



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

Refer to NMFS No.:
2005/02053

July 18, 2005.

Mr. Donald Borda
U.S. Army Corps of Engineers
Regulatory Branch, CENWP-CO-GP
P.O. Box 2946
Portland, Oregon 97208-2946

REC'D JUL 19 2005

Re: Endangered Species Act Section 7 Formal Consultation and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for the Salem Regional Employment Center, Mill Creek - Little Pudding River (HUC 170900070104), Salem, Marion County, Oregon (Corps No.: 200400803-2)

Dear Mr. Borda:

The enclosed document contains a biological and conference opinion (Opinion) prepared by the National Marine Fisheries Service (NMFS) pursuant to Section 7(a)(2) of the Endangered Species Act (ESA) on the effects of authorizing site preparation, including the filling of wetlands, associated with the proposed Salem Regional Employment Center Project under Section 404 of the Clean Water Act. In this Opinion, NMFS concludes that the proposed action is not likely to jeopardize the continued existence of Upper Willamette River (UWR) spring-run Chinook salmon (*Oncorhynchus tshawytscha*) and UWR steelhead (*O. mykiss*) or result in the destruction or adverse modification of proposed critical habitat.

As required by Section 7 of the ESA, an incidental take statement prepared by NMFS is provided with the Opinion. The incidental take statement describes reasonable and prudent measures NMFS considers necessary or appropriate to minimize incidental take associated with this action. It also sets forth nondiscretionary terms and conditions, including reporting requirements, that the Federal agency and applicant, if any, must comply with to carry out the reasonable and prudent measures. Incidental take from actions by the action agency and applicant that meet these terms and conditions will be exempt from the ESA take prohibition.

This document also includes the results of our consultation regarding the action's likely effects on essential fish habitats (EFH) pursuant to Section 305(b) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), and includes two conservation recommendations to avoid, minimize, or otherwise offset potential adverse effects to EFH. Section 305(b)(4)(B) of the MSA requires Federal agencies to provide a detailed written response to NMFS within 30 days after receiving these recommendations.



If the response is inconsistent with the recommendations, the U.S. Army Corps of Engineers (COE) must explain why the recommendations will not be followed, including the justification for any disagreements over the effects of the action and the recommendations.

In response to increased oversight of overall EFH program effectiveness by the Office of Management and Budget, NMFS established a quarterly reporting requirement to determine how many conservation recommendations are provided as part of each EFH consultation and how many are adopted by the action agency. Therefore, in your statutory reply to the EFH portion of this consultation, we ask that you clearly identify the number of conservation recommendations accepted.

If you have questions regarding this consultation or need to request confirmation of a conference as a biological opinion, please contact Jim Turner, fishery biologist, in the Oregon State Habitat Office at 541.231.6894.

Sincerely,

Michael R. Crown
F.R.

D. Robert Lohn
Regional Administrator

cc: Steve Mamoyac, ODFW
Carrie Landrum, DSL
Joe Zisa, USFWS
Tom Melville, DEQ
Yvonne Vallette, EPA

Endangered Species Act-Section 7 Consultation
Biological and Conference Opinion

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Magnuson-Stevens Fishery Conservation and
Management Act
Essential Fish Habitat Consultation

Salem Regional Employment Center
Mill Creek - Little Pudding River (HUC 170900070104)
Salem, Marion County, Oregon
(Corps No.:200400803-2)

Lead Action Agency: U.S. Army Corps of Engineers

Consultation
Conducted By: National Marine Fisheries Service
Northwest Region

Date Issued: July 18, 2005

Issued by: For Michael R. Crown
D. Robert Lohn
Regional Administrator

NMFS No.: 2005/02053

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conditions described below, are necessary and appropriate to minimize the likelihood of incidental take of ESA-listed species due to completion of the proposed action.

The COE shall:

1. Minimize incidental take by applying permit conditions or project specifications that avoid or minimize adverse effects to riparian and aquatic systems during construction.
2. Minimize incidental take from project implementation by ensuring effective project management, monitoring, and reporting.

