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## What a Salmon Czar Might Hope for

William H. Rodgers Jr.  
*University of Washington School of Law*

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## WHAT A SALMON CZAR MIGHT HOPE FOR

William H. Rodgers, Jr.\*

There is a window of opportunity in the wave of Endangered Species Act salmon listings that has descended on the Pacific Northwest in 1998 and 1999.<sup>1</sup> Federal law links listings to the “inadequacy of existing regulatory mechanisms.” Experience in Oregon has shown that EPA listings cannot be avoided by “voluntary or future conservation efforts.” Meaningful state law that will deter federal overrides must be “current” and “enforceable.”<sup>2</sup>

With salmon stocks plummeting and with “inadequate” regulation prominently confirmed, what would the naïve observer expect from a Washington State legislature intent upon saving the salmon and protecting its authority? A spate of stunning new laws pushing the outer limits of environmental protection? A declaration that the better-documented offenses to the salmon (unscreened water withdrawals, forest practices, outright obstructions) are now “point sources” that can be summarily suppressed under the clean water laws? An insistence that Atlantic salmon escaping from West Coast fishing operations are “pollutants” that should be curtailed under penalty of law?<sup>3</sup>

Not quite. Lawmakers in Washington State are motivated to secure their “state lead” in salmon recovery. But the means to this end is not an enthusiastic embrace of environmental law. The centerpiece of the latest efforts to save the salmon is Senate Bill 5595, which was approved with partial veto of Governor Gary Locke on June 11, 1999.<sup>4</sup>

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\* Stimson Bullitt Professor of Environmental Law, University of Washington School of Law.

1. See National Marine Fisheries Serv., *Fact Sheet on West Coast Chinook Salmon* (1999) (on file with author).

2. Compare section 4(a)(1)(D) of the ESA, 16 U.S.C. § 533(a)(1)(D) (1994) with *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139, 1155 (D. Or. 1998).

3. For a specification of the problems that plague the salmon, see State of Washington Governor's Salmon Recovery Office, 1 *Draftwide Strategy to Recover Salmon: Extinction Is Not an Option* (1999) [hereinafter *Governor's 1999 Salmon Recovery Strategy*]. For the latest incident in escaping Atlantic salmon (recently found not to be “pollutants” by the Pollution Control Hearings Board), see *Phuong Le, Tide Currents Free 100,000 Penned Atlantic Salmon*, *Seattle Post-Intelligencer*, June 15, 1999, at B1.

4. *Salmon Recovery Funding*, Second E.S.S.B. 5595, 56th Leg., 1st Spec. Sess. (effective July 1, 1999) [hereinafter *Salmon Recovery Funding Bill*].

Senate Bill 5595 is denominated "Salmon Recovery Funding." It is a structural and planning law. It authorizes establishment of a Salmon Recovery Funding Board that will fix criteria and allocate funds for "salmon habitat projects" and "salmon recovery activities." The projects include habitat restoration and protection; the activities include preparation of stream corridor guidelines and programmatic permitting endeavors.

The Board will work from a "habitat project list" that is to be developed by a "critical pathways methodology." This approach is defined as "a project scheduling and management process for examining interactions between habitat projects and salmonid species prioritizing habitat projects, and assuring positive benefits from habitat projects."<sup>5</sup> There is a special salmon recovery account created in the state treasury.<sup>6</sup>

The immediate goal of this planning and these habitat projects and recovery activities is to fashion a "salmon recovery plan." This is defined as a "state plan" developed "in response to a proposed or actual listing under the federal endangered species act that addresses limiting factors including, but not limited to, harvest, hatchery, hydropower, habitat, and other factors of decline."<sup>7</sup> The point of the plan, nowhere clearly expressed, is to bring back salmon fisheries to levels that are sustainable, harvestable, and abundant.<sup>8</sup>

Senate Bill 5595 contains several soft and appropriate references to the catchwords of this age of salmon saving. There is talk of active public involvement and credible scientific oversight. Bouquets are tossed to collaborative, incentive-based management. Applause is given to adaptive management that should enable us to detect whether salmon recovery dollars are wisely spent.

