US Army Corps
of Engineers
Seattle District

Special Public Notice

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CORPS OF ENGINEERS REGULATORY PROGRAM AND THE ENDANGERED SPECIES ACT

Since May 24, 1999, a number of species of salmon, steelhead, and trout inhabiting Northwest waters were listed in the Federal Register by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service as endangered, threatened, or proposed species under the Endangered Species Act (ESA) of 1973. In addition, the habitat for most of these species has been designated as critical for their conservation. The purpose of this special public notice is to advise permit applicants and agents who apply for Department of the Army permits, as well as other interested parties, of the following:

- **Purpose of the Endangered Species Act**
- **How the ESA Listings and Critical Habitat Designations Affect the U.S. Army Corps of Engineers' (Corps) Regulatory Program and Permit Applicants**
- **Actions Being Taken by the Corps and Other Agencies to Expedite the Processing of Permit Applications**
- **Table of Current ESA Listings for Washington State Waters (see enclosure 1)**
- **Draft Guidance for Preparation of a Biological Evaluation or Biological Assessment (see enclosure 2)**
- **Project Conditions or Actions Determined to Have No Effect on Listed Species or Designated Critical Habitat for Fresh, Marine, and Estuarine Waters (see enclosure 3)**
- **Common Terms Used in the ESA (see enclosure 4)**

PURPOSE OF THE ESA OF 1973. The Endangered Species Act of 1973 was passed by the United States Congress for the purpose of providing a means whereby ecosystems and the endangered and threatened species that depend upon them may be conserved. It is the declared policy of Congress that all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of the ESA. Congress further declared that Federal agencies shall cooperate with

State and local agencies to resolve water resource issues in concert with conservation of endangered species (see 50 CFR, Part 402 and 33 CFR, Part 320.3(i)).

Section 7(a)(1) of the Act authorizes Federal agencies, in consultation with the Secretary of the Interior or Commerce, depending on the species involved, to utilize their resources in furtherance of the purposes of the Act by carrying out programs for the conservation of endangered and threatened species ("listed species") listed pursuant to Section 4 of the Act.

Section 7(a)(2) of the Act requires Federal agencies, in consultation with the Secretary, to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat of such species which has been designated as critical ("critical habitat"). Authority to conduct consultations has been delegated by the Secretary of the Interior to the U.S. Fish and Wildlife Service (FWS) and by the Secretary of Commerce to the National Marine Fisheries Service (NMFS) (the Services).

HOW THE ESA LISTINGS AND CRITICAL HABITAT DESIGNATIONS AFFECT THE CORPS' REGULATORY PROGRAM AND APPLICANTS. Under the Corps' Federal permit program, permit applications must be reviewed for the potential impact on threatened and endangered species pursuant to Section 7 of the ESA. The Corps, through informal and formal consultation procedures with the Services, must evaluate information on the presence of listed species (including timing and life stages), habitat for such species and their prey sources, and other parameters. These consultation procedures are outlined in a *March 1998 Consultation Handbook* prepared by the Services. The information required for ESA evaluation must be prepared in the form of a Biological Evaluation (BE) or Biological Assessment (BA) which is utilized to assess project impacts to listed, and/or proposed species and designated and/or proposed critical habitat (see enclosure 2 of this special public notice for a list of required information that must be included in a BE/BA).

As required by the Corps' regulations at 33 CFR, Part 325.2(b)(5), ESA information is required for all pending and future permit applications for work affecting listed species before a permit decision can be made. Department of the Army permit regulations (33 CFR, 325.1(e)) authorize the District Engineer to obtain additional information from permit applicants deemed essential to making a public interest determination including environmental data such as the ESA information discussed herein. Before the Corps can make a permit decision on pending and future permit applications for work affecting listed species or critical habitat, a BE/BA must be prepared by a qualified biologist at the applicant's expense and be provided to the Corps so that the required ESA coordination can be conducted with the appropriate agencies. Many consulting firms in the area have qualified biologists on staff that can prepare a BE/BA. In the event that an applicant is unable to have a BE/BA prepared, they should contact the Corps' Seattle District, Regulatory Branch, at telephone (206) 764-3495 for assistance. Additional project information may also be requested before the permit application is processed.

Because the new ESA listings are all aquatic species, the Corps must now review the potential project impacts on listed species and designated critical habitat for the majority of the permit

applications received. In addition, the Corps must also review potential project impacts on species proposed for listing and proposed critical habitat. The additional ESA requirements have resulted in much longer permit processing times by the Corps' Seattle District, Regulatory Branch, than in the past and a large backlog of permit applications. The backlog as of March 16, 2000, was approximately 849 pending permit applications, a 103 percent increase since the May 24, 1999, ESA listings. As discussed below, the Corps is currently placing ESA emphasis on large groups of similar types of activities (programmatic BEs) to expedite the processing of some of the permit applications. We request your patience as we attempt to serve all permit applicants in as equitable a manner as possible.

