, then the agency will have to do a hatchery by hatchery review to determine which hatchery fish can be taken.

Sincerely,

Bronwen Wright
Conservation Associate
On Behalf of Pacific Rivers Council