Students of environmental law are familiar with the metaphor of geology where law accumulates over time and where legal strategy involves much picking and choosing among legal preferences expressed

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5. Salmon Recovery Funding Bill, *supra* note 4, § 2(3). This section was vetoed for the reason that it precluded funding related to the Growth Management Act. Because Governor Locke's veto message does not indicate opposition to the definition relevant here, the definition is still useful.

6. See Salmon Recovery Funding Bill, *supra* note 4, § 16.

7. Salmon Recovery Funding Bill, *supra* note 4, § 2(12). Like the definition discussed *supra* note 5, this definition also fell with the Governor's veto.

8. One goal of the plan was to "[r]estore salmon, steelhead and trout populations to healthy harvestable levels and improve those habitats on which the fish rely." *Governor's 1999 Salmon Recovery Strategy*, *supra* note 3, at sec. 1.1.

in different eras.<sup>9</sup> Repealer does not happen as busy legislators prefer to assemble today's concoctions of law atop those of yesterday. Past failures are papered over by new schemes. Coordination and reconciliation are somebody else's problem. Political benefits are measured in the short term and in the narrow context, and perception is nine-tenths of reality.

This is not to say that law might not need two or three false starts to get on the right track. Senate Bill 5595 redefines the salmon problem as something that can be fixed by "activities" and "projects" such as habitat restoration and corrective maintenance. In this respect, it resembles the federal Superfund law which attacked contaminated sites and lands by selectively framed and directed cleanup strategies.<sup>10</sup> Also like the Superfund law, Senate Bill 5595 anticipates a priority list and a chipping away at worst things first. Finally, like the Superfund law, Senate Bill 5595 is erected atop a failed superstructure of preexisting law—solid waste, air, and water pollution law, on the one hand, and salmon protection habitat laws on the other.

Viewed through the lens of the Superfund statute, questions can be asked about how Senate Bill 5595 addresses issues of (1) funding, (2) enforcement, (3) voluntary compliance, (4) regulatory certainty, and (5) scientific input.

### 1. *Funding*

Senate Bill 5595 does not begin to solve questions of long-term funding. The Superfund law is paid for by a combination of taxes on the chemical industry and cost-recovery actions against responsible parties. The theory is "the polluter pays."<sup>11</sup> There is no comparable effort to link salmon enhancement to sectors of the economy responsible for the decline. Salmon restoration taxes are not imposed on agricultural, silvicultural, and hydroelectric activities that stress species. Governor Locke has not sought a federal tax (with designated shares to the state) for offshore fishing activities that "incidentally" impact listed stocks.

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9. See William H. Rodgers, Jr., *Defeating Environmental Law: The Geology of Legal Advantage*, 15 *Pace Env'tl. L. Rev.* 1 (1997).

10. See William H. Rodgers, Jr., *4 Environmental Law: Hazardous Wastes & Substances* ch. 8 (1992 & Supp. 1999).

11. *Id.* at 479.

Consequently, Senate Bill 5595 is little more than a mechanism for distributing the latest version of largesse that goes by the name of salmon dollars. It has boondoggle features, shared by Superfund, where a salmon disaster is not an occasion for regret but an opportunity for the inflow of a federal monetary balm. This crasser side of dispensing of the goodies appeared in section 22 of Senate Bill 5595, which was vetoed by Governor Locke because it fully allocated the money that was supposed to be distributed later under the watchful eye of the Salmon Recovery Funding Board.<sup>12</sup> But the listing that the Governor vetoed gives a clear indication of the outputs deemed satisfactory to Washington lawmakers—not a penny to the Indian tribes that have proven themselves sturdy defenders of the fish, \$9.93 million to be used “solely for planning and engineering activities,” \$2.1 million to cities and counties for the protection of critical areas “using nonregulatory programs,” and up to \$8 million for the “buyback” of commercial fishing licenses. Senate Bill 5595 is on the same determined course set by the federal Superfund law—pay contractors generously to undo what they did in the name of economic development a few years earlier.<sup>13</sup>

## 2. *Enforcement*

The backers of Senate Bill 5595 forgot that the cleanup revolution wrought by the Superfund law was prompted by a draconian liability scheme that offered no way out. A striking feature of Senate Bill 5595 is that the taxpayers are being called upon again to correct stream obstructions, forbidden by law since pre-statehood days; unscreened irrigation ditches, forbidden by law since 1909; and culvert blockages, forbidden by law since 1943. Nonenforcement of environmental laws remains the current state religion, although courts have made it quite clear that paper plans and fake restrictions are insufficient to buy reprieve under the Endangered Species Act.