The ESA procedures discussed above must be followed for all pending and future projects potentially affecting listed species or designated critical habitat, regardless of the size or potential impacts (adverse or beneficial) of a proposed project, whether a project is for new work or the repair or replacement of existing work (i.e., Nationwide Permit 3), or the type of permit process utilized by the Corps. The ESA procedures must be followed for all projects that could be authorized by nationwide permits, including those that did not previously require prior notification to the Corps. This requires submittal of appropriate notification (JARPA, pre-construction notification, or letter) to the Corps including project drawings and a BE/BA.

A BE/BA prepared for a specific project will have one of three conclusions as to its effect on listed species. These conclusions are as follows: (1) no effect; (2) may affect, not likely to adversely affect; or (3) may affect, likely to adversely affect. If the Corps determines that a project will have "no effect" on a listed species, consultation with the Services is not required and the Corps can proceed with the permit process and a permit decision. The Corps, in consultation with the Services, has determined that certain actions would have "no effect" on listed species. A description of actions determined to have "no effect" on listed species or designated critical habitat is provided in enclosure 3 of this public notice. This list will be updated, as needed. Where the conclusion in a BE/BA is a "may effect, not likely to adversely effect" or "may effect, likely to adversely effect," see discussion below.

ACTIONS BEING TAKEN BY THE CORPS AND OTHER AGENCIES TO EXPEDITE THE PROCESSING OF PERMIT APPLICATIONS. The Corps and the Services have been meeting on a bi-weekly basis ("batched consultation meetings") to discuss permit applications in which completed Draft BE/BAs have been prepared and the Corps has concluded that the proposed work "may affect, but is not likely to adversely affect" listed species or designated critical habitat. This is part of the "informal consultation" process. If the Services concur with a Corps determination that a project is "not likely to adversely affect" listed species or designated critical habitat, then the Corps can complete its permit process and permit decision. If either of the Services non-concurs with the Corps' determination, then formal consultation can be initiated as discussed below. In the informal consultation process, the Services will typically respond within 30 days of receipt of a BE/BA. If a permit is issued, special conditions may be added to the permit to protect listed species or designated critical habitat [33 CFR, Part 325.4(a)(1)].

When the Corps determines that a proposed project is "likely to adversely affect" listed species or designated critical habitat, "formal consultation" with one or both of the Services is initiated.

The formal consultation process is similar to the informal consultation process described above with the major exception of time allowances for resource agency review. In the formal consultation process, the agencies have up to 90 calendar days to prepare a draft Biological Opinion (BO) and have up to an additional 45 calendar days for the Corps' review and comment and for preparation of a final BO. Also, in formal consultation, the Services can require certain reasonable and prudent measures, terms, and conditions to be incorporated into the project if they believe the work can proceed with only incidental take that will not cause jeopardy to the continued existence of the species. However, if the Services believe no conditions could be placed upon the work to reduce impact to that level, they can then make a determination of "jeopardy." If this occurs, then the Corps must deny the permit request.

As a result of the large backlog of permit applications due to the new ESA requirements, the Corps is working closely with the Services to develop "programmatic" BE/BAs to expedite the ESA compliance process for the majority of permit applications. These programmatic permits will be prepared in two phases. The Phase I programmatic BEs will include a number of different types of minor construction activities considered "not likely to adversely affect" listed species or designated critical habitat. The Services must then provide a concurrence letter (with or without conservation measures) or non-concur and explain why they believe certain types of projects would adversely affect listed species.

The Phase II programmatic BAs will include a number of different activities considered "likely to adversely affect" listed species or designated critical habitat. This is intended to result in formal consultation as described above with a programmatic BO either stipulating measures to allow projects to proceed with appropriate permit conditions (reasonable and prudent measures to reduce potential impacts on listed species), or stipulating that one or more activities are likely to cause jeopardy in the areas of their intended use. Phase I of the programmatic consultations has been initiated and is expected to be finalized in the spring of 2000. Work on developing Phase II of the programmatic consultations will be initiated after the submittal of Phase 1 to the Services. Upon conclusion of these processes, a special public notice will be published announcing the results of each of these phases.

The Corps is also planning to delegate certain State or local agencies as non-Federal representatives to work one-on-one with the Services on informal consultation, as allowed by 50 CFR 402.08 of the ESA regulations. If an agency has a consultation protocol in place and has qualified biological staff dedicated to preparing BEs, then the Corps' Seattle District, Regulatory Branch, may consider such delegation. The Corps is currently working closely with King County and the Washington State Department of Transportation on ESA delegation authority.

In addition to the above actions, the Corps will be holding workshops in the summer of 2000 for consultants and other interested parties concerning the preparation of BE/BAs. A public notice will be issued announcing the proposed dates of these workshops.

Additional ESA information may be obtained from the following web sites:

http://www.nwr.noaa.gov/1salmon/salmesa/index.html
http://www.fws.gov/r9endspp/endspp.html
http://www4.law.cornell.edu/uscode/16/ch35.html

If you have any questions or need additional information on the ESA, please contact the Corps' Seattle District, Regulatory Branch, at telephone (206) 764-3495.