Terms and Conditions

To be exempt from the prohibitions of Section 9 of the ESA, the COE and its cooperators, including the applicant, if any, must fully comply with conservation measures described as part of the proposed action and the following terms and conditions that implement the reasonable and prudent measures described above. Partial compliance with these terms and conditions may invalidate this take exemption, result in more take than anticipated, and lead NMFS to a different conclusion regarding whether the proposed action will result in jeopardy or the destruction or adverse modification of critical habitats.

1. To implement Reasonable and Prudent Measure #1 the COE shall ensure that:
 - a. Pre-construction. Flag the boundaries of clearing limits associated with site access and construction before significant alteration of the project area to prevent ground disturbance of critical riparian vegetation, wetlands, and other sensitive sites beyond the flagged boundary.
 - b. Site Preparation. Native materials, including large wood, native vegetation, weed-free topsoil, and native channel materials (gravel, cobble, and boulders), disturbed during site preparation must be conserved on site for site restoration or replaced with a functional equivalent during site restoration and returned to those areas and placed in a natural configuration so that they may be expected to function naturally.
 - c. Pollution and Erosion Control. Implement a pollution and erosion control plan accounting for phased development to prevent pollution caused by construction, land and/or facilities management by managing the timing of activities and controlling the discharge of sediment and other pollutants into adjacent streams. The plan must be available for inspection on request by NMFS and include provisions to:
 - i. Limit area of disturbance to absolute minimum.
 - ii. Cease activity during high flows where inundation is imminent.
 - iii. Contain and stabilize all exposed bare ground.
 - iv. Contain and remove construction debris, excessive concrete, grout or other simlare materials.
 - v. Contain and notify appropariate entities in the avent of spill or toxic or hazardous materials.

- d. Fish Screens. Have a fish screen installed, operated, and maintained according to NMFS' fish screen criteria on each water intake used for project construction, including pumps used to isolate any in-water work area.
- e. Stormwater Management. Stormwater management must be implemented for any new impervious surface or a land cover conversion that will slow the entry of water into the soil. The stormwater management must be commensurate with the scale of the project and include:
 - i. Measures to minimize runoff by redirecting surface flows through vegetated areas.
 - ii. To the maximum extent practicable, incorporate design features for roads, parking surfaces, and walkways that increase infiltration through the use of pervious materials and the redirection of surface flows to vegetated swales.
 - iii. Pre-treatment of stormwater from paved surfaces before discharge into waterways that would likely be present from a 6-month, 24-hour storm.
 - iv. Ensure that the duration of post-project discharge matches or does not exceed the pre-development discharge rates from 50% of the two-year peak flow up to the full 50-year peak flow.
 - v. Ensure that 90% of the annual runoff volume is captured and treated for water quality.
 - vi. Minimizing modification and disturbances of natural drainage system and hydrology.
- f. Heavy Equipment. Use of heavy equipment is restricted as follows:
 - i. When heavy equipment will be used, the equipment selected must have the least adverse effects on the environment (e.g., minimally sized, low ground pressure equipment).
 - ii. Store construction materials, and fuel, operate, maintain and store vehicles 150 feet or more from any stream, waterbody or wetland, unless otherwise approved in writing by NMFS. Inspect, clean, and treat all vehicles operated within 150 feet of any stream, waterbody, or wetland.
- g. Site Restoration. Site restoration must be carried out to ensure that all streambanks, soils, and vegetation disturbed by the project are cleaned up and restored to the maximum extent practicable and include:
 - i. Replanting each area requiring revegetation before the first April 15 following construction. Use a diverse assemblage of species native to the project area or region, including grasses, forbs, shrubs and trees. Noxious or invasive species may not be used.
 - ii. Use of as much as possible of the large wood, native trees, native vegetation, topsoil, and native channel material that was stockpiled during site preparation.
 - iii. To the maximum extent practicable, native trees shall be planted on 50% or more of open space areas and along stormwater swales.
 - iv. Do not apply surface fertilizer within 50 feet of any stream channel.
 - v. The use of herbicide glyphosate is limited to hand application and not within 50 feet of any stream channel or waterbody.