The most optimistic of fish protectors do not anticipate that the Washington State legislature will develop effective enforcement mechanisms or a salmon cost-recovery scheme. Citizen suits and bounty

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12. See Letter from Gary Locke, Washington State Governor, to President and Members of the Senate of the State of Washington on Salmon Recovery Funding Act (June 11, 1999) (on file with author). Governor Locke recently named William Ruckelshaus, the EPA's first administrator, as the head of the newly created Salmon Recovery Funding Board. See Robert T. Nelson, *Locke Chooses Ruckelshaus to Lead Salmon-Saving Effort*, Seattle Times, July 15, 1999, at B6.

13. See Rodgers, *supra* note 10, at 618–19.

provisions must await an initiative or referendum. But surely the Salmon Recovery Funding Board can be persuaded to look favorably on projects to enforce existing laws. In years past, salmon advocates in the State of Washington fought nobly to save the fish from ill-considered federal hydroelectric licensing endeavors.<sup>14</sup> There is a second chance to wage these campaigns under the relicensing provisions of federal law. These efforts deserve recognition and support as “salmon recovery activities.”<sup>15</sup>

### 3. *Voluntary Compliance*

Senate Bill 5595 is committed to the voluntary approach. Each project on the “habitat project list,” for example, can proceed “only with a written agreement from the landowner on whose land the project will be implemented.”<sup>16</sup> This theme of volunteerism is everywhere in the world of salmon restoration. It has two sides. The positive side is that compliance is not enough. The goal should be enthusiastic compliance. Incentives should be in full alignment with protection of salmon habitat. Each landowner that can deliver fish habitat deserves high praise, social support, and financial reward.

But the other side of volunteerism is an option not to participate. Senate Bill 5595 makes clear that “no private landowner may be forced or coerced into participation in habitat restoration in any respect.”<sup>17</sup> But one can question the source of this untrammelled freedom to defect. A landowner strategically situated to help the salmon might be within practical reach of community control. At a minimum, defectors might attract a strong dose of ostracism and social retaliation.<sup>18</sup>

Defection is an option too freely acknowledged in consensus processes involving natural resource management. Distinctions can be drawn between laborious, good faith negotiations and opportunistic strikes. In Washington, the Timber, Fish and Wildlife Agreement has earned a certain stability for its arrangements, which are the product of a

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14. See, e.g., *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

15. See *supra* note 5.

16. See Salmon Recovery Funding Bill, *supra* note 4, § 2(4), which was also vetoed by Governor Locke.

17. Salmon Recovery Funding Bill, *supra* note 4, § 11.

18. *Ostracism as a Social and Behavioral Phenomenon* (Margaret Gruter & Roger Masters eds., 1986).

dozen years of in-the-trenches bargaining.<sup>19</sup> But the 1995 congressional salvage rider—the product of quick-strike defection that overrode a generation's worth of environmental laws—deserves contempt for its design and its passage.<sup>20</sup> Getting even for the salvage rider will stand in the way of getting back to consensus negotiations.

There is a legal reason to resist the option to defect from salmon enhancement strategies. All landowners in the State of Washington should resist the temptation to be puffed up and prideful of their unassailable entitlements to their logging, their water, their streamsides, and their riparian zones. Those with short legal memories forget that property in the state is sharply impressed with fish protection easements in the form of the Stevens' treaties reserving the Indians' rights to take fish.<sup>21</sup> Those whose land-management prerogatives are ruffled by salmon-enhancement endeavors might contemplate the prospect that their own properties do not include the treasured right to do as they please.