Corps' Seattle District's Web site
http://www.nws.usace.army.mil

Threatened & Endangered Salmonid ESUs & DPSs Occurring in Washington State (by species)			Critical Habitat
Evolutionary Sig. Unit (ESU)	*Status*	*Fed. Register Date*	
Snake R. Spring/Summer Chinook	Final, Threatened	Apr. 22, 1992	Y
Snake R. Fall Chinook	Final, Threatened	Apr. 22, 1992	Y
NOTE: On Mar. 9, 1998, proposal made to add areas to Snake R. fall chinook ESU			
Lower Columbia R. Chinook	Final, Threatened	Mar. 24, 1999	Y
Upper Columbia R. Spring Chinook	Final, Endangered	Mar. 24, 1999	Y
Upper Willamette R. Chinook	Final, Threatened	Mar. 24, 1999	Y
Puget Sound Chinook	Final, Threatened	Mar. 24, 1999	Y
Snake R. Sockeye	Final, Endangered	Nov. 20, 1991	Y
Ozette Lake Sockeye	Final, Threatened	Mar. 25, 1999	Y
Snake R. Steelhead	Final, Threatened	Aug. 18. 1997	Y
Lower Columbia R. Steelhead	Final, Threatened	Mar. 19, 1998	Y
Middle Columbia R. Steelhead	Final, Threatened	Mar. 25, 1999	Y
Upper Columbia R. Steelhead	Final, Endangered	Aug. 18, 1997	Y
Upper Willamette Steelhead	Final, Threatened	Mar. 25, 1999	Y
Columbia River Chum	Final, Threatened	Mar. 25, 1999	Y
Hood Canal Summer Chum	Final, Threatened	Mar. 25, 1999	Y
Lower Columbia R./SW WA. Coho	Candidate	Jul. 25, 1995	N/A
Puget Sound/St. of Georgia Coho	Candidate	Jul. 25, 1995	N/A
Coastal/Puget Sound Bull Trout	Final, Threatened	Nov. 1, 1999	N
Columbia River Bull Trout	Final, Threatened	Jun. 20, 1998	N
SW Washington/Columbia River Coastal Cutthroat Trout	Proposed, Threatened	Apr. 5, 1999	N

Common Name : Scientific Name

Chinook salmon : *Oncorhynchus tshawytscha*
Chum salmon : *Oncorhynchus ket*
Coho salmon : *Oncorhynchus kisutch*
Cutthroat Trout : *Oncorhynchus clarki clarki*
Sockeye salmon : *Oncorhynchus nerka*
Steelhead : *Oncorhynchus mykiss*
Bull Trout : *Salvenlinus confluentus*

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CENWS-OD-RG
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WORKING DOCUMENT – for Preparation of a Biological Evaluation (BE) or Biological Assessment (BA)

This outline is to serve as a guide for the preparation of average Biological Evaluations or Biological Assessments (BEs/BAs) required for consultation under the Federal Endangered Species Act (ESA). The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services) administer the ESA, and all Federal action agencies must be in compliance. Informal consultation (submission of a BE) is geared to demonstrate to the Services that impacts to *listed* species are *insignificant* and/or *discountable*[1], and if the Services agree they will write a concurrence letter. Formal consultation (submission of a BA), indicates that the impacts to *listed* species are not *insignificant* and/or *discountable*. In the case of formal consultation, the Services will write a Biological Opinion (BO). While the U.S. Army Corps of Engineers, Seattle District, Regulatory Branch (Corps) requires that applicants prepare BEs and BAs, we encourage applicants or their consultants to first work with the Corps project manager on defining *action area* (note caveats in ***bolded italics*** below).

Applicants should be aware that the Corps requires revisions to the majority of the BE/BA's. As the Corps consults with the Services, new information and new understandings are developed as to the level of detail needed for varying activities. The process, especially in regards to *listed* fish species, is evolving so rapidly that updates from the Corps and the Services are only periodic. For the most recent updates, please see the Corps website http://www.nws.usace.army.mil/reg/reg.htm. In between updates, the Corps' only means of dispersing new information is through individual comments on BE/BA's.

I. Project Description:

A. Project Location: City, county, State, township, range and section number. Provide vicinity maps.

B. Project Description: Describe the proposed project (briefly), the project purpose and the methods and timing of construction to be employed in building the project (in detail). The idea is to identify both temporary and permanent actions that could affect the species or *critical habitat* in sufficient detail to allow an assessment of potential impacts.

Consider actions such as, but not limited to, vegetation removal, temporary or permanent elevations in noise level, temporary or permanent water quality impacts associated with sedimentation, turbidity and/or erosion, temporary or permanent

[1] All italicized words have specific definitions under the Endangered Species Act (ESA). Refer to these definitions, not those within other Corps or federal guidance.

channel modifications, temporary or permanent hydrological or hydraulic alterations (i.e. dewatering). Include secondary impacts such as access roads, power lines etc.