- vi. Install fencing as necessary to prevent access to revegetated sites by livestock or unauthorized persons.
- vii. All restoration activities shall be monitored for five years to ensure performance measures are being met; bare ground is minimized and active soil erosion is not evident; vegetation is healthy with good plant litter covering the soil; trees and shrubs planted along the streambank are continuous, and streambank are stable and well-vegetated.

2. To implement Reasonable and Prudent Measure #2 the COE shall ensure that:

- a. Salvage Notice. Include the following notice with each permit issued, or in writing to each party that will supervise completion of the action.

NOTICE. If a sick, injured or dead specimen of a threatened or endangered species is found, the finder must notify Portland Field Office of NMFS Law Enforcement at 1-800-853-1964. The finder must take care in handling of sick or injured specimens to ensure effective treatment, and in handling dead specimens to preserve biological material in the best possible condition for later analysis of cause of death. The finder also has the responsibility to carry out instructions provided by Law Enforcement to ensure that evidence intrinsic to the specimen is not disturbed unnecessarily.

- b. Project Monitoring, Site Restoration, and Compensatory Mitigation Reporting. As applicable, a monitoring, site restoration and/or compensatory mitigation report must be submitted by December 31 each year after the project is completed until the COE determines that the project has been completed including site restoration and/or compensatory mitigation.
 - i. This report must describe the date and purpose of each visit to project, restoration, and/or compensatory mitigation site; site conditions observed during that visit; performance standards; and any corrective action planned or taken.
 - ii. Project monitoring shall be implemented to demonstrate that the performance standards for stormwater peak flow attenuation have been met and account for water quality parameters as discharged in Mill Creek and Little Pudding River.

MAGNUSON-STEVENSON FISHERY CONSERVATION AND MANAGEMENT ACT

The consultation requirements of Section 305(b) MSA directs Federal agencies to consult with NMFS on all actions, or proposed actions, that may adversely affect EFH. Adverse effects include the direct or indirect physical, chemical, or biological alterations of the waters or substrate and loss of, or injury to, benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality or quantity of EFH. Adverse effects to EFH may result from actions occurring within EFH or outside EFH, and may include site-specific or habitat-wide impacts, including individual, cumulative, or synergistic

consequences of actions (50 CFR 600.810). Section 305(b) also requires NMFS to recommend measures that may be taken by the action agency to conserve EFH.

The Pacific Fishery Management Council designated EFH for groundfish (PFMC 1998a), coastal pelagic species (PFMC 1998b), and Chinook salmon, coho salmon, and Puget Sound pink salmon (PFMC 1999). The proposed action and action area for this consultation are described in the Introduction to this document. The action area includes areas designated as EFH for various life-history stages of Chinook and coho salmon (PFMC 1999). The effects of the proposed action on EFH include loss of water storage and water filtering capabilities, increase stormwater runoff, increase sediment discharge during construction, and potential increase to instream erosion.

EFH Conservation Recommendations

The NMFS believes that the two conservation measures indicated above by reference are necessary to avoid, mitigate, or offset the impact that the proposed action has on EFH. These measures are applicable to salmon EFH include Term and Condition 1 and 2 specified in the ESA section of this Opinion.

Statutory Response Requirement

Federal agencies are required to provide a detailed written response to NMFS' EFH conservation recommendations within 30 days of receipt of these recommendations [50 CFR 600.920(j)(1)]. The response must include a description of measures proposed to avoid, mitigate, or offset the adverse affects that the activity has on EFH. If the response is inconsistent with the EFH conservation recommendations, the response must explain the reasons for not following the recommendations, including the scientific justification for any disagreements over the anticipated effects of the proposed action and the measures needed to avoid, minimize, mitigate, or offset such effects.

In response to increased oversight of overall EFH program effectiveness by the Office of Management and Budget, NMFS established a quarterly reporting requirement to determine how many conservation recommendations are provided as part of each EFH consultation and how many are adopted by the action agency. Therefore, in your statutory reply to the EFH portion of this consultation, we ask that you clearly identify the number of conservation recommendations accepted.

Supplemental Consultation

The COE must reinitiate EFH consultation with NMFS if the proposed action is substantially revised in a way that may adversely affect EFH, or if new information becomes available that affects the basis for NMFS' EFH conservation recommendations [50 CFR 600.920(k)].