#### 4. *Regulatory Certainty*

Another icon in the debate over salmon restoration is the need for regulatory certainty. House Bill 2091, approved by the Governor on June 7, 1999, adds an entire section under the heading of “federal assurances related to forest practices conducted under the state salmon recovery strategy.”<sup>22</sup> This legislation proclaims a “failure of assurances” if within two years the National Marine Fisheries Service does not deliver a section 4(d) rule allowing “incidental takes” of salmon, pursuant to authorized forest practices. The same tack is taken if section 10(a) habitat conservation plans are not delivered with full promises of “incidental take,” or if “no surprises” protection is not afforded to affected landowners. Any “failure of assurance,” this law insists, can be met by a retaliatory takeback of fish protection measures “including the termination of funding or the modification of such other statutes.”

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19. See Forest Practices—Salmon Recovery, E.S.H.B. 2091, 56th Leg., 1st Spec. Sess., §§ 201–202 (effective Aug. 18, 1999).

20. See Jeffrey St. Clair, *The Etiology of Betrayal: Clinton & the Rider*, Wild Forest Rev., July–Aug. 1995, at 3.

21. See *United States v. Washington*, 506 F. Supp. 187 (W.D. Wash. 1980).

22. Forest Practices—Salmon Recovery, E.S.H.B. 2091, 56th Leg., 1st Spec. Sess., pt. XIII, § 1301 (effective Aug. 18, 1999).

Fortunately, legislatures are without shame or pride. This section of the bill makes the entire legal commitment to salmon on the forest practices side dependent on delivery to the industry of a federal discretionary *quid pro quo*. One cannot think of a better way to cheapen the commitment to salmon protection and convince a federal court that state measures are “inadequate.” The further demand for a “no surprises” policy is an explicit insistence that the industry is prepared to help the salmon *once*, with future benefits strictly a matter of purchase and sale.<sup>23</sup> This posture belies ostensible commitments to adaptive management, which presumes experimentation and tentative approaches. And it makes a commodity of future regulation. Had salmon advocates taken this approach, discussion of salmon enhancement in Washington would have begun and ended with insistence upon compliance with the laws of 1886 or 1909 or 1943.

##### 5. *Scientific Advice*

Incorporating science into the salmon restoration process presents any number of attractive opportunities. Good science can help in many ways, from fashioning project criteria to selecting projects to monitoring existing projects to measuring the success of those projects. One can imagine a project certification arrangement and the identification of “model projects” that deserve duplication.

In Senate Bill 5595, the Washington legislature did not solve the problem of the role of science in salmon recovery. In various places, the law gives an uncertain role on matters of science to the Governor’s salmon recovery office, an independent science panel, the Salmon Recovery Funding Board, an interagency technical review team, and the Interagency Committee for Outdoor Recreation. Part of the confusion is attributable to the fusion of House and Senate versions of the bill without attempt at reconciliation. Governor Locke has responded to this problem by writing to Curt Smitch, Chairman of the Joint Natural Resources Cabinet,<sup>24</sup> asking for a clarification of the roles of the Joint Natural Resources Cabinet, the Government Council on Natural Resources, the Salmon Recovery Funding Board, the Salmon Recovery Office, the

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23. See Karin P. Sheldon, *Habitat Conservation Planning: Addressing the Achilles Heel of the Endangered Species Act*, 6 N.Y.U. Envtl. L.J. 279 (1998).

24. See Letter from Gary Locke, Washington State Governor, to Curt Smitch, Chairman of Joint Natural Resources Cabinet (June 11, 1999) (on file with author).



Interagency Review Team, the Interagency Science Advisory Team, the Independent Science Panel, and the Interagency Committee for Outdoor Recreation. Good salmon science is still looking for a home somewhere in these cabinets and councils and boards and offices and teams and panels and committees.

A salmon czar would hope for reliable funding, relentless enforcement, enthusiastic compliance, regulatory stability, and good science. The hopes are awaiting future delivery by Washington lawmakers.