Provide project drawings. In some cases it is useful to provide drawings showing the location of the staging, access, detours, and work corridors associated with the construction activity.

C. **Construction Technique**: Address the following items:
- Construction Sequencing:
- Site Preparation:
- Equipment Used:
- Materials Used:
- Work Corridor:
- Staging areas and equipment wash outs:
- Stockpiling areas:
- Running of Equipment During Construction:
- Soil stabilization:
- Clean-Up and Revegetation:
- Project Timing:
- Duration of Construction:

Common mistakes: Common mistakes in the Project Description and Project Construction include:

- Addressing only the project description and not the project construction
- Describing an aspect of project construction and then not addressing the associated impacts of project construction under "*Effects of the Action*".
- Failure to discuss temporary impacts such as detours, temporary road accesses, temporary clearing for staging areas, construction areas, and dewatering.
- Failure to identify the location of borrow sites or disposal sites.
- Failure to discuss construction sequencing and timing of construction.
- Failure to discuss methods of clean-up, disposal, and/or revegetation.
- Failure to discuss mitigation areas (plans) that may be required through the Corps, state or local regulations (i.e. wetland mitigation areas).
- Referring to "Best Management Practices (BMPs)" and/or "Temporary Erosion and Sediment Controls (TESC)" without stating each BMP or TESC under *Conservation Measures*.
- Referring to construction or revegetation monitoring without providing the monitoring plans with the BE/BA.

II. **Action Area**: The *action area* includes not only the activity proposed within Corps jurisdiction but also all *interrelated and/or interdependent* activities. The *action area* must include the project area and all the areas surrounding the activity proposed in Corps jurisdiction up to where effects will no longer be felt. All potential *direct* and *indirect*, and short- and long-term effects to the *listed* species and its habitat are included. These

impacts vary from species to species. For example, when driving piling, the project area would include the pile being driven and the equipment and barge driving the pile. If *listed* fish and bald eagles occur in the vicinity, the *action area* would include the project area and, among other impacts, the potential water quality impacts to fish through increased turbidity during the pile driving (typically a 25-foot radius around the pile) and the potential noise impacts to bald eagles from the pile driving (a radius of 1 mile around the pile).

Interrelated activities are those activities that are a part of the activity in the Corps jurisdiction and depend on the activity in the Corps jurisdiction for its justification. The *interrelated activity* may be proposed by the applicant or a separate entity. For example, a weir is being placed in a stream and wetlands, changing the stream into a pond. Although not proposed by the applicant, an adjacent property owner installs an irrigation pump in the pond. The irrigation pump is an *interrelated activity* and must be addressed in the BE/BA. *Interdependent activities* are those activities that have no independent (separate) utility apart from the activity in Corps jurisdiction. A new boat house in the uplands is being constructed along with a new pier. The boat house is an *interdependent activity* because it does not have independent (separate) utility apart from the pier. It is often easier and less complicated to discuss *interrelated* and/or *interdependent activities* together. However, be sure to identify all potential *interrelated* and/or *interdependent activities.*

We recommend that you coordinate with the Corps Project Manager to help define the action area for your proposed activity, especially linear projects.

Common mistakes: Common mistakes in the *action area* include:

- Failure to address *interrelated/interdependent activities.*
- Failure to define the construction access areas (temporary and permanent and both in-water and uplands), staging areas, washout areas, and work corridors.
- If defining potential area of effect for short-term impacts (i.e. water quality), failure to provide a justification or citation for the defined area of effect.
- Failure to include mitigation areas that may be required through Corps, state or local regulations (i.e. wetland mitigation).

III. Species and Habitat Information: Identify each *listed* or *proposed* species, including terrestrial species, in the *action area*, and indicate whether or not there is *designated* or *proposed critical habitat.* To determine what *listed* or *proposed* species may occur in the *action area*, contact:

US Fish and Wildlife Service (USFWS)
Endangered Species Division
510 Desmond Dr., SE # 102
Lacey, WA 98503-1273
(360) 753-9440
http://endangered.fws.gov/index.html

National Marine Fisheries Service (NMFS)
Habitat Conservation Branch
510 Desmond Dr., SE # 103
Lacey, WA 98503
(360) 753-9530
http://www.nwr.noaa.gov

For Central and Eastern Washington:

U.S. Fish and Wildlife Service (USFWS)
Post Office Box 848
Ephrata, Washington 98823
(509) 754-8580
ATTN: Mr. Greg Kurz

A. **Species Present:** List all federally *listed* or *proposed* species present in the vicinity of the project , stating their listing status (threatened or endangered) and if there is *designated* or *proposed critical habitat.*

B. **Species Utilization:** Describe how the *listed* species is currently utilizing the *action area*, such as spawning, breeding, rearing, over-wintering, or travel corridor (migration). Discuss the species status in the *action area* and range-wide. If known, provide a short discussion on how the species historically utilized the area. Do not include detailed life histories. Depending upon the scale of the potential impacts and the project's timeline you may elect to include *candidate* species.

