

FR: Native Fish Society

TO: Senate Committee on Rules

RE: Comments on SB 857 - In support of maximum loading weight of motorboats

Dear Chairman Wagner and Members of the Committee,

Native Fish Society<sup>1</sup> supports SB 857, a bill to designate a maximum loading weight of motorboats to 4,000 pounds or less for issuance of a towed watersports motorboat certificate. This change is a critically important component in the state's efforts to conserve and recover the Willamette River and its native fish species.

The Willamette River Basin was once a wild fish producing powerhouse. It is estimated that half a million adult Spring Chinook Salmon and Winter Steelhead once returned to the Willamette each year. Today, the Willamette's Salmon and Steelhead runs have been reduced to less than 1% of their historic levels. This precarious situation led to the listing of both species as "Threatened" under the Endangered Species Act (ESA). In the two decades since their listing, these populations have continued their precipitous decline. In 2017, only 817 wild winter steelhead returned above Willamette Falls--the lowest population ever recorded. Because of this dire situation, we have requested that National Marine Fisheries Service (NMFS) upgrade these populations to the "Endangered" designation under the ESA.

This situation is why Native Fish Society and the many organizations, agencies, and stakeholders involved in fisheries recovery and management are focused on implementing actions that will have a direct benefit on the survival and recovery of Salmon and Steelhead in the Willamette. This is why reducing the harmful impacts of wave energy in the Willamette is absolutely critical today.

Legislative action to address the impacts of wake sports on ESA-listed species in the Willamette is not only warranted for the sake of the fish but legally necessary. ESA Section 9 prohibits the take of listed species. Take as defined under the ESA means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"<sup>2</sup> and "harm may include significant habitat modification where it actually kills or injures a listed species through impairment of essential behavior."<sup>3</sup>

ESA Section 9 prohibitions apply to all individuals, organizations, and agencies subject to U.S. jurisdiction including the state of Oregon and the citizens of the state. The ESA also requires the federal management agencies to designate, protect, and restore the critical habitats of listed species. While boaters and the Oregon State Marine Board (OSMB) don't intend to cause the harm, harassment, or wounding of protected species or the modification of their critical habitat when

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<sup>1</sup> The Native Fish Society is a registered 501(c)(3) nonprofit with a mission to restore abundant wild fish, free-flowing rivers, and thriving local communities across Oregon and the Pacific Northwest.

<sup>2</sup> Endangered Species Act, 16 USC § 1532 (1973).

<sup>3</sup> [https://www.fws.gov/endangered/esa-library/pdf/HCP\\_Incidental\\_Take.pdf](https://www.fws.gov/endangered/esa-library/pdf/HCP_Incidental_Take.pdf)

operating wake-producing motor boats, the prohibited and illegal take of ESA protected species and modification of critical habitat is occurring and is ongoing nonetheless.

In January of 2020, the National Marine Fisheries Service (NMFS) made this clear when they wrote a letter to OSMB stating:

“In NMFS’ experience, noise and wave action are frequently a threat to juvenile salmon and steelhead. Therefore, **we expect that wake sports are likely to have a significant adverse impact on those listed species and their critical habitats by injuring and killing individual fish** when, for example, the surge and wakes caused by artificial waves from passing boat and wake sport participants wash juvenile fish onto the shore, or otherwise modify or degrade PBFs [physical and biological features] in ways that injure or kill fish by significantly impairing their essential behavior patterns.”<sup>4</sup> (*emphasis added*)

Despite communication from NMFS to the OSMB that illegal and prohibited take is likely occurring and asking the state to seek compliance with the ESA, OSMB has failed to address the violations through the agency rulemaking process. This leaves the state and individuals vulnerable to ongoing violations of the ESA as continued production of wake action in the Willamette is causing the direct and indirect take of threatened salmon and steelhead and the modification of their critical habitat. The ongoing failure of OSMB to comply with federal law and regulations necessitates legislative action by this body to address the state’s liability and protect our iconic Salmon and Steelhead populations that are on the brink of collapse.

To be clear, without action, the state is inviting potential litigation and federal intervention. A recent example in Oregon is that of the state Department of Forestry. The department crafted a Forest Management Plan (FMP) that did not adequately avoid the take of listed species, specifically threatened Oregon Coast Coho Salmon. Activities on state forest lands, managed under the FMP, continued to result in harm to Coho and modification of their critical habitats. The department was aware of this liability, but proceeded with executing the FMP, and was subsequently sued for violating the ESA. The state is now seeking to remedy this violation by obtaining an Incidental Take Permit under Section 10 of the ESA. This process requires the time and resource intensive process of developing and submitting a Habitat Conservation Plan to the federal management agencies for review and approval, which also triggers a federal National Environmental Policy Act (NEPA) process as well.