C. **Survey Results**: If surveys have been conducted providing information as to the species utilization of the *action area* or similar areas, it is beneficial to reference the surveys and summarize the survey results – discussing when the survey was conducted, and the timing and method of the survey as well as the results. Depending on the scale of potential impacts and the habitat element that might be impacted, the Corps and the Services may require specific surveys to be conducted, with defined timing and protocols. A typical survey required in marine areas is a dive survey to determine presence or absence of eelgrass or other macroalgae.

Coordinate with the Corps Project Manager to determine what, if any, surveys may be needed for your project assessment.

Common mistakes: Common mistakes for species and habitat information include:

- Failure to discuss all *listed* or *proposed* species in the *action area*. Often the BE/BA only addresses *listed* fish species and other *listed* or *proposed* species that may occur in the area (i.e. birds, mammals, plants, reptiles, and marine mammals) are forgotten.
- Failure to discuss habitat for forage species.

IV. **Existing Environmental Conditions (Environmental Baseline)**: The environmental baseline should paint a picture of the habitat for *listed* or *proposed* species in the *action area* and the amount of degradation that has occurred to date. Describe the present condition of the habitat elements essential for the *listed* or *proposed* species. If the *action area* includes *designated* or *proposed critical habitat* for the *listed* species, describe the *critical habitat* and level of degradation.

For example, if bald eagles nest in the area, a typical concern is the topography – is the project in line of site of the nest? – or noise levels and human activity – what is the

ambient noise level in the area? For *listed* or *proposed* fish species, concerns may include existing water quality, existing riparian vegetation and cover, availability of forage species (other fish, insects or invertebrates).

For a list of habitat elements essential for *listed* or *proposed* salmonids in freshwater habitats, refer to the Pathways and Indicators developed by NMFS in the NMFS' "A Guide to Biological Assessments," revised March 23, 1999, and the FWS' "A Framework to Assist in Making Endangered Species Act Determinations of Effect for Individual or Grouped Actions at the Bull Trout Subpopulation Watershed Scale," February 1998. To date, NMFS has not finalized a matrix for marine/estuarine waters. Do not include a table or matrix for marine/estuarine waters since quantitative criteria have only been approved for freshwater systems.

Common mistakes: Common mistakes in the environmental baseline include:

- Failure to address forage species habitat as well as *listed* species habitat elements.
- Extensive discussion on aspects of the environmental baseline either outside the *action area* or unrelated to the affected *listed* or *proposed* species.
- Use of a matrix for marine/estuarine waters when a matrix does not exist.

V. **Effects Analysis**: Describe the *direct* and *indirect* and secondary effects of the action on the protected species and *critical habitat* within the *action area*. *Direct* and *indirect effects* have very distinctive meanings under the Endangered Species Act (ESA). These are not the same definitions as under the National Environmental Policy Act (NEPA). *Direct effects* under ESA are defined as "effects that may result from the project that would directly affect the species". *Indirect effects* under ESA are defined as "effects that may result from the project that would occur later in time." For example, with a bulkhead, the *direct effects* may include the construction impacts (i.e. water quality impacts) and the impacts of the immediate existence of the structure (i.e. loss of habitat due to encroachment of the structure on the beach). The *indirect effects* may include erosion of the beach in front of the bulkhead or erosion that is exacerbated on the adjacent properties due to the bulkhead.

Consider the impact to both individuals and the population. Discuss the short-term, construction-related impacts as well as the long-term and permanent effects. With regard to *critical habitat*, depending on the *listed* or *proposed* species, include habitat alterations to essential features such as spawning sites, loss of prey or food sources, water quality and quantity, riparian vegetation, loss of nesting or breeding habitat or cover. Address the timing of the disturbances relative to the life history of the *listed* or *proposed* species or their forage species in the *action area*, particularly nesting or spawning periods.

For both Corps regulatory purposes and ESA, the applicant must avoid or minimize impacts as much as possible. Variations in design or the construction techniques may avoid or minimize impacts to such an extent that impacts to *listed* species are *insignificant and/or discountable*, thereby qualifying the project for "informal consultation" - a much speedier review process. *Insignificant* is defined as "effects that are not measurable or detectable and <u>never</u> reach the scale where "*take*" occurs." *Discountable* is defined as

"effects that are extremely unlikely to occur." However, if an individual impact, either in the short- or long-term, breaches the threshold of *insignificant and/or discountable*, then the activity is "likely to adversely affect" the *listed* species or *critical habitat* and the project must go through "formal consultation" procedures – a more lengthy process.

Aim to avoid causing a "*take*" of any *listed* species or degradation of the environmental baseline for those species.

The analysis must include consideration of the *interrelated* and *interdependent* effects of the actions. For the BA's only, the analysis must also include consideration of *cumulative impacts*. For the purposes of the Endangered Species Act, *cumulative impacts* are defined as all future State, local, or private activities that are reasonably certain to occur within the *action area* of the project under consultation. The analysis *does not* include future Federal activities (including those which would need to be authorized by a Corps permit) unrelated to the proposed action, as those impacts will be subject to separate consultation.

For activities that may impact freshwater habitats where *listed* or *proposed* fish species are likely to occur, discuss and/or provide a matrix for the various environmental pathways and indicators of effect (See reference under Environmental Baseline). Depending on the activity proposed and its location, impacts to consider for *listed* or *proposed* fish species may include but are not limited to:

- Effects of Construction:
- Water Quality:
- Effects of Stormwater Runoff:
- Water Temperature:
- Water Flow:
- Habitat Access:
- Riparian Area/Refugia:
- Watershed Conditions:

Common mistakes: Common mistakes seen in the *effects* analysis include:

- Statements of effects with no rationale (i.e. "Impacts to water quality will be *insignificant* and/or *discountable*" without stating a reason).
- Definitive statements of impacts or degree of impacts with no citation (i.e. Adult salmonids have a tolerance for "x" amount of suspended sedimentation levels above ambient background levels).
- Describing a project aspect or construction method under project description and then not addressing the potential impacts of that aspect or method in the effects analysis.
- Failure to address impacts associated with stormwater runoff and/or increase impervious surfaces.

VI. **Take Analysis**: Assess and describe the potential for "incidental *take*." *Take* of a *listed* species means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct. *Take* may occur directly to individuals of a

species, or via a species' habitat or to *designated critical habitat.* "Incidental *take*" may occur if a species may be harmed or harassed, etc., in the conduct of your work though you intend it no harm. *Harm* is further defined to include significant habitat modification or degradation that results in death or injury to *listed* species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. *Harass* is defined as actions that create the likelihood of injury to *listed* species to such an extent as to significantly disrupt normal behavioral patters which include, but are not limited to, breeding, feeding, or sheltering.

Incidental take is the "*take*" of individuals of a *listed* species that results from, but is not the purpose of, carrying out an otherwise lawful activity. *Incidental take* may be authorized through formal ESA Section 7 consultation. If you do intend to "*take*" species for scientific study or other purpose as part of your action, you must apply to the appropriate Service for an ESA Section 10 permit.

Common Mistakes: Common mistakes in the *take* analysis include:

- Writing a *take analysis* when the effects determination for a project is *may affect, not likely to adversely affect.*

VII. **Conservation Measures**: *Conservation measures* are measures that would reduce or eliminate the adverse impacts of the proposed activity, particularly measures to be taken to reduce the likelihood of *take*. The measures need to be as specific as possible. Include a discussion of how construction methods and/or site locations have minimized potential impacts to the *listed* species. These *conservation measures* may include alterations in the proposed activity such as timing restrictions or changes in project features or location which are intended to reduce impacts, or Best Management Practices (BMPs) you intend to implement.

It is essential to spell out the specific measures or BMPs implemented. *Conservation measures* may not simply defer to state or industry standards or guidelines, but must state the specific standard or guideline.

If your project is approved, the *conservation measures* in the BE/BA will become conditions of the Corps authorization. *Conservation measures* need to be worded such that these measures shall be implemented, not that the measures may potentially be implemented if timing, money or other opportunities allow.

Common Mistakes: Common mistakes in the *Conservation Measures* include:

- Failure to define *conservation measures* in enforceable language (i.e. using terms such as "may", "to the practicable extent possible", "frequently", etc.).
- Failure to define all the BMPs used (i.e. referring to contractor will implement BMPs).
- Failure to provide revegetation and monitoring plans proposed as *conservation measures.*

VIII. Determination of Effect: Summary of impacts concluding with statement(s) of effect, by *listed* or *proposed* species and *designated* or *proposed critical habitat*. Even projects that are intended to benefit the species might have short-term adverse impacts and those must be addressed.

Only the following determinations are valid for *listed* species or *designated critical habitat*:

- *No Effect* (NE) – meaning literally no effect whatsoever to the *listed* species or *designated critical habitat*.
- *May Affect, Not Likely to Adversely Affect* (NLAA) – effects to the *listed* species or *designated critical habitat* are *insignificant and/or discountable*. A determination of "NLAA" would be made for those activities that have only a beneficial effect with no short- or long-term adverse impacts.
- *Likely to Adversely Affect* (LAA) – effects will result in a short- or long-term incidental *take* of the *listed* species or *designated critical habitat*.

Only one finding is made for the species and habitat, even if the project may have beneficial as well as detrimental affects. Therefore, even projects that ultimately benefit the species may be found to have an adverse affect, due to construction impacts.

For *proposed* species, the finding is either *Jeopardy* or *No Jeopardy*.

For *proposed critical habitat* the finding is will or will not *adversely modify* or *destroy critical habitat*.

The Corps makes the official agency determination. We generally do not consult or request concurrence from the Services for No Effect determinations, though there are exceptions. The Services have the authority to veto a Corps determination – changing a NLAA to a LAA. of LAA to a NLAA. If the Services change the Corps determination, the Corps must accept the Services determination and consult as necessary.