The state has three options at present to bring itself into compliance with the ESA with regards to wake boats on the Willamette River at this juncture:

- 1) Stop the take of ESA-listed Salmon and Steelhead;
- 2) Prove to NMFS that the take is subject to an exception or exemption under the ESA; or
- 3) Obtain an Incidental Take Permit.

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<sup>4</sup> K.W. Kratz, agency communication by U.S. and electronic mail from National Oceanic and Atmospheric Association to Oregon State Marine Board, January 16, 2020

As previously mentioned, the process of obtaining an incidental take permit is resource and time intensive and subject to determination by the federal management agencies. For non-federal entities like the state, permits often require Habitat Conservation Plans that include substantive mitigation measures and must include consideration of all species now listed or which may be potentially listed during the permit term. They often take significant time to complete (in some recent cases in Oregon, HCP processes have taken up to a decade). During this time, the take of any listed species remains illegal.

With regards to an exception or exemption to ESA Section 9 take prohibitions, it is highly unlikely that the state's wake boating regulations would qualify. The act does contain a provision, referred to as 4(d), which provides the federal agencies limited flexibility in allowing the take of species listed as "Threatened." ESA 4(d) take exemptions "allow for regulatory flexibility and help streamline ESA compliance for actions that have long-term benefits despite generally low-levels of take in the short term and that do not contribute to the threats facing a species' continued existence." It is highly unlikely that the take of listed Salmon and Steelhead and harm to their critical habitats by wake boats would qualify for an exception or exemption under the 4(d) rule in this instance. In the final listing determination for the Willamette's Winter Steelhead, NMFS specifically called out that activities that modify steelhead habitats do not qualify for an exemption from ESA Section 9 take prohibitions. They state:

"Activities that we believe could potentially harm steelhead (see 50 CFR 222.102) in the listed DPSs [Distinct Population Segments], and result in a violation of the section 9 take prohibition include, but are not limited to...Destruction/alteration of the steelhead habitats for any listed DPS, such as removal of large woody debris and "sinker logs" or riparian shade canopy, dredging, discharge of fill material, draining, ditching, diverting, blocking, **or altering stream channels or surface or ground water flow...**"<sup>5</sup> (*emphasis added*)

This leaves the state with only one option: stopping the take of ESA listed species and the modification of their critical habitat.

Activity restrictions and closure orders are commonly used tools to protect listed species and their habitats and thereby maintain compliance with ESA mandates. For example, in the Columbia River, the state of Oregon has designated specific areas as thermal refugia. Angling in these habitats is prohibited during the summer to protect migrating salmon and steelhead that seek out cool water areas when river temperatures rise. In the Willamette Basin, the Oregon Department of Fish and Wildlife has implemented gear restrictions when angling in the Santiam River to reduce mortality and harm to threatened wild Winter Steelhead that are caught in the recreational fishery. In many other instances, the state and federal land management agencies routinely implement closure orders on public lands which prohibit specific types of recreation such as cross country travel of off road vehicles or dispersed camping in sensitive riparian areas or habitats. There are numerous examples of the state complying with the mandates of the ESA through regulatory action. Utilizing these tools to protect the Willamette's Salmon and Steelhead is the only feasible option at this time to bring the state into compliance with the obligations under the Endangered Species Act.

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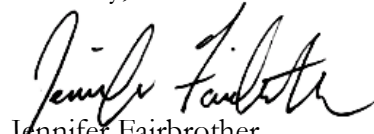
<sup>5</sup> 71 FR 833, pg. 833-862. <https://www.federalregister.gov/d/06-47>

Placing boundaries on activities that the public enjoys is hard. We all want Oregonians to be able to appreciate and enjoy our natural environment; it's one of the main reasons so many of us choose to make this place our home. But boundaries are necessary and healthy for our society. They ensure that we balance the use of our natural treasures with ensuring that Oregonians can continue to experience and enjoy them into the future.

Salmon and Steelhead are icons of the Willamette basin and the Pacific Northwest. They support multimillion dollar recreational and commercial fisheries and provide the key ocean-derived nutrients that ecosystems rely upon. They are the silver thread that has woven together the fabric of the northwest's people, communities, and landscapes for millennia.

Wild, native fish are a keystone species; they're uniquely entwined in a natural relationship with people and wildlife. Their wellbeing and success affect us all. Let's ensure that we nurture our rivers and wild fish so they in turn can continue to nurture us.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer Fairbrother". The signature is fluid and cursive, with a large initial "J" and "F".

Jennifer Fairbrother  
Conservation Director