Common Mistakes: Common mistakes in the Determination of Effect includes:

- Failure to justify a "*no effect*" determination appropriately. (Please see guidance on "*no effect*" determinations on the Corps website http://www.nws.usace.army.mil/reg/reg.htm)
- Failure to provide a detailed effects analysis to coincide with the determination of effect. For example:
  - The determination of effect is "*may affect, likely to adversely affect*" but the effects analysis states that impacts are "*insignificant* and/or *discountable*".

IX. References. Many BE/BA's either make definitive statements with no reference or cite studies or papers within the text of the BE/BA, but fail to provide full references.

X. **Appendices (as needed)**: Such as condensed life histories, mitigation and/or revegetation implementation and Monitoring plans, results of studies, results of water or sediment quality testing, drawings, photos, etc. The Corps will attach detailed life histories, if needed. The detailed life histories are available on the Corps website http://www.nws.usace.army.mil/reg/reg.htm

The Services and the Corps find it extremely helpful to have color photos of the existing project site included in the BE/BA, and this can serve to expedite our review of the environmental baseline and impacts.

Common Mistakes:

- Failure to include project drawings. The Services do not receive a copy of the application, only the BE/BA.
- Failure to include mitigation and revegetation implementation and monitoring plans referenced in the BE/BA.
- Failure to include, if issued, a copy of the Hydraulic Project Approval (HPA) from Washington Department of Fish and Wildlife (WDFW).
- Failure to include color photographs of the project area.

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-WORKING DRAFT -

PROJECT CONDITIONS OR ACTIONS THAT QUALIFY AS "NO EFFECT" ON LISTED OR PROPOSED T&E FISH OR THEIR CRITICAL HABITAT IN WASHINGTON STATE UNDER THE ENDANGERED SPECIES ACT[1]

(All Fresh Waters, *including* Columbia River & Baker Bay)

1. No listed fish or fish proposed for listing, or their forage base, or designated or proposed critical habitat occur in the waterbody where work is to occur, and work will not result in short- or long-term water quality or quantity impacts which may affect listed or proposed species or their forage base downstream of the project site. This condition applies to all fresh waters of the U.S., including wetlands, and includes all isolated waters or wetlands.

2. For salmon and steelhead: Work that occurs as part of a single and complete project that is 300 feet or more away from a water of the U.S. which may contain listed fish or fish proposed for listing, including intermittent streams and adjacent wetlands, and work will not result in short- or long-term water quality or quantity impacts which may affect listed or proposed fish species or their forage base downgradient of the project site. The 300-foot measurement is a horizontal measurement from the ordinary high water (OHW) mark (or top of the bank if an OHW mark is not observable), and does not take topography into account.

3. For bull trout: For streams and rivers: Work that occurs as part of a single and complete project that is beyond the edge of the channel migration zone (CMZ) of streams and rivers which may contain listed fish or fish proposed for listing (including intermittent streams) plus one site-potential tree height, or that is 300 feet or more away from a water of the U.S., whichever is the greater distance, and work will not result in short- or long-term water quality or quantity impacts which may affect listed or proposed fish species or their forage base down-gradient of the project site. For the purposes of this determination, site-potential tree height shall be defined as 130 feet for areas east of the Cascade crest and 200 feet for areas west of the Cascade crest. The 300-foot measurement is a horizontal measurement from the ordinary high water (OHW) mark (or the top of the bank if an OHW mark is not

[1] Based on available literature [50 CFR Part 226, FR Vol. 65, No. 32], the Corps' Seattle District, Regulatory Branch, notes that a 300-foot riparian area should provide a high level of protection for these species and their critical habitat under the Endangered Species Act (ESA). This "No Effect" list is meant to cover those single and complete projects that meet the stated criteria. For projects that do not meet these criteria the applicant should contact the Corps for a case-by-case determination of effect under the ESA. Such projects may still qualify for a "No Effect" determination on an individual basis. This list does not represent any finding regarding the Clean Water Act, the Rivers and Harbors Act, nor any Federal law other than the ESA.

observable), and does not take topography into account. For lakes and other waters: Work that occurs as part of a single and complete project that is 300 feet or more away from a lake or other water of the U.S. which may contain listed fish or fish proposed for listing, including wetlands, and work will not result in short- or long-term water quality or quantity impacts which may affect listed or proposed fish species or their forage base down-gradient of the project site. The 300-foot measurement is a horizontal measurement from the ordinary high water (OHW) mark (or the top of the bank if an OHW mark is not observable), and does not take topography into account.

4. Replacement of decking, rails, stringers, or other above-water parts on serviceable structures in navigable waters, provided that: any stain, paint, or preservatives to be applied on such components is completely dry/cured prior to installation, creosote and pentachlorophenol preserved wood will not be used, and no material shall enter the waterbody during the removal of decking, etc. [work typically allowed under Nationwide Permit 3]

5. Replacement of floats, provided that: replacement float is no larger and within the same footprint as the original float; only the over-water float is replaced and the original anchor system remains in place; the float is unchained from the anchor, moved onshore and new replacement float is placed in the water fully intact and chained to the existing anchor; any stain, paint, or preservatives to be applied onto the float is done while the float is on the land and all treatments are completely dry/cured prior to returning the float to the water; and the flotation is fully contained in a rigid protective casing. [work typically allowed under Nationwide Permit 3]

(NOTE: The EPA/Corps jurisdiction under the Clean Water Act generally does not extend to: artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; nor artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons; nor to waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the U.S. Additionally, construction or maintenance of farm or stock ponds is exempt from needing a Corps permit, as is construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the U.S.)

COMMON TERMS USED IN THE ENDANGERED SPECIES ACT (ESA). The following definitions are provided to familiarize readers with important terms used in the ESA.

- **Action Area**. All areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

- **Biological Evaluation/Assessment (BE/BA)**. Information prepared by, or under the direction of, a Federal agency to determine whether a proposed action is likely to: (1) adversely affect listed species or designated critical habitat; (2) jeopardize the continued existence of species that are proposed for listing; or (3) adversely modify proposed critical habitat. The outcome of a biological evaluation/assessment determines whether formal consultation or a conference is necessary. An assessment is called a BE if the determination is "no effect" or "not likely to adversely affect." It is called a BA if the determination is "likely to adversely affect."

- **Biological Opinion (BO)**. Document which includes: (1) the opinion of the U.S. Fish and Wildlife Service (FWS) and by the Secretary of Commerce to the National Marine Fisheries Service (NMFS) (the Services) as to whether or not a Federal action is likely to jeopardize the continued existence of listed species; or result in the destruction or adverse modification of designated critical habitat; (2) a summary of the information on which the opinion is based; and (3) a detailed discussion of the effects of the action on listed species or designated critical habitat.

- **Candidate Species**. The term "candidate species" means any species considered for possible addition to the List of Endangered and Threatened Species. The NMFS considers candidate species imminent for listing.

- **Conservation Measures**. These are actions to benefit or promote the recovery of listed species that are included by the Federal agency as an integral part of the proposed action. These actions will be taken by the Federal agency or applicant, and serve to minimize or compensate for, project effects on the species under review. These may include actions taken prior to the initiation of consultation, or actions which the Federal agency or applicant have committed to complete in a BA or similar document.

- **Critical Habitat**. The term "critical habitat" for a threatened or endangered species means:

  (1) the specific areas within the geographical area occupied by the species... on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and

(2) specific areas outside the geographical area occupied by the species... upon a determination by the Secretary that such areas are essential for the conservation of the species.

- **Destruction or Adverse Modification of Critical Habitat**. A direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.

- **Effects of the Action**. The direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. These effects are considered along with the environmental baseline and the predicted cumulative effects to determine the overall effects to the species for purposes of preparing a biological opinion on the proposed action.

- **Endangered Species**. The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range.

- **Environmental Baseline**. The past and present impacts of all Federal, State, or private actions and other human activities in an action area; the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early Section 7 consultation; and the impact of State or private actions that are contemporaneous with the consultation process.

- **Formal Consultation**. A process between the Services and a Federal agency or applicant that is initiated when a proposed Federal action is likely to adversely affect listed species or modify designated critical habitat. It begins with a Federal agency's or the Services written request and submittal of a complete initiation package. The process concludes with the issuance of a BO and incidental take statement by either of the Services.

- **Incidental Take**. The take of listed fish or wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant.

- **Indirect Effects**. Those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur.

- **Informal Consultation**. If a proposed Federal action may affect, but is not likely to adversely affect, listed species or designated critical habitat, the informal consultation process is required. This process allows the Federal agency to utilize the Services' expertise to evaluate the agency's assessment of potential

effects or to suggest possible modifications to the proposed action which could avoid potentially adverse effects. It is also an optional process, prior to formal consultation, that includes all discussions and correspondence between the Services and a Federal agency or designated non-Federal representative to determine whether a proposed Federal action may affect listed species or critical habitat.

- **Interdependent Effects**. Effects from activities which have no independent utility apart from the action being considered.

- **Interrelated Effects**. Effects from activities that are part of a larger action and depend on the larger action for their justification.

- **Jeopardize**. The determination given by the NMFS or FWS in their BO when an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

- **Likely to Adversely Affect**. The appropriate conclusion in a BA if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interdependent or interrelated actions, and the effect is not: discountable, insignificant, or beneficial (see definition of "not likely to adversely affect" below).

- **No Effect.** The appropriate conclusion when the action agency determines its proposed action will not affect a listed species or designated critical habitat.

- **Not Likely to Adversely Affect**. The appropriate conclusion in a BE when effects on listed species are expected to be discountable, insignificant, or completely beneficial.

- **Proposed Species**. Any species of fish, wildlife or plant that is proposed in the Federal Register to be listed under Section 4 of the Act.

- **Reasonable Prudent Measures**. Actions the Director believes necessary or appropriate.

- **Take**. To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.

- **Threatened Species**. The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.